







LAW-DICTIONARY,

EXPLAINING THE

RISE, PROGRESS, AND PRESENT STATE

OF THE

British Law:

DEFINING AND INTERPRETING

THE TERMS OR WORDS OF ART,

AND COMPRISING ALSO

COPIOUS INFORMATION ON THE SUBJECTS

OF

TRADE AND GOVERNMENT.

BY

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WITH EXTENSIVE ADDITIONS.

EMBODYING THE WHOLE OF THE RECENT ALTERATIONS IN THE LAW.

BY

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IN THREE VOLUMES.

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ADVERTISEMENT.

THIS Edition of The Law Dictionary was originally undertaken by the late Mr. Dodd, who had made considerable progress in the printing of the first volume, when he was compelled through ill health to abandon the task, and the completion of it was committed to the present Editor, whose responsibility begins with the title *Deposition*.

Although the latter was aware, previous to commencing his labours, that they would be of some duration, yet the time and attention requisite to prepare the work for the press have greatly exceeded his anticipations.

Owing to the extensive changes that have been effected during the fifteen years which have elapsed since the last Edition, in almost every branch of the Law, both civil and criminal, and to the alterations made in the practice of the Courts of Law and Equity, there is hardly a title of any importance that has not called for a thorough revision, and generally very considerable additions; while, besides the supply of new matter, the present Editor has in numerous instances considered it advisable to recast and arrange the old, so as to give to it a more systematic and connected form.

Many new heads of Law also have been introduced, with a view to increase the utility of the publication, as a work of general reference.

It may perhaps be thought, he might have expunged more of the old Law, where it has been reduced to a dead letter by recent enactments; but in the cases in which it is left, it has been retained in a condensed shape, in order to afford to the reader—what it is one of the objects of this Dictionary to comprise—a historical summary of the rise and progress of our legal forms and institutions.

The work will be found to embody the material provisions of the Statutes enacted in the last Session of Parliament, as well as an accurate Digest of the Law generally down to the end of the past year, and with respect to the greater portion of the second and third volumes, nearly down to the present moment.

In conclusion, the Editor trusts that this Edition will support the high character which has hitherto been maintained by The Law Dictionary, and that it will prove useful to the profession at large, but particularly to such members of it as are not possessed of extensive libraries, since it contains more general information, and embraces a wider range of subjects, than are to be met with in any other legal publication.

June 12th, 1835. 12, King's Bench Walk, Temple.

THE

LAW DICTIONARY.

ABA

AB, from the word abbot, in the beginning of the name of any place, shows that probably it once belonged to some abbey; or that an abbey was founded there. Blount.

ABACOT. A cap of state wrought up in the form of two crowns; worn by our ancient British kings. Chron. Angl. 1463. Spelm.

Gloss.

ABACTORS, abactores, ab abigendo.] Stealers and drivers away of cattle by herds, or in

great numbers. Cowel.

ABACUS. Arithmetic: from the abacus, or table strewed with dust, on which the ancients made their characters and figures. Cowel: Du Fresne. Hence

ABALLABA. Appleby, in Westmoreland. ABANDUM, abandonum.] Any thing sequestrated, proscribed, or abandoned. Abandon, i. e. in bannum res missa; a thing banned or denounced as forfeited and lost; from whence, to abandon, desert, or forsake as lost and gone. See title Insurance.

ABARNARE, from Sax. Abrian.] To discover and disclose to a magistrate any secret

erime. Leg. Canuti, c. 104.

ABATAMENTUM. An entry by inter-1 Inst. 277. See the succeeding position.

articles.

TO ABATE, from the Fr. Abattre.] prostrate, break down, or destroy; and in law to abate a castle or fort, is to beat it down. Old Nat. Br. 45: Stat. West. 1 c. 17. Abattre maison, to ruin or cast down a house, and level it with the ground; so to abate a nuisance is to destroy, remove, or put an end to it. See title Nuisance.

To abate a writ, is to defeat to overthrow it. by showing some error or exception. Brit. c. 48. In the statute de conjunctim feoffatis, it is said the writ shall be abated; i. e. disabled and overthrown. Stat. 34 E. 1 st. 1. So it is said an appeal shall abate, and be defeated by reason of covin or deceit. Staundf. P. C. 148. -And the justices shall cause the said writ to be abated and quashed. Stat. 11 H. 6, . c. 2.

VOL. I.

ABATEMENT.

The word abate is also used in contradistinction to disseise; for as he that puts a person seized of the freehold out of possession of his house, land, &c. is said to disseise; so he that steps in between the former possessor and his heir, or devisee, is said to abate, he is called an abator, and this act of interposition is termed an abatement. 3 Black. Comm. 168: 1 Inst. 277: a Kitch. 173: Old Nat. Br. 91. 115. See titles Disseisin; Intrusion.

ABATEMENT. For its least usual mean-

ings see the two preceding articles.

In its present most general signification it relates to writs or plaints; and means, the quashing or destroying the plaintiff's writ or

plaint.

A Plea in Abatement, is a plea put in by the defendant, in which he shows cause to the court why he should not be impleaded or sued; or if impleaded, not in the manner and form he then is; therefore praying that the writ or plaint may abate; that is, that the suit of the plaintiff may for that time cease. 1 Inst. 134. b. 277: F. N. B. 115: Gilb. H. C. P. 186: Terms de Ley, 1: Chitty on Pleading, vol. 1.

As to abatement in Chancery, see this Dictionary, title Revivor.

On this subject shall be considered,

- I. The various Pleas in Abatement, at Law.
 - 1. To the Jurisdiction of the Court. 2. To the Person of the Plaintiff.
 - a. Outlawry.
 - b. Excommunication.
 - c. Alienage.
 - d. Attaint: and other Pleas in Abate-
 - 3. To the Person of the Defendant.
 - a. Privilege.
 - b. Misnomer.
 - c. Addition.
 - 4. To the Writ and Action.
 - 5. To the Count or Declaration.
 - 6. On Account of; a. The Demise of the
 - b. The Marriage of the Parties. c. The Death

Bar or Abatement.

III. The Judgment in Abatement.

I. 1. The Courts of Westminster have a superintendency over all other courts, and may, if they exceed their jurisdiction, restrain them by prohibition; or, if their proceedings are erroneous, may rectify them by writs of error and false judgment. Nothing shall be intended within the jurisdiction of an inferior court but what is expressly alleged; so that where an action on promise is brought in such inferior court, not only the promise, but the consideration of it (i. e. the whole cause of action,) must be alleged to arise within that jurisdiction; Bac. Ab. Pleas (E. 1.): 1 Will. Saund. 74. n. 1; such inferior courts being confined in their original creation, to causes arising within the express limits of their jurisdiction; and therefore, if a debtor who has contracted a debt out of such limited jurisdiction comes within it, yet he cannot be sued there for such a debt. (Ibid.)

There are no pleas to the jurisdiction of the courts at Westminster in transitory actions, unless the plaintiff by his declaration shows, that the cause of action accrued within a county palatine, or it be between the scholars of Oxford or Cambridge. 4 Inst. 213: 1 Sid. 103: Bac. Ab. Courts (D. 3:) Vin. Ab. Uni-

versity. (K.)

There is a difference between a franchise to demand conusance, and a franchise ubi breve domini regis non currit. For in the first case the tenant or defendant shall not plead it, but the lord of the franchise must demand conusance; but in the other case the defendant must plead it to the writ. 4 Inst. 224. See titles Franchise, Conusance, County

Palatine.

Where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts at Westminster entrench on their privileges, they must demand conusance; that is, desire that the cause may be determined before them; for the defendant cannot plead it to the jurisdiction. And the reason is, because when a defendant is arrested by the king's writ, within a jurisdiction where the king's writ doth not run, he is not legally convened, and therefore he may plead it to the jurisdiction; but the creating a new franchise does not hinder the king's writ from running there as before, but only grants jurisdiction to the lord of the liberty. Bac. Ab. tit. Courts. (D. 3.)

If the court has not a general jurisdiction of the subject, the defendant must plead to the jurisdiction, for he cannot take advantage of it on the general issue. And in every plea to the jurisdiction another jurisdiction must be Cowp. 172; Rex v. Johnson, 6 East, stated.

The pleas to the jurisdiction are either that

II. The Time and Manner of Pleading in the cause of action, or the person of the party, Abatement; and herein of Pleading in is not the object of the jurisdiction of the court; of the first sorts are pleas that the land is held in ancient demesne, or that the cause of action arose in the County Palatine, or within the Cinque Ports, or other inferior courts, having peculiar local jurisdiction; that the Bishop of Ely has not a Palatine jurisdiction. See 3 East, 128. Of the latter sort is the plea of Privilege; but which is generally considered rather as a plea to the person of the defendant. See this Dictionary under those titles; and post, Division 3. a. of the pre-

2. a. Outlawry may be pleaded in abatement, because the plaintiff having refused to appear to the process of the law, thereby loses its protection; but this is only a disability till the outlawry is reversed, or till he has obtained a charter of pardon. 1 Inst. 128: Lit. § 197: Dy. 23. 222: Ass. 49: Br. Nonability, 25.

This disability is only pleadable when the plaintiff sues in his own right; for if he sues in auter droit, as executor or administrator, or as mayor with his commonalty, outlawry shall not disable him; because the person or body whom he represents has the privilege of the law. When the plaintiff brings a writ of error to reverse an outlawry, the outlawry in that suit, or in any other, shall not disable him. The outlawry itself must not be an objection, for that would be exceptio ejusdem rei cujus petitur dissolutio; and if a man were outlawed at several men's suits, and one should be a bar to another he could never reverse any of them. 1 Inst, 128: Doct. Plac. 396, 7: Bac. Ab. Outlawry. (D.)

When outlawry is pleaded in Abatement, the plaintiff shall not reply that the outlawry is erroneous, for it is good till reversed.

Lutw. 36.

As to the time and manner of pleading outlawry, see post, under Division II. of this title Abatement.

Outlawry in a county palatine cannot be pleaded in any of the courts of Westminster, for the plaintiff is only ousted of his law within that jurisdiction. Gilb. Hist. C. P. 200: Fitz. Coron. 233. It has been suggested, but surely without reason, that outlawry in the county palatine of Lancaster may be pleaded in the courts of Westminster; because that county was erected by act of parliament in the time of E. 3; whereas those of Chester and Durham are by prescription. 12 E. 4. 16: Doct. Plac. 396: Bac. Ab. Outlawry. (D.)

b. A person excommunicated is disabled to do any judicial act; as to prosecute any action at law (though he may be sued); be a witness, &c.: but see now 53 G. 3. c. 127. § 3.

Excommunication is a good plea even to an executor or administrator, though they sue in auter droit; for an excommunicated person is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses; also it is one of the effects of excommunication, that he cannot be a prosetherefore cannot represent the deceased. 1

Inst. 134: 43 E. 3. 13: Thel. 11.

But in an action brought by officers with their corporation, the defendant shall not plead excommunication in the officers; because a corporation cannot be excommunicated as such; and they suc and answer by attorney. Thel. 11: 30 E. 3. 4.: 1 Inst. 134: 4 Inst. 340.

Excommunication is no plea in a qui tam action, the statute giving the informer ability

to sue. 12 Co. 61.

When excommunication is pleaded in the plaintiff, he shall not reply that he has appealed from the sentence; for it is in force until repealed, and whilst it is in force he cannot appear in any of the courts of justice; but he may reply that he is absolved, for then his disability is taken away. Bro. Excom. 3: 3

Bulst. 72: 20 H. 6. 25: Roll. 226.

When prohibition is brought against a bishop, and he pleads excommunication against the plaintiff, and in the excommunication there is no cause thereof shown, this is not a good plea; for in such case it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding, by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions. Thel. 10, 11: 28 E. 3. 27: 8 Co. 68. But the law is now altered as to excommunication by 53 G. 3. c. 127. b 2, 3; by which it is provided that persons expenalty or disability whatsoever.

c. Alienage is a plea in abatement, now discouraged, and but seldom used; the following, however, appears to be still law on the

subject:

It may be pleaded in abatement, in an action real, personal, or mixed, that the demandant or any such person in rerum natura. See Com. plaintiff is an alien, if he be an alien enemy; and in an action real or mixed, that he is an alien, though he be in amity. But in an action personal, it is no plea that he is an alien if he be in amity. 1 Inst 129. b.; Ast. Ent. 11: 9 E. 4. 7: Yelv. 198: 1 Bulst. 154: Bro. tit. Denizen: Bac. Ab. Aliens. (D.)

Where the defendant pleads that the plaintiff is an alien, in abatement of the writ, it is triable where the writ is brought, and the replication must conclude to the country; but otherwise, it is said, where it is pleaded in bar, that the plaintiff is an alien, the replication must conclude with an averment. Salk. 2: West. 5: Amb. 394.

Where the defendant pleaded that the plaintiff was an alien, born at Rouen in the kingdom of France, within the ligeance of the king of France; the plaintiff replied that he was an alien friend, born at Hamburgh, within the ligeance of the emperor, and traversed that he was born at Rouen; Holt inclined that it was an ill traverse, and offered an ill issue. Comb. 212. See title Aliens.

d. Attaint, &c. It may be pleaded in abatecutor or attorney for any other person, and ment, that the plaintiff is attainted of treason or felony; or attainted in a præmunire; or that he hath abjured the realm. 1 Inst. 128. a. 129. b. 130. a.: Noy. 1: Scho. 155: and Bac. Ab. Præmunire: 2 Barn. & A. 258.

Popish Recusancy, can no longer be considered as pleadable since the stat. 31 G. 3. c. 23; and see 10 G. 4 c. 7. for the relief of the

Roman Catholics. See tit. Papist.

Coverture; It is also pleadable in abatement to the person of the plaintiff that she is a feme covert; 1 Inst. 132. b.; and that she is the wife of the defendant. 1 Bro. Ent. 63. And by the defendant that she is herself a feme covert. Lutw. 23: Barnes, 334. See tit. Baron and Feme, and post, 6. b.

Joint Actions; Of pleas in abatement for want of proper parties. See Com. Dig. tit. Abatement (E. 8.) (F. 4.): Bac. Ab. Abatement.

plaintiff must sue all the contracting parties; but if ex delicto, he may sue all or any one. And the same rule applies where a tort is committed by a servant. See 5 Term. Rep. 65: 7 Term. Rep. 279: 2 New Rep. 365: and

tit. Action, Joint-tenants.

But in an action ex contractu, the omission to join one contractor as defendant is no objection, unless pleaded in abatement. Bac. Ab. Abutement. (K.) If the action be in substance ex quasi contractu, though its form be tort, the defendant may plead nonjoinder in communicated shall in no case incur any civil abatement. 6 Term. Rep. 369: 2 New. Rep. 365; 12 East, 452: Bac. Ab. Abatement. (K.)

The defendant cannot plead the nonjoinder of a secret partner in abatement. 1 Barn &

Adol. 400.

A defendant may plead in abatement to the person of the plaintiff, that there never was

Dig. tit. Abatement. (E. 16.)

An action does not abate by the plaintiff's becoming a bankrupt; and where he became so between interlocutory and final judgment, and sued out execution in his own name, the Court of King's Bench refused to set aside the proceeding. 3 Term. Rep. 437: but see Tidd's Prac. 934. (9th ed.): and as to suits not abating by the death or removal of assignees of a bankrupt, see 6 G. 4 c. 16. § 67: Deacon's B. L.: or of an insolvent debtor, see 7 G. 4 c. 57. § 26. 3. a. The officers of each court enjoy the

privilege of being sued only in those courts to which they respectively belong; because of the duty they are under of attending those courts, and lest their clients' causes should suffer if they were drawn to answer to actions in other courts. 2 Mod. 297: Vaugh. 155: 2 H. 7. 2: 2 Ro. Ab. 272: 1 Lutw. 44, 639. So a baron of the Cinque Ports is to be impleaded within that jurisdiction. See Com. Dig. tit. Abatement (D. 3.): and this Dict. tit. Cinque Ports.

tiff can have the same remedy against the King's Bench, on motion for his being disofficer in his own court, as in that where he charged, the court denied it, and put him to sues him; for if money be attached in an attorney's hands by foreign attachment in the Sheriff's Court in London, the attorney shall the plaintiff would be remediless. 1 Saund.

So if a writ of entry, or other real action, be brought against an attorney of the King's Bench, he cannot plead his privilege; for the King's Bench hath not cognizance of real ac-

tions. 1 Saund. 67.

So if an attorney of the Common Pleas be sued in a criminal appeal, he shall not have his privilege; for his own court hath not cognizance of this action. 38 H. 6. 29, b.: 9 E. 4. 35; Cro. Car. 585: 1 Leon. 189: 2 Leon. other, the misnaming either of the parties. 156.

they sue or are sued as executors or adminis-, trators, they then represent common persons, and are entitled to no privilege. Hob. 177. But an attorney sued for an act done as a magistrate, is entitled to be sued by bill. 3 Taunt.

So if an officer of one court sue an officer of another court, the defendant shall not plead abatement take advantage of a misnomer, yet his privilege; for the attendance of the plaindefendant in his; and therefore the cause is Ro. Ab. 275. pl. 4: Moor. 556.

So if a privileged person brings a joint acwith his wife, for her debt, dum sola, loses plaintiff may reply, that defendant was known his privilege; 1 Taunt. 245; but not if sued by the name in the writ. 1 Salk. 6, 7. jointly with a person having privilege of par-

Reg. 7:3 Lev. 398: Lutw. 193.

his privilege; but otherwise where he is bailed, and so only legally supposed in custody. 1 Salk: 1 Comb. 390: 4 Barn & A. 88.

of the privilege of their own officers; as where a filazer of the King's Bench was arrested by writ, he was discharged on common bail;

But this is to be understood when the plain- mon Pleas was sued by bill in the Court of plead his privilege. 1 Mod. Ent. 26. See 1

Wils. 306: 2 Black. Rep. 1085.

After a general imparlance an officer cannot have his privilege; because in this case not plead his privilege, because by imparling he affirms the jurisdiction of the court, but after a special imparlance he may plead his privilege. Bro. Priv. 25: 22 H. 6. 6. 22. 71:1 Ro. Rep. 294: 1 Sid. 29: Ro. Ab. 273. 9: Hardr. 365: 1 Lutw. 46: 1 Salk. 1. And now the common practice is to use a special imparlance. See farther this Dict. tit. Privilege. Bac. Ab. Privilege. (D.) Indeed no plea in abatement is good after a general imparlance. 4 Term. Rep. 227.

b. Misnomer, is the using one name for an-This may be pleaded in abatement by the de-This privilege, which the courts indulge fendant, whether the misnomer is in his own their officers with, is restrained to such suits name, or in that of the plaintiff; and this in only as they bring in their own right; for if christian or surname, name of dignity, name of office or addition. See post, and Com. Dig. tit. Abatement (E. 18.) (F. 17.): Bac. Ab. Abatement (D.): Tidd's Prac. 448. (9th ed.)

A misnomer may be pleaded in abatement where the plaintiff misnames himself. 1 Bos.

& Pull. 44.

But though a defendant may by pleading in in such plea he must set forth his right name tiff is as necessary in his court as that of the (surname as well as christian name,) so as to give the plaintiff a better writ; Finch, 363: legally attached in the court where the plain- 9 H. 5, 1; which is the intent of all pleas in tiff is an officer. 2 Mod. 298: 2 Lev. 129: 2 abatement. 4 Term. Rep. 227; 8 Term. Rep. 515: Bac. Ab. Abatement. (D.)

Where a defendant comes in gratis, or tion, or if an action be brought against him pleads by the name alleged by the plaintiff, and others, he shall not have his privilege; he is estopped to allege any thing against it. but if the action can be severed without doing Sty. 440. Where one is misnamed in a bond, any injury, the officer shall have his privilege. the writ should be in the right name, and the Dy. 377: Godb. 10: 2 Ro. Ab. 275: 2 Lev. count show that defendant by such a name 129:1 Vent. 298, 9. An attorney sued jointly made the bond. To a plea of misnomer the

One defendant cannot plead misnomer of liament. 4 Maule & S. 585.

An officer shall not have his privilege admit himself to be the person in the writ. 1 against the king. Bro. Supersed. 1: 2 Ro. Ab. Lutw. 36. The defendant, though his name 174. But in a qui tam action, at the suit of be mis-taken, is not obliged to take advantage. an informer, he shall have his privilege. Lil. of it; and therefore if he be impleaded by a wrong name, and afterwards impleaded by If a person who hath the privilege of being his right name, he may plead in bar the for-sued in another court, be in actual custody of mer judgment, and aver that he is the same the marshal of King's Bench, he cannot plead person. Gilb. H. C. P. 218.

Where an indictment for a capital crime is abated for misnomer of the defendant, the court will not dismiss him, but cause him to The Court of King's Bench will take notice be indicted de novo by his true name. 2 Hawk. P. C. 523: 7 G. 4. c. 64. § 19. See farther

this Dict. tit. Misnomer ..

c. Addition, is a title given to a man besides being an immediate officer of the court, where his christian and surname, setting forth his his attendance was absolutely necessary estate, degree, trade, &c. Of estate, as yea-Salk. 544. But where an attorney of the Com. man, gentleman, esquire, &c. Of degree, as

knight, earl, marquis, duke, &c. Of trade, as | Earl of Stirling, 8 Bing. 174. The words merchant, clothier, carpenter, &c. There are likewise additions of place of residence, as London, York, Bristol, &c. If one be both a duke and earl, &c. he shall have the addition of the most worthy (i. e. superior) dignity. 2 brought against the son, he ought to be dis-Inst. 669. But the title of duke, marquis, earl, tinguished by the appellation of the younger, &c. are not properly additions, but names of added to his other description, or the writ may dignity. Terms de Ley, 20. The title of be abated; but in an action against the father knight or baronet is part of the party's name (as is also clarencieux, or king at arms, &c.) and ought to be exactly used; but the titles of esquire, gentleman, yeoman, &c. being no part of the names, are merely additions. 1 Lil. 34. An earl of Ireland is not an addition of honour here in England, but such person must be called by his christian and surname with the addition of esquire only; so sons of over of an original writ, and yet a plea in English noblemen, though they have titles abatement, for want of additions to the defendgiven them by courtesy in respect of their families, if they are sued, must be named by their christian and surnames, with the addition of esquire; as, A. B. Esq. commonly called Lord A. 1 Inst. 16. b.: 2 Inst. 596, 666.

By the common law, if a man that had no name of dignity, was named by his christian and surname in all writs it was sufficient. If R. 188: and see Bonner v. Wilkinson, 5 he had an inferior name of dignity, as knight, Barn. & A. 682. &c. he ought to be named by his christian a duke, &c. might be sued by his christian any dilatory plea of misnomer, or want of adname only, and name of dignity, which stands for his surname. 2 Inst. 665, 6. By stat. 1 where process of outlawry lies (see 1 Salk. 5), defendant to show his estate, mystery, and been pleaded. place of dwelling; and that writs not having ex officio. See Cro. Jac. 610: 1 Ro. Rep. 780. If a city be a county of itself, wherein are several parishes, addition thereof, as of London, is sufficient. But addition of a parish not in a

person is created an earl pending the action, Hob. 1. 51, 52. bill, or suit, it shall not abate. See stat. 1 E. the roll stating that after the last continuance, the writ may not be abated in the whole, but ss. on such a day and year, the king, by his letters, patent, created, &c. setting them forth 31, 32.

A plea in abatement, by an earl, of misnomer in his title of dignity, must allege positively, and not merely by inference, that he action brought, and this appears, the plainwas an earl at the time of suing out the writ. tiff's writ shall abate. Hob. 245. Digby v. Alexander, 8 Bing. 416. It is no

"having privilege of parliament" are mere surplusage, and may be rejected.

If there are two persons, father and son, with the same name and addition, in an action he need not be distinguished by the appellation of the elder. See 2 Hawk. P. C. 187.

On the whole it is proper to observe as to misnomers and want of addition, that the courts of Westminster will not abate a writ for a trifling mistake; and will in all cases amend, if possible. See title Amendment.

As the Court of King's Bench will not grant ant, is bad without over, the effect is to prevent such plea from being pleaded, and therefore, if pleaded, that court will quash it. 7 East's Rep. 383. A plea of the statute of additions is considered a nullity, and plaintiff may sign judgment. 3 Bos. & Pull. 393: 1 Bos. & Pull. 645: 4 Term. Rep. 371: 2 New.

By stat. 7 Geo. 4 c. 64. § 19. no indictment and surname, with the name of dignity; but or information shall be abated by reason of dition, or wrong addition; but on affidavit of such fact, the indictment or information shall H. 5. c. 5. it is enacted that in suits or actions be amended according to the truth, and the court shall call upon the party to plead thereadditions are to be made to the name of the to, and shall proceed as if no dilatory plea had

4. The writ being the foundation of the such additions shall be abated, if the defendant subsequent proceedings, great certainty and take exception thereto, but not by the court exactness is requisite, to the end that no person be arrested or attached by his goods, unless there appear sufficient grounds to warrant such proceedings; so that if the writ vary materially from that in the register, or be decity must mention the county, or it will not be good. 1 Danv. 237.

The name of earl, if omitted, abates the E. 3. 1; Hob. 1. 51, 52. 80; Carth. 172. But writ, Dav. Rep. 60; a.; and it shall not be where the writ shall not abate for variance amended. Hob. 129; 1 Vent. 154. But if a from the register, so that it be equivalent, see

Where a demand is of two things, and it 6. c. 7. § 3. But there must be an entry on appears the plaintiff hath action only for one, shall stand for that which is good; but if it appear that though the plaintiff cannot have with a profert in curiá, &c. which the said this writ which he hath brought for part, he defendant doth not deny, &c. 1 Mod. Ent. may have another, the writ shall abate in the whole, 11 Rep. 45: 1 Saund. 285: Bac. Ab.

Abatement. (L.)

In case administration be granted, after the

It is a good plea in abatement that another ground for a plea in abatement that a defend-ant sued as a Scotch peer is also described as having privilege of parliament. Cantwell v. tiff has sued out two writs against the sam: both should be pencing at the time of the co. Strutt, 645; 7 Last, 3-3; Told, 646, 9th ed.) fendant's pleading in abatement; for if there the second, it is plain the second was vexatious and ill, ab initio. But it must appear plainly to be for the same thing; for an assize of lands in one county shall not abate an assize in another county, for these cannot be the same lands. 4 H. 6. 24: 9 H. 6. 12: 5 Co. 61: Doct. Pl. 10. And the suits must be between the same parties. 2 Sim. & Stu. 464.

In general writs, as trespass, assize, covenant, where the special matter is not alleged, and the plaintiff is nonsuited before he counts, and the second writ is sued pending the other, yet the former shall not be pleaded in abatewrit being general, the plaintiff might have declared for a distinct thing from what he demanded by the second writ; but when the first is a special writ, and sets forth the particular demand, as in a præcipe quod reddat, mon law, all suits depending in the king's &c., there the court can readily see that it is courts were discontinued by the death of the for the same thing; and therefore, though the king; so that the plaintiffs were obliged to plaintiff be nonsuited before he counts, yet the commence new actions, or to have re-sum-first shall abate the second writ, it being apmons or attachment on the former processes, parently brought for the same thing. 5 Co. to bring the defendant in; but to prevent the 61: Doct. Pl. 11, 12. In an action of debt, inconvenience, expense, and delay which this &c., another action depending in the courts occasioned, the stat. 1 E. 6. c. 7. was made. of Westminster for the same matter is a good plea in abatement; but a plea of an action in of a quo warranto, are not abated by the dean inferior court is not good, unless judgment mise of the crown. 2 Stra. 782. Where the be given. 5 Co. 86; and see 5 Co. 62. A king brings a writ of error in quare impedit,

to be sued out after the abatement of the first, cessors.

Allen 34.

same thing, the plaintiff may pray that the record may be inspected by the court, or demand over of it, which, if not given him in convenient time, he may sign his judgment. Dy. 227: Carth. 453. 517.

In action of debt on a judgment, defendant cannot plead a writ of error brought and pending either in bar or abatement; but the court usually stays proceedings on terms till the error is decided. Bac. Ab. Abatement (N.):

Tidd, 541. 1145. (9th edit.)

5. After the party suing has declared, the party impleaded may demand over of the writ; and then if there be any fault or insufficiency in the count for a cause apparent in itself, or if there be a variance between the count and the writ, or between the writ and a record, party impleaded ought to show it by his plead-

defendant, for the same thing, the second will not now grant over of the writ, so that writ shall abate; and it is not meessare tent these does in abstement are disused. I Bos.

Defendant may plead in abatement of a dewas a writ in being at the time of suing out claration where the action is by original; but if it be by bill he must plead in abatement of the bill only. 5 Mod. 144. A little variance between the declaration and the bond pleaded will not vitiate the declaration; but uncertainty will abate it. Plowd. 84. The variance of the declaration from the obligation, or other deed on which it is grounded, will sometimes abate the action. Hob. 18, 116: Moor. 645. But at the present day the objection of variance between the bond or deed and the declaration, is taken at the trial, as a ground of nonsuit as to what variances are and are not fatal: see Bac. Ab. Pleas (B.): and as to ment; because it doth not appear to the court amending in cases of variance, see Lord Tenthat it was for the same thing; for the first terden's Act, 9 G. 4. c. 15. And if a declaration assign waste in a town not mentioned in the original writ, the writ of waste shall abate.

6. a. As to the demise of the king; at com-

Proceedings on an information, in nature suit pending in England is not a good plea in abates by his death. 2 Stra. 843. By 11 G. bar to a subsequent suit for the same matter 4. and 1 W. 4. c. 43 § 4. all commissions for in the plantations. 3 Swanst. R. 703. taking affidavits and recognisances of bail If a second writ be brought, tested the same shall, notwithstanding the demise of the crown, day the former is abated, it shall be deemed remain in force during the pleasure of his suc-

b. With respect to the marriage of the par-If an action pending in the same court be ties; coverture is a good plea in abatement, pleaded to a second action brought for the which may be either before the writ sued, or pending the writ. By the first the writ is abated de facto, but the second only proves the writ abateable; both are to be pleaded with this difference, that coverture, pending the writ, must be pleaded after the last continuance; whereas coverture before the writ brought may be pleaded at any time, because the writ is de facto abated. Doct. Pl. 3: 1 Leon, 161: 169: vide 2 Ld. Raym. 1525: Comb. 449: Lutw. 1639.

If a writ be brought by A. and B. as baron and feme, whereas they were not married until the suit depended, the defendant may plead this in abatement; for though they cannot have a writ in any other form, yet the writ shall abate, because it was false when sued out. Fitz. Brief, 476. If a writ be specialty, &c., mentioned in the count, the brought against a feme covert as sole, she may plead her coverture; but if she neglects to do Thel. lib. 10. c. 1. § 5: Fitz. Count. 27. it, and there is a recovery against her as a Such was the old proceeding; but the court feme sole, the husband may avoid it by a writ of error, and may come in any time to plead that neither the death of the plaintiff or deit. Latch, 24; Stile, 254, 280; 2 Roll, Rep. fendant after interlocutory judgment shall 53. If an action be brought in an interior abute it, if the action might be originally procourt against a teme sole, and pending the suit secuted by and against the executors or adshe intermarries, and afterwards removes the ministrators of the parties; see 4 Taunt. 884; cause by habeas corpus; and the plaintiff de- and if there are two or more plaintiffs or declares against her as a feme sole, she may plead coverture at the time of suing the habeas action shall not abate, if the cause of action corpus; because the proceedings here are de survives to the surviving plaintiff, or against novo; and the court takes no notice of what the surviving defendant; but such death being was precedent to the habeas corpus; but upon suggested on record, the action shall proceed. court will grant a procedendo. For though Eliz. 652: 1 Inst. 139: Dy. 279: Hard. 151. this be a writ of right, yet where it is to abate a rightful suit, the court may refuse it; and the plaintiff had bail below to this suit, which by this contrivance he might be ousted of, and possibly by the same means of the debt. 1 Salk. 8.

In ejectment against baron and feme, after a verdict for the plaintiff, baron dies between the day of Nisi Prius and the day in Bank; adjudged that the writ should stand good against the feme, because it is in nature of a a trespass, and the feme is charged for her own act; and therefore the action survives against her. So if the wife had died, the baron should have judgment entered against him. Cro. Jac. 356: Cro. Car. 509: 1 Roll. Rep. 14: Moor, 469.

If a feme sole plaintiff, after verdict, and before the day in Bank, takes husband, she shall have judgment, and the defendant cannot it at. Cro. Car. 232: 1 Bulst. 5.

If an original be filed against a feme sole, and before the return she marries, you may declare against her without taking notice of her husband, for her intermarriage is no abatement of the writ in fact, but only makes it abateable. Comb. 449: 1 Roll Rep. 53.

'Tis now in general held, that if a feme sole commences an action, and p naing the same marries, the suit is abated; but that it is othershe shall not take advantage of her own act.

See farther, title Baron and Feme.

the writ before the declaration, the defendant must plead this in abatement, and cannot give the coverture in evidence under the general issue. 6 Term. Rep. 265. But if the coverture existed at the time of the cause of action, it may be pleaded in bar, or given in evidence, or the general issue for it shows an incapacity to contract, &c. 8 Term Rep. 543: 3 Camp.

c. The general rule is, that whenever the death of any party happens pending the writ, and yet the plaintiff is in the same condition. as if such party were living, there such death. Where the party dies between interlocutory makes no alteration or abatement of the writ. 1 New Abr. 7.

The death of a plaintiff did generally at common law abate the writ before judgment,

fendants, and one or more die, the writ or motion on the return of the habeas corpus, the For the cases previous to this statute, see Cro. 164 : Stile, 299 : 3 Mod. 249 : Cro. Car. 426 : 1 Jones, 367: 1 Roll. Ab. 756: 1 Show. Rep. 186: 1 Vent. 34: 3 Mod. 249: Tidd's Prac. 1117.

Where husband and wife commenced an action for money, lent by the wife before marriage, and she died pending the action, it is held that it abated. 6 Barn & C. 253: 8 Dow. & Ry. 592. In a writ of error formerly, if there were several plaintiffs, and one died, the writ abated, because the writ of error was to set persons in statu quo, before the erroneous judgment given below; and they that are plaintiffs in error were distinct sufferers in executions issued thereupon, and different representatives were by such judgment affected; and by consequence the survivor cannot prosecute the writ of error for the whole, lest by a collusive persuasion, or by negligence or design, he should hurt the representative of the deceased. Bridg. 78: Yelv, 208: 10 Co. 1351: 1 Vent. 34: 1 Sid. 419. cont. But by the effect of the stat. 8 & 9 W. M. 3 c. 11. the death of one plaintiff in error does not abate the writ. Clarke v. Reppon, 1 Barn & A. 586. And if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment goes to the survivor, ad la only is to defend it. Sid. 419: Yelv. 208: 1 Ld. Raym. 439. If there be several wise with respect to a feme sole defendant, as persons named as plaintiffs in the writ, and one of them was dead at the time of purchasing the writ, this may be pleaded in abatement; because it falsifies the writ; and because the right was in the survivors, at the time of suing the writ, and the writ not according to the case. 20 Hen. 6. 30: 18 E. 4. 1: 2 H. 7. 16: 1 Brownl. 3, 4: Clif. Ent. 6: Rast. Ent. 126.

By stat. 17 Car. 2. c. 8. (made perpetual by 1 Jac. 2 c. 17. § 5.) it is enacted that the death of either of the parties between verdict and judgment shall not be alleged for error, so as judgment be entered within two terms after such verdict. See 1 Salk. 8: 2 Ld. Raym. 1415: Sid. 385. This statute does not apply to cases of non-suit; 10 Barn & C. 480; nor indement and the return of the inquiry. 4 Taunt. 884. See tits, Amendment, Pleading,

Joint Action.

The death of a defendant between the comtill the stat. 8 & 9 W.3. c. 11; which declares mission-day and day of trial was held by the the sittings in term, the Court of Common Pleas set aside the verdict and the judgment entered thereon. 3 Bos & Pull. 549: Tidd's Pleas in disability of the plaintiff may not Prac. 933, (9th ed.)

But if a declaration be delivered against one in custody, he has the whole term to plead in

abatement. Salk. 515.

If the declaration be delivered in the vacation, or so late in term, that defendant is not bound to plead to it that term; he may plead in abatement, within the first four days of next term; and where Sunday is the last of the four days, the plea in abatement may be filed on the fifth day. 3 Term Rep. 642; but see 4 Term Rep. 520: Tidd, 639.

As pleas in abatement enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions on them. First, by the statute of 4 & 5 Ann. cap. 16. for amendment of the law, no dilatory plea is to be received unless on oath, and probable cause shown to the court. Secondly, no plea in abatement shall be received after respondeas ouster, for then they would be pleaded in infinitum. 2 Saund. 41. Thirdly, they are to be Dyer in marg. 210: Stile, 30: Latch. 83: 5 Co. 105: 9 Co. 31: Han. Ent. 103.

and without an affidavit annexed to it judg- & A. 258. ment may be signed. Impey's Instruct. Cler.

Tidd, 640. (9th ed.)

the court, it is to be observed that the defend- the excommunication, since we may be abant must plead in propria persona; for he can-solved by the bishop, and that will not appear not plead by attorney without leave of the in the king's court, because such assoilment court first had, which leave acknowledges the is not returned into the king's court, from jurisdiction; for the attorney is an officer of whence the significavit is sent. But now by the court; and if he put in a plea by an officer the 53 G. 3. c. 127, persons excommunicated of the court, that plea must be supposed to be shall not incur any civil disability. put in by leave of the court. 1 New Ab. 2.

for if he makes the full defence quando et league: in the former to an alien enemy. I ubi curia consideraverit, &c. he submits to the jurisdiction of the court. Lutw. 9: 1 Show.

If a plea in abatement be pleaded to the Rep. 386: Stephen on Plead. 436: Tidd, 637. person of the plaintiff, there it must conclude,

Court of King's Bench not to be a ground for If a plea is pleaded to the jurisdiction of setting aside a verdict for the plaintiff. 7 the court, it ought to conclude with a prayer Term Rep. 31. But where a defendant of judgment in this manner, viz. The said died on the night before the trial of a cause at defendant prays judgment, whether the court

Pleas in disability of the plaintiff may not be pleaded after a general imparlance. 1 Lutw. 19: Tidd, 639. (9th ed.) In pleading II. A plea in abatement must be put in outlawry in disability in another court, the within four days (both days inclusive) after ancient way was to have the record of the the return of the writ, because the person outlawry itself, sub pede sigili by certiorari coming in by the process of the court ought and mittimus; see Doct. Pl. 393: Stam. 103: not to have time to delay the plaintiff. Lutv. Fitz. Coron. 233; but this being very expen-1181: 2 Stra. 1192: 1 Term Rep. 277: 5 T. sive, it is now sufficient to plead the capias ut R. 210: 3 T. R. 642: Tidd, 639. (9th ed.) lagatum under the seal of the court from whence it issues; for the issuing of execution could not be without the judgment; and therefore such an execution is a proof to the court that there is such a judgment, which is a proof that the defendant's plea of matter of record is proved by a matter of record; and consequently appears to the court not to be merely dilatory; and therefore, on showing such execution, if the plaintiff will plead nul tiel record, the court will give the defendant a day to bring it in. Co. Lit. 128: Doct. Plac. See tit Outlawry.

Outlawry may be pleaded in bar, after it is pleaded in abatement, because the thing is forfeited, and the plaintiff has no right to re-

cover. 11 H. 7. 11: 2 Lutw. 1604.

Outlawry may be always pleaded in abatement, but not in bar, unless the cause of action be forfeited. Co. Lit. 128. b.: Doct. Pl. 395:

Tidd, 644. (9th ed.)

In personal actions, where the damages are pleaded before imparlance. See Yelv. 112: uncertain, outlawry cannot be pleaded in bar; 1 Lutw. 46. 178: 2 Lutw. 1117: Doct. Pla. but in actions on the case, where the debt to 224: 4 Term Rep. 227. 520. Except where avoid the law wager, is turned into damages, ancient demesne is pleaded; for this may be there outlarry may be pleaded in bar, for it done after imparlance, because the lord might was vested in the king, by the forfeiture, as a reverse the judgment by writ of disceit, and it debt certain, and due to the outlaw; and the goes in bar of the action itself. For this see turning it into damages, whereby it becomes uncertain, shall not divest the king of what he was once lawfully possessed of. 2 Lutw. A plea in abatement must be signed by 1604: 3 Lev. 29: 2 Vent. 282: 3 Leon, 197. counsel, and filed with the clerk of the papers; 205: Cro. Eliz. 204: Owen, 22. See 2 Barn.

Where excommunication is pleaded, it is K. B. Or the court may be moved to set it not sufficient to show the writ de excommunicato capiendo under the seal of the court; for With respect to pleas to the jurisdiction of the writ is no evidence of the continuance of

Alienage may be pleaded either in bar or The defendant must make but half defence, abatement: in the latter case to an alien in

if he ought to be compelled to answer. 1 Mod. bar or in abatement, for if the plaintiff cannot Ent. 34: Tidd, 638.

In all pleas of abatement which relate to the person, there is no necessity of laying a venue, for all such pleas are to be tried where Lev. 92; 1 Salk. 5. 94; Carth. 243. the action is laid. Bac. Ab. tit. Abatement.

If it be pleaded to the writ, then the plea abatement, vide 2 Ld. Raym. 1207, 1208. Concludes with the prayer of judgment of the writ, and that the writ may be quashed. When it is to the action of the writ, there he should show that the party ought not to have that abatement: and the plea in bar or general iswrit, but by the matter of his plea should insue only shall be tried. 2 Hard timate to him how he should have a better. and the authorities there cited. Latch. 178. Respondere non debet is a proper beginning to a plea to the jurisdiction of the court; but a plea of ne unques executor ought to begin with petit judic' de billâ. 5 Mod. 132, 133. 146: 1 Saund. 283: 2 Saund. 97. 189, 190. 339: 2 Lutw. 44: Show. 4. In a replication to a plea in abatement, where matter of fact is pleaded, the plaintiff must pay his damages; but where matter of law is pleaded, of an appeal or indictment of felony, and the plaintiff must only pray that his writ may be maintained. 1 Ld. Kaym. 339, 594; 2 Ld. Raym. 1022.—If one pleads matter of C. 277. But in criminal cases, not capital, abatement, and concludes in bar, Et petit judi- on demurrer in abatement adjudged against cium si actionem habere debet, though he begins in abatement, and the matter be also in abatement, yet the conclusion being in Barn. & C. 502: 5 Dow. & Ry. 422. in abatement, yet the conclusion being in bar, makes it a bar; and the reason is becially against the action. 18 H. 6. 27: 32 (except assizes of mort d'ancestor, novel distinguisser et al. 17: 36 H. 6. 18: 22 H. 6. 536: 1 Show. abatement, triable by the 4: 2 Ld. Raym. 1018: 6 Taunt. 587: and see Chit. on Plead. 494. If a man pleads matter afterwards to plead any new matter, but final in bar, and concludes in abatement, it shall be judgment shall be given against him. 2 taken for a plea in bar, from the nature and reason of the thing; for the plaintiff can have no writ if he has not a cause of action, and therefore the court will take the plea to be in recovered, the defendant demurs partly in bar. 37 H. 6. 24: 36 H. 6. 24: 2 Mod. 6: 2 abatement, and partly in bar, the court shall Will. Saund. 209. c. The rule (as to pleas in give judgment in chief. Show. 255. In debt, bar) is, that a mere prayer of judgment is if the defendant pleads in identification and extends the same of sufficient, without pointing out that judgment, writ, to which the plaintiff imparls, and at because the court is bound to give the proper the day given the defendant makes default, judgment. 4 East, 502: 10 East, 87.

Rep. 227. Therefore a plea of misnomer must fendant, on a plea in abatement, is quod breve, state the real name; 8 Term. Rep. 515: Bac. or narratio cassetur. See Maule & S. 453. If Ab. Misnomer (F.); and a plea of privilege of issue be joined on a plea in abatement, and it peerage must show how defendant derives his be found for the plaintiff, it shall be peremptitle, and that he is a peer of the United Kington; 4 Dow. & Ry. 592; and it hath been shall be quod recuperet, because the defendant of the plaintiff. expressly resolved, that where the plea is in choosing to put the whole weight of his cause abatement, and it is of necessity that the defendant must disclose matter of bar, he shall in chief, is an admittance that he had no other have his election to take it either by way of bar or abatement. 2 Roll. Rep. 64: Salkill v. And in this case the jury who try that issue Shilton. In short, whatever destroys the shall assess the damages. See 2 Will. Saund. plaintiff's action, and disables him for ever 5. (3.) from recovering, may be pleaded in bar. But If there be two defendants, and they plead the defendant is not always obliged to plead two several pleas in abatement, and there be in bar, but may plead in abatement; as in re- issue to one and demurrer to the other, if the plevin for goods, the defendant may plead pro-perty in himself, or in a stranger, either in not proceed on the demurrer: and sic vice Vol. I.

prove property in himself, he fails of his action for ever; and it is of no avail to him who has the property if he has it not. 1 Vent. 249: 2

Where matter of bar may be pleaded in

If a defendant, together with a plea in abatement, plead also a plea in bar, or the general issue, he thereby waives the plea in sue only shall be tried. 2 Hawk. P. C. 277.

III. If issue be taken upon a plea to the writ, judgment against the defendant is peremptory; but if there be a demurrer, the judgment is then, only that the plaintiff answer over. Yelv. 12: Allen, 66: 2 Will. Saund. 2.

Whatever matters are pleaded in abatement found against the defendant, yet he may afterwards plead over to the felony. 2 Hawk. P.

In appeals of mayhem and all civil actions against the defendant, he shall not be suffered Hawk. P. C. 277; and see the authorities there cited.

Upon a judgment in waste for the damages the day given the defendant makes default, judgment is final upon the default, though The nature of a plea in abatement is to enthe plea was only in abatement. 10 E. 4.7: title the plaintiff to a better writ; see 4 Term. Mod. Cases, 5. The judgment for the de-

the other plea becomes useless. Hob. 250: liament, and called abbots sovereign, and ab-

Bac. Ab. tit. Abatement.

goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in fayour of the plea, judgment of nil capiat shall in each case judgment of nil capiat shall be minster, Circneester, St. Alban's, St. Mary given against the plaintiff. Thus, where in an action for criminal conversation the decester, Malmsbury, Waltham, Thorney, St. given for the plaintiff, yet the court having the priory de Sempringham. See also Spelafterwards determined the demurrer in fa-man's Glossary. These abbeys and priories Saund. 300. (3.)

as well by the one name as the other, upon demurrer overruled, there will be judgment of respondeas ouster, and not quod recuperet.

East's Rep. 542.

In abatement the court will give no other than the proper judgment prayed for by the purty. 10 East's Rep. 83; and see 2 Bos. & Pull, 422: 1 Chit. on Plead. 494. (5th ed.)

ABATOR. See Abate.

ABATUDA. Any thing diminished .-Moneta abatuda, is money clipped or diminished in value. Cowel. Du Fresne.

ABBACY, abhatia. The government of a religious house, and the revenues thereof, subject to an abbol, as bishoprick from bishop.

ABBANDUNUM, ABBENDOMA, AB-BENDONIA. Abington in Berkshire, formerly Sewsham.

ABBAS, estuarium.] Humber in York-

ABBAT, or Abbot; abbas, Lat.—abbé, Fr. abhud, Sax. by some derived from the Syriac abba, pater.] A spiritual lord or governor, having the rule of a religious house. these abbots here in England some were elective, some presentative; and some were mitred, and some were not; such as were mitred had episcopal authority within their limits, being exempted from the jurisdiction of the diocesan; but the other sort of albots were subject to the diocesan in all spiritual govern-

versa; for either way the writ is abated, and ment. The mitred abbots were lords of parbots general, to distinguish them from the other It seems that where the defendant's plea abbots. And as there were abbots, so there were also lords priors, who had exempt jurisdiction, and were likewise lords of parliament. Some reckon twenty-six of these lords abbots be entered, notwithstanding there may be also and priors that sat in parliament. Sir Edw. one or more issues in fact; because, upon the Coke says, there were twenty-seven parliawhole, it appears that the plaintiff had no mentary abbots and two priors. 1 Inst. 97. cause of action. So where several pleas are In the parliament 20 R. 2. there were but pleaded since the stat. of 4 & 5 Ann. c. 16. all twenty five; but anno 4 E. 3. in the sumof them going to destroy the action, and one mons to the parliament at Winton, more are or more issues are joined on some of the named. And in Monasticon Anglicanum pleas, and there are one or more demurrers there is also mention of more, the names of And in Monasticon Anglicanum to the rest, if the court determine the demur which were as follow: abbots of St. Austin, rers in favour of the defendant before the is- Canterbury, Ramsey, Peterborough, Croysues are tried, they shall not be tried; and if land, Evesham, St. Bennet de Hielmo, Thornafter the trial, it will make no difference, for by, Colchester, Leicester, Winchcomb, Westfendant pleaded, 1, not guilty, and 2, not Edmund's Beaulieu, Abingdon, Hide, Readguilty, within six years, and there was an issue ing, Glastonbury, and Osney.—And priors of on the first plea, and a demurrer to the other, Spalding, St. John's of Jerusalem, and Lewes. although the issue was tried before the de- .- To which were afterwards added the abbots murrer was disposid of, and a verdict was of St. Austin's Bristol, and of Bardney, and vour of the defendant, judgment of nil capiat were founded by our ancient kings and great was given. Burr. 749. Cooke v. Sayer. See men, from the year 602 to 1133. An abbot, William's Saunders, 109 (1.): 2 Will. with the monks of the same house, were called the convent, and made a corporation. To a plea in abatement of misnomer of Terms de Ley, 4. By stat. 27 H. 8. c. 28. all plaintiff, replication that plaintiff was known abbeys, monasteries, priories, &c. not above the value of 200l. per ann. were given to the king, who sold the lands at low rates to the gentry. Anno 29 H. 8. the rest of the abbots, &c. made voluntary surrenders of their houses to obtain favour of the king; and anno 31 H. 8. a bill was brought into the house to confirm those surrenders; which passing, completed the dissolution, except the hospitals and colleges, which were not dissolved, the first till the 33d, and the last till the 37th of H. 8; when commissioners were appointed to enter and seize the said lands, &c.

ABBATIS. An avenir or steward of the

stables; an ostler, Spelm.

ABBREVIATE of ADJUDICATION. This term (in the Scotch law) is applied to an abstract of the adjudication.-Adjudication is that diligence of the law by which the heritage of a debtor is adjudged to belong to his creditor in payment of debt; and the abbreviate of the adjudication is an abridgment of the record, containing the names of the creditor, of the debtor, and of the lands, with the Of amount of the debt; it is signed by the judge who pronounced the decree in the process of adjudication, and must be recorded in the register of abbreviates. Scotch Dict.

ABBROCHMENT, abbrocamentum.] The forestalling of a market or fair. MS. Antiq.

ABBUTTALS. See Abuttals.

ABBY. See Abbott.

or refuse any thing. Terms de Ley, 5.

ABDICATION, abdicatio.] In general, is crime. Old Nat. Br. 21. where a magistrate, or person in office, renounces and gives up the same before the term numerous statutes creating and punishing ofof service is expired. And this word is free fences, and in the stat. 7 and 8 G. 4 c. 29. quently confounded with resignation, but dif- 61; aiders and abettors in misdemeanor are fers from it, in that abdication is done purely punishable as principals. To be present at, and simply; whereas resignation is in favour and aid and abet the commission of, a felony of some other person. Chamb. Dict. 'Tis said makes the party (if he is not the actual perpeto be a renunciation, quitting and relinquish- trator of the offence) a principal in the second ing, so as to have nothing farther to do with degree: as in rape, if one ravish a woman, a thing; or the doing of such actions as are and others assist by holding the woman or inconsistent with the holding of it. On king otherwise, the actual ravisher is called the James II's leaving the kingdom, and abdica- principal in the first degree; if an aider and ting the government, the Lords would have abettor be absent at the time of the commishad the word desertion made use of; but the sion of the offence he then becomes an acces-Commons thought it was not comprehensive sory. See title Accessory. enough, for that the king might then have the liberty of returning. The Scots called it a beer, or bayer, to expect] is what is in expecverb forisfacio.-This word was fully can- By a principle of law, in every land there is a vassed in the Parliamentary Debates at that fice-simple in somebody, or it is in abeyance; time.

ABDITORIUM. An abditory or hiding place, to hide and preserve goods, plate, or money; and is used for a chest in which reliques are kept, as mentioned in the inventory

of the church of York. Mon. Ang. p. 173.
ABDUCTION of WOMEN. The forcible or fraudulent abduction of women or girls, G. 4. c. 34. § 22-24. By these acts, where any woman shall have any interest, legal or equitable, present or future, in any estate, real or personal; or being heiress presumptive, or take or detain her against her will, for the offences, are declared guilty of felony, and the incumbent that is presented. Terms de punishable by transportation for life, or not less than seven years, or imprisonment, with The taking of any unmarried girl, under six. in abeyance until J. S. dies. 1 Inst. 342. v. Edward Gibbon Wakefield, published by Murray.

or downright murder; as distinguished from the less heinous crimes of manslaughter or of the occupant. 1 Inst. 342. b. chance-medley. It is derived from the Saxon, æbere, apparent, notorious, and morth, murder; until it comes in esse, so as to be certainly and was declared a capital offence, without charged or aliened; though by possibility it fine or commutation, by the laws of Canute, may fall every hour. 1 Inst. 378. cap. 93. and of Hen. 1, cap. 13. Spelm.

To ABET, abettare, from the Saxon a (ad vel usque) and bedan or beteren, to stir up or incite. In our law signifies to encourage or set on; the substantive abetment is used for an encouraging or instigation. Staundf. Pl. Cr. | hold could never be in abeyance. See 2 Wils.

To ABDICATE, abdicare.] To renounce 105. An abettor (abettator) is an instigator or setter on; one that promotes or procures a

AIDERS and ABETTORS are named in

ABEYANCE, or abbayance, [from the Fr. forefalture (forfeiture) of the crown, from the tation, remembrance, and intendment of law. that is, though for the present it be in no man, yet it is in expectancy, belonging to him that is next to enjoy the land. 1 Inst. 342. The word abeyance hath been compared to what the civilians call hareditatem jucentem; for as the civilians say lands and goods jacent, so the common lawyers say that things in like estate are in abeyance; as the logicians term it in posse, or in understanding; and as we on account of their fortune, is punished in it in posse, or in understanding; and as we England by 9 G. 4. 31. and in Ireland by 10 say in nubibus, that is, in consideration of law. See Plowd. Rep. 547.

If a man be a patron of a church, and presents one thereto, the fee of the lands and tenements pertaining to the rectory is in the next of kin to any one having such interest, parson; but if the parson die, and the church any person who, from motives of lucre, shall become void, then the fee is in abeyance until there be a new parson presented, admitted, purpose of her being married (or defiled), and and inducted; for the patron hath not the fee, all counsellors, aiders, and abettors in such but only the right to present, the fee being in

Ley, 6.

If a man makes a lease for life, the remainor without hard labor, not exceeding four years. der to the right heirs of J. S., the fee-simple is teen, out of the possession of a parent or guar- lands be leased to A. B. for life, the remainder dian is declared a misdemeanor, punishable to another person for years, the remainder for by fine and imprisonment. See titles Heiress, years is in abeyance, until the death of the Woman, and the remarkable case of the King lessee for life; and then it shall vest in him in remainder as a purchaser, and as a chattel shall go to his executors. 3 Leon. 23. Where ABEREMURDER, aberemurdum.] Plain tenant for term of anothers life dieth, the freehold of the land is in abeyance till the entry

Fee-simple in abeyance cannot be charged until it comes in esse, so as to be certainly

The necessity there was in the old law, that there should always be some person to do the feudal duties, to fill the possession, and to answer the actions which might be brought for the fief, introduced the maxim that the free-

165. But it was admitted there were some | from nobody, but that there was a " suspension nanced and discouraged as much as possible, and allowed upon none but the most urgent occasions. The chief reasons of this may be found in Blackstone's argument in the case of Perryn and Blake; and Mr. Hargrave's observations on the rule in Shelly's case. To these reasons the modern law has added her marked and unremitted odium of every restraint upon alienation; it being clear that no restraint could be more effectual than the admission of a suspension of the inheritance. The same principles have in some degree given rise to the well known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence in some degree the doctrines respecting the destruction of contingent remainders. See 1 Inst. 216. a. and 342 b. and the notes there.

"In a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, nam nemo est hæres viventis; it remains, therefore, in waiting or abeyance during the life of Richard. This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life, and the inheritance remains in abeyance. And not only the fee but the freehold also may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance until a successor is named, and then it vents in the suc-

cessor. 2 Comm. c. 7. p. 107.

This opinion, which may now be considered as exploded, was founded on a notion, generally speaking true enough, that the operation of livery was immediate and entire, and therefore that the livery to John, in the case put, carried the remainder over with it at the same time out of the grantor; and if the remainder passed from the grantor, as it clearly

cases in which the inheritance, when separated of the complete or absolute operation of such from the freehold, might be so. But this abey-ance or suspension of the inheritance could heritance, till the intended channel for the renot but be considered with a very jealous eye, and it was agreed that it should be discounted ance." This principle will be found to explain all the cases in the text: whatever portion or the inheritance cannot take effect in præsenti remains in the grantor or his heirs; and it the inheritance can never pass, as in the case of the church, it always remains there. See Fearne on Con. Rem. 359, 364, (6th ed.)

With respect to the case of a freehold in abeyance, that seems, upon other grounds, as objectionable as the former; feudal principles always requiring an immediate tenant of the freehold for the performance of the services, and to answer to the action of a stranger. The case put of the glebe during a vacancy of the church is not perhaps easy of solution; that which Mr. Christian proposes in a note on this passage is not entirely satisfactory. He would place the freehold in the future successor, who is to be brought into view and notice by institution and induction. But if it is in him, it is not there usefully for either of the purposes for which alone the law requires it to be in any one,—the services are not performed, and there is no one to answer the præcipe of a stranger. The same objection indeed applies if we place it in the heir of the founder or the ordinary. Perhaps it may be thought not unreasonable to admit this to be an exception to the general rule; an estate altogether is the creature of legal reasoning, to be moulded, raised, or extinguished accordingly; and it may be fairly argued that as the freehold can exist in no one to any useful legal purpose, during the vacancy of the church, it may not exist at all. This is a conjecture hazarded with great diffidence, but which may be allowed in a question of more curiosity than practical importance. Coleridge's Note, 2 Black. Comm. 107. n. 2.

As to the abeyance of titles of honour, and their being revived by the royal nomination, see 1 Inst. 165. a; where Lord Coke says, that if an earl of Chester die, leaving more passed for the present to nobody, this doctrine daughters than one, the eldest shall not of of abeyance was a necessary consequence. right be a countess, but the king may, for the This conclusion, though couched in imposing uncertainty, confer the dignity on which terms, as abeyance in gremio legis, and in nubibus, was by no means satisfactory; these though our books furnish little matter on the phy, did not explain to any man's mind where subject; and there are many instances of an the estate was in the interval. At the same exertion of this prerogative. One of the most time certain opinions were held, seemingly remarkable took place in the person of the late inconsistent with it: for instance, it was laid Mr. Norborn Berkley, who, in 1764, was calldown, that if John died in the lifetime of Rich- ed to the House of Peers in right of the old ard, as the heirs of Richard could never take, barony of Botetourt, after an abeyance of sevethe grantor should have the land again, the ral centuries, and was allowed to sit according same grantor in whom, by the hypothesis, no to the antiquity of that barony. See Cas. in estate remained. Mr. Ferne met the doctrine Dom. Proc. 1764. Another instance was in in the only way in which it could be met, by the case of Sir Francis Dashwood, late Lord denying the premises, and reasoned, that if de Spencer; for in 1763 he was called to the the remainder passed to nobody, it passed ancient barony of that name in right of his

deceased mother, who was eldest sister and (liberty and free habitation) he would choose one of the co-heirs of an earl of Westmoreland. on whose death that barony had become in abeyance, and being so summoned he took his seat as premier baron, in place of Lord Abergavenny, who before possessed that distinction. See various other cases in Cruise on Dignities, chap. 5.

ABGETORIA, abgetiorum. The alphabet, Matt. Westm .- The Irish still call the

alphabet abghitten.

ABIDING-BY. This term is used (in the Scotch law) where a deed is challenged as forged; the party founding on the deed must appear in court and abide by it; this is done by his signing a declaration that he abides by the deed quarrelled sub periculo falsi, which has the effect of pledging him to stand to the consequences of founding on a forged deed. It will most commonly happen, however, that the abiding-by is qualified; as, for instance, in the case of a bill, the holder will state that it came fairly into his hands in the course of business, and he will abide by it, under that protestation and qualification, and as in no shape accessory to the forgery if there be one. Scotch Dict.

ABIGEVUS, for abigens. The same as Abactor, which see, and Bract. Tract. 11.1.3.

c. 6. 105 a.

ABILITY to inherit. See title Alien.
ABISHERING or ABISHERSING, is understood to be quit of americaments. It originally signified a forfeiture or amercement, and is more properly mishering, mishersing, or miskering, according to Spelman. It hath since been termed a liberty or freedom; because, wherever this word is used in a grant or charter, the persons to whom made, have the forfeitures and amercements of all others, and are themselves free from the control of any within their fee. Rastal's Abr. Terms de Ley, 7.

ABJURATION, abjuratio.] A forswearing or renouncing by oath: in the old law it signified a sworn banishment, or an oath taken to forsake the realm for ever. Staundf. Pl.

C. l. 2 c. 40.

time, and other reigns down to the 22 H. 8. (in imitation of the clemency of the Roman emperors towards such as fled to the church,) thence to be tried for his crime; but on conperson might give him meat and drink for his in French (quarto,) without title, date or petual confinement of the offender to some ranged work, first published in 5 vols. folio, sanctuary, wherein (upon abjuration of his in 1762, and following years; the last edition

to spend his life (as appears by the stat. anno 22 H. 8. c. 14.,) this privilege was abolished by stat. 21 Jac. 1. c. 28; and this kind of abjuration ceased. 2 Inst. 629.

As to the effect of abjuration on the mar-

riage tie, see tit. Baron and Feme.

In its modern and now more usual signification, it extends to the person as well as place; as for a man to abjure the Pretender by oath, is to bind himself not to own any regal authority in the person called the Pretender, nor ever to pay him any obedience, &c. See, on this subject, tit. Nonconformists, Oaths, Papist, Recusants, &c.

ABLATO-BULGIO. Bulness or Bolness,

in Cumberland.

ABOLITION. A destroying or effacing, or putting out of memory; it also signifies the leave given by the king, or judges, to a criminal accuser to desist from further prosecution. Stat. 25 H. 8. c. 21.

ABONE, Abonis.] Avington or Aventon,

in Gloucestershire.

ABORTION. See Homicide.
ABREVICUM. Berwick on Tweed.
To ABRIDGE, abbreviare from the Fr. abbreger.] To make shorter in words, so as to retain the sense and substance. And in the common law it signifles particularly the making a declaration or count shorter, by severing some of the substance from it: a man is said to abridge his plaint in assize, and a woman her demand in action of dower, where any land is put into the plaint or demand which is not in the tenure of the defendant; for if the defendant pleads non-tenure, jointtenancy, &c. in abatement of the writ, as to part of the lands, the plaintiff may leave out those lands, and pray that the tenant may answer to the rest. See Brook, tit. Abridgment; vide 21 H. 8. c. 3.

ABRIDGMENT. The epitome of a larger work contracted into a narrow compass. (Hooker.) See tit. Books, Literary Property.

The principal Abridgments of the Law are that of Sir Anthony Fitzherbert, a judge temp. Hen. 8- first printed in 1516, and containing Formerly, in King Edward the Confessor's cases down to 21 Hen. 7; a work of authority, containing many cases not in the year books, some before the judges in their Itinera. The "Grand Abregement" of Sir Robert if a man had committed felony here, and he Brooke, Chief Justice of the Common Pleas, could fly to a church or church-yard before temp. Philip and Mary, first printed in the his apprehension, he might not be taken from year 1568. This work is principally founded on Fitzherbert's, adding many readings not fession thereof before the justice, or before the now extant, and many fresh cases. Statham's coroner, he was admitted to his oath, to abjure abridgment, which was the first attempt at or forsake the realm; which privilege he was digesting the law, and contains the cases to have forty days, during which time any down to the time of Hen. 6. It was printed sustenance, but not after, on pain of being name. Sir John Comyns's (Chief Baron of guilty of felony. See Porn's Mirror, lib. 1. the Exchequer) " Digest of the Laws of Eng-But, at last, this punishment being but a per- land," a learned, accurate, and excellently arserves, that the whole work is remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution; but that Pleader seems to be the author's favourite title. Bacon's Abridgment of the Law, a luminously digested and learned work, of high authority, originally composed principally from the manuscripts of Chief Baron Gilbert, by Matthew Bacon, Esq., and first published in 1736, 1740, and 1751. It has passed through seven editions, the last, in 8 vols. being enlarged by the addition of 1500 pages of matter, and much altered and improved; three volumes being edited by Sir Henry Gwillim, and five volumes by Charles Edward Dodd, Esq. 1832. Viner's "General and Complete Abridgment of Law and Equity," in 24 vols., an immense body of law and equity, first published in 1741-1751, a highly useful compilation, notwithstanding some defects and inaccuracies; there is a supplement, in 6 vols. published 1799-1806.

ABROGATE, abrogare. To disannul or take away any thing: to abrogate a law is to lay aside or repeal it. Stat. 5 and 6 E. 6. c. 3. Leges posteriores priores contrarias abrogant.

ABSENCE. A decree (in the Scotch law) is said to be in absence, where no appearance is made for the defender. Every Scotchman who is within the kingdom is liable to be called in an action before the court of session; in which action decree may be given against the defender, although no appearance be made for him. Even a foreigner, though not within the kingdom, provided he be possessed of a land estate in it, or of goods which have been attached for the purpose of founding jurisdiction, may be exposed to a decree in absence. Scotch Dict.

ABSENTEES, or des absentees. A parliament so called, was held at Dublin, 10th May, 8 H. 8; and mentioned in letters patent,

dated 29 H. 8. 4 Inst. 354. ABSOLVE. See Assoile.

ABSOLUTE WARRANDICE, is a warrant against all mortals. Scotch Dict.

ABSOLUTIONS, from Rome. See tit.

Papists.

ABSONIARE, a word used by the English Saxons in the oath of fealty, and signifying to shun or avoid-As in the form of the oath among the Saxons recorded by Somner.

ABSQUE HOC. See tit. Traverse.

ABUTTALS, from the French abutter or abouter, to limit or bound.] The buttings and boundings of lands, East, West, North, or South, with respect to the places by which they are limited and bounded. Camden tells us that limits were distinguished by hillocks raised in the lands called Botentines. The sides on the breadth of lands are properly adjacentes, lying or bordering: and the ends in to make an assurance of such lands to such length abbuttantes, abutting or bounding. The uses as in the condition mentioned; the deboundaries and abuttals of corporation and fendant pleaded that he had made a feoffment

was published in 1822. Mr. Hargrave ob-! church lands, and of parishes, are preserved by an annual procession. Boundaries are of several sorts; such as inclosures of hedges, ditches, and stones in common fields, brooks, rivers, and highways, &c. of manors and lord-

> ACCAPITARE, accapitum.] To pay relief to lords of manors.—Capitali domino ac-

Fleta, l. 2. c. 50.

ACCEDAS AD CURIAM, a writ to the sheriff, where a man hath received false judgment in a hundred court, or court baron. issues out of the Chancery, but is returnable into B. R. or C. B: and is in the nature of the writ de falso judicio, which lies for him that had received false judgment in the county court. In the Register of Writs, it is said to be a writ that lies as well for justice delayed, as for false judgment; and that it is a species of the writ recordare, the sheriff being to make record of the suit in the inferior court, and certify it into the king's court. Reg. Orig. 9. 56: F. N. B. 18: Dyer 169.

ACCEDAS AD VICECOMITEM. Where a sheriff hath a writ called Pone delivered to him, but suppresseth it, this writ is directed to the coroner, commanding him to deliver a

writ to the sheriff. Reg. Orig. 83.

ACCEPTANCE, acceptatio.] The taking and accepting of any thing in good part, and as it were a tacit agreement to a preceding act, which might have been defeated and avoided were it not for such acceptance had.

As to the effect of acceptance of Rent, see

tit. Rent, Lease.

How far acceptance of one Estate shall destroy another, see tit. Estate.

Where the acceptance of money shall discharge a Bond, see tit. Bond V.

As to acceptance of Bills, see Bills of Exchange.

How far the acceptance of one thing shall be

a good bur to the demand of another.

When the condition of a bond is to pay money, acceptance of another thing is good. But if the condition is not for money, but a collateral thing, it is otherwise. Dyer, 56: 9 Rep. 79. The acceptance of uncertain things, as customs, &c. made over, may not be pleaded in satisfaction of a certain sum due on bond. Cro. Car. 193. If a woman hath title to an estate of inheritance, as dower, &c. she shall not be barred by any collateral satisfaction or recompense: and no collateral acceptance can bar any right of inheritance or freehold, without some release, &c. 4 Rep. 1. When a man is entitled to a thing in gross, he is not bound to accept it by parcels; and if a lessor distrain for rent, he is not obliged to accept part of it; nor in action of detinue, part of the goods, &c. 3 Salk. 2.

Debt upon bond, conditioned for the obliger

of the same lands to other uses than in the deed of poisoning is committed. 3 Inst. 138. condition expressed, which the obligee had And the same reason will hold with regard to accepted; upon demurrer it was adjudged an other murders committed in the absence of ill plea; for the obligor ought not to vary from the murderer, by means which he had prepar-

Bulst. 301. See tit. Payment.

extinction of a debt, with a declaration that sues; in every of these cases the party offendthe debt has been paid when it has not; or the ing is guilty of murder as a principal in the acceptance of something merely imaginary in first degree. For he cannot be called an acsatisfaction of the debt. Scotch Dict.

Particeps criminis.] One guilty of a feloni- the madman, cannot be held principals, being ous offence, not principally, but by participa- only the instruments of death. As therefore

&c.

Abettors and Accomplices also come in some measure under the name, though the former cessories. An Abettor is one who stirs up, perior in the guilt, whom he could aid, abet, incites, instigates, or encourages, or who commands, counsels, or procures another to commit felony (and this is now extended to minor offences; see post); and in many, indeed in almost all cases, is now considered as much a principal as the actual felon, in some cases more, as in the case of murder. See Leach's Hawk. P. C. l. 2. c. 29. § 7, 8. and c. 33. § 98 -103. An Accomplice is one of many equally concerned in a felony; and the word is generally applied to those who are admitted to give evidence against their fellow criminals, for the furtherance of justice, which might otherwise be eluded; and this is done on the ancient principle of law relative to Approvers. See Leach's Hawk. P. C. l. 2. c. 37. § 3. 7. and notes; 4 Comm. 329.

The following extracts from Blackstone's Commentaries (4 Comm. 34-40. and 423.) give a methodized general idea of the princi-

information.

pal in an offence in two degrees. A principal in the first degree, is he that is the actor, or absolute perpetrator of the crime; and in the second degree, he who is present, aiding and abetting the fact to be done. 1 Hale's P. C. 615.—Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. Foster, 350. And this rule hath also other exceptions; for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it (Keb. 52.) who is ignorant of the poisonous quality (Foster, 349.), or giving it to him for that purpose; and yet not administ before the fact. 1 Hale's P. C. 615. So too ter it himself, nor be present when the very in petit larceny, and in all crimes under the

the uses set forth in the condition, 1 Brownl 160. ed before hand, and which probably could not Acceptance of a less sum may be in satis- fail of their mischievous effect. As by laying faction of a greater sum, if it be before the a trap, or pitfall, for another, whereby he is day on which the money becomes due. 3 killed; letting out a wild beast, with an intent to mischief; or exciting a madman to ACCEPTILATION (in Scotch law,) the commit murder, so that death thereupon encessory, that necessarily presupposing a prin-ACCESSARY or Accessory. Accessorius, cipal; and the poison, the pitfall, the beast, or tion; as by command, advice, or concealment, he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal; and if principal, then in the first degree, not strictly under the legal definition of Ac- for there is no other criminal, much less a suor assist. 1 Hale's P. C. 617: 2 Hawk. P. C. 441, 2.

II. Of Accessories.—An Accessory is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed; in considering the nature of which degree of guilt, we will examine, 1. What offences admit of accessories, and what not; 2. Who may be an accessory before the fact; 3. Who may be an accessory after it; 4. How accessories, considered merely as such, and distinct from principals, are to be treated; 5. Of accessories or accomplices ac-

cusing principals.

1. In high treason there are no accessories, but all are principals: the same acts that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime. 3 Inst. 138: 1 ples governing this subject.-Consult also Hale's P. C. 613. Besides, it is to be consi-Hale's Hist. P. C. and Hawk. P. C. for fuller dered, that the bare intent to commit treason is many times actual treason; as imagining I. Of Principals.—A man may be princi-the death of the king, or conspiring to take away his crown. And as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact, since the very advice and abetment amounts to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in these, no advice to commit them, unless the thing be actually performed, will make a man a principal traitor. Foster, 342. In petit treason, murder, and felonies, with or without benefit of clergy, there may be accessories; except only in those offences, which, by judgment of law, are sudden and unpremeditated, as manslaughter and the like, which, therefore, cannot have any accessories

degree of felony, there are no accessories either | and unconsequential nature. 1 Hale's P. C. before or after the fact: but all persons con- 617. But if the felony committed be the same cerned therein, if guilty at all, are principals; in substance with that which is commanded, 1 Hale's P. C. 613; the same rule holding and only varying in some circumstantial matwith regard to the highest and lowest offences; though upon different reasons. In treason all are principals, propter odium delicti; in trespass all are principals, because the law, quæ de minimis non curat, does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim that accessorius sequitur naturam sui principalis; 3 be guilty of a higher crime than his principal, being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder, though, had he been present and assisting, he would have been guilty, as principal, of petty treason, and the stranger of murder. 2 Hawk. P. C. 441, 2.

P. C. 614.

one, who being absent at the time the crime So likewise to convey instruments to a felon command another to commit a crime. Herein gaoler to let him escape, makes a man an acabsence is necessary to make him accessory; cessory to the felony. And by stat. 11 and 12 A. is accessory in the murder. And this holds necessaries, is no offence: for the crime imputhough the party killed be not in rerum natable to this species of accessory is the hind-tura at the time of the advice given. As if A. rance of public justice, by assisting the felon the reputed father, advises B. the mother of to escape the vengeance of the law. 1 Hale's a bastard child, unborn, to strangle it when P. C. 624. A man may be an accessory to an born, and she does so, A. is accessory to the murder. Dyer, 186. And it is also settled (Foster, 125.) that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act is accessory to all that ensues upon that unlawful act, but is not accessory to any act distinct from the other: as if A. commands B. to beat C., and B. beats him so that he dies, B. is guilty of murder as principal, and A. as accessory; but if A. commands B. to burn C.'s house, and he in so doing commits a robbery, now A., though the parent assists the child or the child his accessory to the burning, is not accessory to parent, if the brother receives the brother, the the robbery, for that is a thing of a distinct master his servant, or the servant his master,

ters; as if, upon a command to poison A., he is stabbed or shot, and dies, the commander is still accessory to the murder, for the substance of the thing commanded was the death of A., and the manner of its execution is a mere collateral circumstance. 2 Hawk. P. C. 443. There can be no accessories either before or after a homicide per in infortunium or se de-Inst. 139; and therefore an accessory cannot fendendo, for it is presumed to be sudden; and if it come with deliberation it is murder. 1 Hale, 437. 616: 2 Hawk. P. C. c. 29. § 24. Nor any accessories before in manslaughter. 1 Hale, 450: 2 Hawk. P. C. c. 29. § 24: East, P. C. 353.

3. An accessory after the fact may be, where a person, knowing a felony to have been committed, receives, harbours, relieves, comforts, aids, or assists the felon. 1 Hale's P. C. 618: Brooke's Ab. Jurisdiction, 4: Dal-Though generally an act of parliament, cre-tun, c. 161. Therefore to make an accessary ating a felony, renders (consequentially) ac- expost facto, it is in the first place requisite cessories before and after, within the same that he knows of the felony committed. 2 penalty, yet the special penning of the act of Hawk. P. C. 446. In the next place, he must parliament in such cases sometimes varies the receive, relieve, comfort, or assist him. And, case. Thus the statute of 3 H. 7. c. 2. against generally, any assistance whatever given to a taking away maidens, &c., makes the offence, telon, to hinder his being apprehended, tried, and the procuring and abetting, yea, and wit- or suffering punishment, makes the assister tingly receiving also, to be all equally princi- an accessory. As furnishing him with a pal felonies, and excluded of clergy. I Hale's horse to escape his pursuers, money or victuals to support him, a house or other shelter 2. Sir Matthew Hale (5 Hale's P. C. 615, to conceal him, or open force or violence to 616.) defines an accessory before the fact to be rescue or protect him. 2 Hawk. P. C. 414, 5. was committed, doth yet procure, counsel, or to enable him to break gaol, or to bribe the for it such procurer, or the like, be present, W. 3. c. 7, the receiving a pirate or any vessel he is guilty of the crime as principal. If A. or goods piratically taken renders the rethen advise B. to kill another, and B. does, in coivers accessory to the piracy. But to rethe absence of A., now B. is principal, and lieve a felon in gaol with clothes or other accessory by the receiving him, knowing him to be an accessory to felony. 1 Hale, 622.

The felony must be complete at the time of the assistance given; else it makes not the assistant any accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for till death ensues, there is no felony committed. 2 Hawk. P. C. 447. But so strict is the law, where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If

or even if the husband relieves his wife, who highly necessary, though the punishment is receivers become accessories, ex post facto. and such accessories as offend before the fact 3 Inst. 108: 2 Hawk, P. C. 320. But a feme is committed. covert cannot become an accessory by the receit and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she

to discover her lord. 1 Hale's P. C. 621. 4. The general rule of the ancient law was, that accessories shall suffer the same punishment as their principals; if one be liable to death, the other is also liable. 3 *Inst.* 188. Why, then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons; 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet by the statutes relating to the benefit of clergy, now abolished, a distinction was made between them; accessories after the fact being allowed the benefit of elergy, denied to the principals, and accessories before the fact, in many cases; as among others in petit-treason, murder, robbery, and wilful burning. 1 Hale's P. C. 615. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even before the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment. Beccar. c. 37. See post. 3. Because no man formerly could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him, though that law is now much altered. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon is no acquittal of the felony itself: but it is a matter of some doubt, whether if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also. 1 Hale's P. C. 625, 626: 2 Hawk. P. C. 529, 530: Foster, 361. But it is clearly held, that one acquitted as principal may be indicted as accessory after the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be court having jurisdiction to try the principal,

may have any of them committed a felony, the still much the same with regard to principals

By the old common law, the accessory could not be arraigned till the principal was attainted, unless he chose it, for he might waive the benefit of the law; and therefore principal and accessory might and may still be arraigned and plead, and also be tried together. But otherwise if the principal had never been indicted at all, had stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned; for non constitit whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen where it was possible that a trial of the principal might be had subsequent to that of the accessory; and therefore the law still continues that the accessory shall not be tried so long as the principal remains liable to be tried hereafter.

By § 9. of 7 G. 4. c. 64. for improving the administration of criminal justice in England. accessories before the fact (by counselling, procuring, or commanding) to any felony at common law or by statute, shall be deemed guilty of felony, and may be indicted either as accessory with the principal felon, or after his conviction, or for substantive felony, whether the principal be convicted or not, and shall be punished as an accessory, and may be tried by the court having jurisdiction to try the principal, wherever the offence may have been committed, by land or sea, within the king's dominions or without, and if committed in a distant country from the principal of-fence, may be tried in either; but no such accessory, when once so tried, shall be again indictable for the same offence.

By § 10. accessories after the fact, to any felony, may be tried (but as accessories only and after conviction of the principal) in like manner as accessories before the fact.

By § 11. of the same act, accessories, either before or after the fact in felony, may be prosecuted after the conviction of the principal, although the principal die, or be pardoned, or otherwise delivered before attainder, and shall suffer the same punishment as such accessory would have been liable to if the principal had been attainted.

By § 3. of 9 G. 4. c. 31. accessories before the fact to murder shall suffer death as felons. By the acts 7 and 8 G. 4. c. 28. for Eng-

land, and 9 G. 4. c. 54. for Ireland, an accessory before the fact may be tried and punished as such, either with the principal, or after his conviction, or as a substantive felon, by any

Vol. I.-4

although the offence be committed on the seas, or abroad. When offences are committed in different counties, accessories may be tried in either. Accessory after the fact may be tried either in the county where the principal offence, or that of the accessory, was committed. Accessory may be prosecuted after conviction of principal, though he be not attainted, &c.

By stat. 7 and 8 G. 4. c. 29. § 61. (which introduces new provisions in the law by constituting principals in the first and second degree, and accessories in misdemeanors) it is enacted, "that every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable by indictment under this act shall be liable to be indicted and punished as a principal offender." And in the same words it is so enacted in stat. 7

and 8 G. 4. c. 30. § 26.

By stat. 7 and 8 G. 4. c. 29. § 61. it is enacted, "that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable, and every accessory after the fact, to any felony punishable under this act (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years." See Abettors in cases of misdemeanors by the same section, and see tit. Receivers.

In stat. 7 and 8 G. 4. c. 30. § 26. this clause is enacted in the same words as to all cases of felony punishable by that act, except only the words "receivers of stolen property"

being omitted.

To aid, abet, counsel, or procure the commission of a felony makes the party (if he be present, but not the party actually committing the offence) a principal in the second degree; in other cases it constitutes him an accessory; but to aid, abet, or assist in the commission of a misdemeanor makes him what is termed an abettor, whose punishment depends on the nature of the offence of the principal. See 7 and 8 G. 4. c. 29. 962.

Persons not present, or sufficiently near to give assistance, cannot be principals, but are

accessories. C. C. R. 336.

By stat. 9 G. 4. c. 31. § 31. accessories after the fact to murder may be transported for life, or imprisoned with hard labour, in the gaol or house of correction, not exceeding four years.

5. The old doctrine of approvements, when one criminal appealed or accused his accomplices in order to obtain his pardon, is now grown into disuse; and the statutes indemnifying or rewarding discoverers are repealed by 7 and 8 G. 4. c. 27.

ACCESSION; property by, see title Occu-

This is also the term used in speaking of the commencement of the king's reign.

ACCOLA. An husbandman who came from some other parts or country to till the lands, eo quod adveniens terram colat. is thus distinguished from Incola, viz. Accolo non propriam, propriam colit Incola terram. Du Fresne.

ACCOLADE, from the Fr. accoler, collum amplecti.] A ceremony used in knighthood by the king's putting his hand about the

knight's neck.

ACCOMPLICE. See Accessory, Approver.

ACCOMPT. See Account.

ACCORD. Fr.] Is an agreement between two or more persons, where any one is injured by a trespass, or offence done, or on a contract, to satisfy him with some recom-pence; which accord, if executed and per-formed, shall be a good bar in law, if the other party after the accord performed, bring an action for the same trespass, &c. Terms de

When a duty is created by deed in certainty, as by bill, bond, or covenant, to pay a sum of money, this duty accruing by writing, ought to be discharged by matter of as high a nature; but when no certain duty arises by deed, but the action is for a tort or default, &c. for which damages are to be recovered, there an accord with satisfaction is a good plea. 6 Rep. 43. In accord one promise may be pleaded in discharge of another, before breach; but after breach, it cannot be discharged without a release in writing. Mod. 44. Accord with satisfaction upon a covenant broken, is a good plea in satisfaction and discharge of the damages. Lutw. 359. And accord made before the covenant broken, had been adjudged a good bar to an action of covenant, as it may be in satisfac-

tion of damage to come. I Danv. Ab. 546; but see contra, 1 Taunt. 428: 7 Price, 604: 3

East, 251: Bac. Ab. Accord. (B.) (7th ed.)

If a contract without deed is to deliver goods, &c. there money may be paid by accord in satisfaction; but if one is bound in an obligation to deliver goods, or to do any collateral thing, the obligor cannot by accord give money in satisfaction thereof: though when one is bound to pay money, he may give goods or any other valuable thing in satisfaction. 9 Rep. 78: 1 Inst. 212. Where damages are uncertain, a lesser thing may be done in satisfaction, and in such a case an accord and satisfaction is a good plea; but in action of debt on a bond, there a lesser sum cannot be paid in satisfaction of a greater. 4 Mod. 88. Accord with satisfaction is a good plea in personal actions, where damages only are to be recovered; and in all actions which suppose a wrong vi et armis, where a capias and exigent lie at the common law, in trespass and ejectment, detinue, &c. accord is a good plea: so in an appeal of maihem. But in real actions it is not a good plea. 4 Rep. 1. 9. 70: 9 Rep. 77. Of late it hath been held, that upon mutual promises an action

without execution, as well as an arbitrament. Raym. 450: 2 Jones, 158. Acceptance of the thing agreed on in these accords is the only material thing to make them binding. Hob. 178: 5 Mod. 86.

In pleading accord is the safest by way of satisfaction, and not of accord alone. For if it be pleaded by way of accord, a precise execution thereof in every part must be pleaded: but, by way of satisfaction, the defendant need only allege, that he paid the plaintiff such a sum, &c. in full satisfaction of the accord, which the plaintiff received. 9 Rep. 80. The defendant must plead that the plaintiff accepted the thing agreed upon in full satisfaction, &c. And if it be on a bond, it must be in satisfaction of the money mentioned in the condition, and not of the bond: which cannot be discharged but by writing under hand and seal. Cro. Jac. 254, 650; Bac. Ab. Accord and Satisfaction. (7th ed.) And the accord and satisfaction must be shown in pleading to be of the whole matter in the declaration, and therefore where in assumpsit on several promises the defendant pleaded accord and satisfaction of the cause of action, the plea was bad, as it did not go to the whole declaration. 2 Chit. Rep. 303; and see 5 Barn. & A. 886. See further Com. Dig. tit. Accord. See tit. Acceptance, Award, Bond, Estate, Lease, Rent, Payment.

The reasoning in cases whether accord and satisfaction is to be allowed a good bar to an action, is often extremely subtle. The general principle is, that it is a good bar where the party seeks pecuniary damages only, or conjointly with the restitution of a chattel real or personal, for some personal wrong, or the breach of some contract whether by parol or specialty; but that it is not a good bar where the object is the recovery of a freehold, or where the admission of it would operate to discharge a subsisting contract under seal.

To make an accord sufficient in cases where such a plea is available, the following rules are important to be observed: 1. It must be in full satisfaction of the injury complained of, and must leave no part uncovered; thus, in trespass for taking cattle, an accord that the plaintiff should have his cattle again would be insufficient, for mere restitution leaves uncovered the damage sustained by the removal and intermediate loss of possession. 2. It must be complete and executed: a promise to give, and an agreement to accept, something at a future day will not avail; nor will it be better, if the day be past, and the defendant at the day tendered the performance of the agreement, which the plaintiff refused to accept. 3. It must be to give or do something which has legal value: and 4. That value must not, upon the face of it, and of necessity, be less than that of the thing in lieu of which it is given or done. Thus, if not lie of a thing certain: if a man delivers

lies, and consequently, there being equal re- the defendant has promised to deliver 100 medy on both sides, an accord may be pleaded bushels of wheat of a certain quality, at a certain time and place, and has failed so to do, it would be no answer to an action to state the plaintiff's acceptance of 50 bushels of the same quality, and at the same time and place in satisfaction thereof. But where the inferiority is not necessary, nor upon the face of the thing, no actual inferiority to be made out by evidence, is a legal objection; as in the case put, a change of quality, time, or place, might make the 50 equal to the 100, and consequently a legal satisfaction for the non-delivery of them. Coleridge's note in 3 Buck. Comm. c. 1.

ACCOUNT or ACCOMPT; computus.] Is a writ or action which lies against a bailiff or receiver to a lord or others, who, by reason of their offices and business, are to render accompt, but refuse to do it. F. N. B. 116.

This action is now seldom used; but the most liberal, extensive, and beneficial action is for money had and received, by defendant to plaintiff's use, which will lie in almost every case where one hath money of another's in his hands, which he ought to pay him. This form of action is equivalent to a bill in equity. An action on the case on insimul computasset is also usual for the balance of a settled account. See Godfrey v. Saunders, 3 Wils. and 3 Comm. 162. The action of account is now very seldom resorted to, since it is held that the balance of an account, however numerous the items, may be recovered in assumpsit. 5 Taunt. 431: 1 Marsh, 115: see vide, 2 Camp. 238. The action of account, however, lies in the following cases.

If a person receives money due to me upon an obligation, &c. I may either have an action of accompt against him as my receiver; or action of debt, or on the case, as owing me so much money as he had received. 1 Lill. 33. If I pay money in my own wrong to another, I may bring an action against him for so much money received to my use: but then he may discharge himself by alleging it was for some debt, or to be paid over by my order to some other person, which he hath done, &c. 1 Lill. 30. But if a man have a servant, whom he orders to receive money, the master shall have accompt against him, if he were his receiver. Co. Lit. 172. If money be recieved by a man's wife to his use, action of accompt lies against the husband, and he may be charged in the declaration as his own receipt. Co. Lit. 295. Account does not lie against an infant, but it lies against a man or woman, that is guardian, bailiff or receiver, being of age and dis-covert: and though an apprentice is not chargeable in this action, for what he usually receives in his master's trade, yet upon collateral receipts he shall be charged as well as another. Co. Lit. 172: Roll. Ab. 117: 3 Leon. 92.

As to other actions of accompt, they will

10l. to merchandize with, he shall not have fourteen years old, he must charge him as account of the 10l. but of the profits, which guardian; but if it be for taking the profits are uncertain; and this is one reason why this action will not lie for the arrears of rent. Danv. Ab. 215. Action of account may be sues a stranger that doth intermeddle with brought against a factor that sells goods and merchandizes upon credit, without a particular commission so to do, though the goods are bona peritura. 2 Mod. 100. If there are two demands in a declaration, to which the defendant pleads an accompt stated, the plaintiff can never after resort to the original contract, which is thereby merged and discharged in the accompt; if A. sells his horse to B. for 10l. and there being divers other dealings between them, they come to an accompt upon the whole, and B. is found in arrear 5l. A. must bring his insimul computasset for it; but if there be only one debt betwixt the parties, entering into an accompt for that would not determine the first contract. 1 Mod. Rep. 206: 2 Mod. 44. It has been held, that mutual demands on an accompt are not extinguished by settling it, and promise to pay the balance; wherefore assumpsit lies for the original debt. Fitzgib. 44. A man having received of another 100l. to be employed in merchandize abroad, covenants at his return to accompt to him; this doth not alter the case; but, notwithstanding the covenant, action of accompt may be brought. 2 Bulst. 256. And if I deliver to another person goods or money beyond sea, to be delivered again to me in England at a certain place, and he delivers it not, I may be relieved by this action. F. N. B. 18.

Accompt may be brought against the fol-

lowing persons:

If a man makes one his bailiff of a manor, &c. he shall have a writ of accompt against him as bailiff; where a person makes one receiver, to receive his rents or debts, &c. he shall have accompt against him as receiver; and if a man makes one his bailiff and also his receiver, then he shall have accompt against him in both ways. Also a person may have a writ of accompt against a man as bailiff or receiver, where he was not his bailiff or receiver; as if a man receive money for my use, I shall have an accompt against him as receiver; or if a person deliver money unto another to deliver over unto me, I shall likewise have accompt against him as my receiver: so if a man enter into my lands to my use, and receive the profits thereof, I shall have accompt against him as bailiff. 9 H. 6: 36 H. 6: 10 R. 2. Fitz. Accompt. 6.

A judgment in accompt, as receiver, is no bar to action of accompt as bailiff; but 'tis said a bailiff cannot be charged as receiver, nor a receiver as bailiff; because then he might be twice charged. 2 Lev. 127: 1 Danv. Abr. 220, 221. The heir may have writ of accompt, before or after his full age, against a guardian in socage, and if he sue the guar-

after that age, then he must sue him as bailiff. Lit. 124: F. N. B. 118. Where an heir his land, he shall charge him in accompt as guardian. F. N. B. 18.

A man devises lands to be sold by his executors, and the money thence arising to be distributed amongst his daughters; action of accompt lies in this case, for the daughters against the executors. Jenk. Cent. 215: 2 Roll. Ab. 285. An action of accompt lies against a bailiff, not only for what profits he hath made and raised, but also for what he might have made and raised by his care and industry, his reasonable charges and expences deducted. Co. Lit. 172. In this instance the action of accompt may be preferable to that for money had and received .- One merchant may have an accompt against another, where they occupy their trade together; and if one charges me as bailiff of his goods ad mercandizandum, I must answer for the increase, and be punished for my negligence;

If a bailiff or receiver make a deputy, action of accompt will not lie against the deputy,

but if he charges me as receiver ad compu-

tandum, I must be answerable only for the bare money or thing delivered. F. N. B.

but against him. 1 Leon, 32.

117: Co. Lit. 272: 2 Leon. Ca. 245.

Statutes.—In the writ of accompt the process by the common law was summons, attachment and distress infinite. The statute of Marlbridge (52 H. 3. c. 23.) gave attachment by the body, if the bailiff had no lands by which he might be distrained. 2 Inst. 380.—By the stat. Westm. 2. (13 E. 1. st. 1.) c. 11. if the accountant be found in arrearages, the auditors that are assigned to him have power to award him to prison.-In the process of outlawry, &c. the stat. 13 E. 3. c. 23. gives an action of accompt to the executors of a merchant; the stat. 25 E. 3. c. 5. to executors of executors; the stat. 31 E. 3. c. 11. to administrators; and by the stat. 3 and 4 Ann. c. 16. actions of account may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other as bailiff, for receiving more than his share, and against their executors and administrators; and the auditors appointed by the court may examine the party on oath.

It may be proper to say something concerning the plea and judgment in account; and though the order may seem somewhat irregular, it will be necessary first to explain the nature of the judgment, which being rightly understood, the distinctions as to the method of pleading will be more easily conceived.

The usual judgment is quod computet, on which the defendant is taken by capias ad comdian for profits of his lands taken before he is putandum; but there are two judgments in

this writ; for if the defendant cannot avoid | Oath. Vide Comyns's Digest, tit. Accompts .the suit by plea, judgment is first given, That he do accompt; and having done this before the auditors, there is another judgment entered, that the plaintiff shall recover of the defendant so much as is found in arrear. 11 Rep. 40. In a late case two principal officers of the court were, on motion, appointed auditors after a judgment quod computet. 2 Chitt. R. 10: and see 3 Dow. & Ry. 596. The first judgment is but an award of the court, like a writ to inquire of damages; and these two judgments depend one upon another; for if judgment be to accompt, and the party die be-fore he hath accounted, the executor cannot proceed in the action, but it must be begun again; and no writ of error will lie upon the first till after the second judgment. 11 Rep. 40.

With respect to the plea, the following dis-

tinctions are to be noticed:

What may be pleaded in bar to the action, shall not be allowed to be pleaded before the auditors. Cro. Car. 82. 161: Bac. Ab. Accompt. (F.) (7th ed.) Some pleas are in bar of the accompt, and others in discharge before auditors; and some pleas will be allowed before auditors, that will not be in bar to the accompt. Dyer, 21: 11 Rep. 8. In accompt the plaintiff declared of the receipt of money by the hands of a stranger; the defendant pleaded a gift of the money afterwards by the plaintiff: this was a good plea as well in bar of the action as before auditors. Winch. 9.

The pleas in this action are, quod nunquam fuit receptor; quod plene computavit, &c. It is no plea by an accomptant that he was robbed, unless he alleges it was without his default and negligence, and then it will be a good plea. Co. Lit. 89. That the defendant never was bailiff, is the general bar; and it is a good plea in bar, by claiming a property in the things to be accounted for. 29 E. 3. c. 47. A defendant, as receiver, cannot wage his law where he receives the money by another's hands: it is otherwise where he received it of the commissioners of the Sick and Hurt. the plaintiff himself. 1 Cro. 919.

It may be proper to add, that the process in accompt is summons, pone, and distress; and, upon a nihil returned, the plaintiff may proceed to outlawry. The statute of limitations, 21 J. 1 c. 16. doth not bar a man who is a merchant from bringing action of accompt for merchandize at any time; but all other actions

of accompt are within the statute.

In Chancery, upon an accompt of fifteen or twenty years' standing, the defendant may be allowed to prove, on his own oath, what he cannot otherwise make proof of; but here the particulars must be named, as to whom the money was paid, for what, and when, &c. 1 C. Rep. 146. And a defendant shall be discharged upon his oath of sums under 40s.; though it is held a plaintiff shall not so charge another, or be allowed any thing in equity on his oath. 2 C. Cas. 249: 1 Vern. 283. See penditure, debt, &c. of Great Britain, to be

Kidd's Com. Dig. Introduction to that title.

ACCOUNTANT-GENERAL, an officer in the court of Chancery, and Exchequer, appointed by act of parliament to receive all money lodged in court. He is to convey the money to the Bank, and take the same out by order; and he is only to keep the account with the Bank; for the Bank is answerable for all money received by them, and not the Accountant-General, &c. Stat. 12. Geo. 1. c. 32: 1 Geo. 4. c. 35.

Counterfeiting the hand of the Accountant-General was formerly a capital felony by stat. 12 Geo. 1. c. 32. § 9: 1 Geo. 4. c. 35. and 27: but now, by stat. 1 Will. 4. c. 66. § 1. the capital punishment appears to be modified, and the offender subjected to transportation for life, or a lesser period. See tit. Forgery.

Property in the hands of the Accountant-General shall on his removal, death, &c. vest in his successor. Stat. 54 Geo. 3. c. 14: 1 Geo.

ACCOUNTS PUBLIC. By stat. 25 Geo. 3. c. 52. the patents formerly granted to Lord Sondes and Lord Mountstuart, as auditors of the imprest, were vacated, and the annual sum of 7000l. each, made payable to them during their respective lives. \(\) 1.3.

Under this act his Majesty was empowered to appoint five commissioners by letters patent. These were styled the Commissioners for auditing the public accounts; and held their

offices quamdiu se bene gesserint.

The commissioners under this act were invested with all the powers, and subject to the same duties and control, as the auditors of the imprest formerly were; except as altered by the act.

Stat. 34 Geo. 3. c. 59. extended the provisions of 25 Geo. 3. c. 52. for better examining and auditing the public accounts of the board of Ordnance, the commissioners of the Navy, the commissioners for victualling the Navy, and

39 Geo. 3. c. 83. transferred to the commissioners for auditing the public accounts the duties then performed in the offices of the au-

ditors of the land revenue. § 1—10. See also 39 and 40 Geo. 3. c. 54: 47 Geo. 3. st. 2. c. 39: 54 Geo. 3. c. 83. for more effectually charging public accountants with payment of interest, for allowing them interest in certain cases, and for compelling payment of balances due from them.

By stat. 41 Geo. 3. c. 22. extended by 48 Geo. 3. c. 91. his Majesty was empowered to appoint five commissioners for the more effectual examination of accounts of public expenditure for the forces in the West Indies, and to report to the commissioners for auditing public accounts in England.

By 42 Geo. 3. c. 70. § 4. the Treasury shall annually cause accounts of the revenues, ex-

the like provisions are made for laying the like accounts before parliament by the Treasury of Ireland, by 44 Geo. 3. c. 58. By 50 Geo. 3. c. 117. and 53 Geo. 3. c. 86. accounts of the increase and diminution of public salaries, pensions, and allowances, shall be annually laid

before parliament. By 46 Geo. 3. c. 141. "for more effectual provision for the more speedy and regular examination and audit of the public accounts of this kingdom;" after reciting 25 Geo. 3. c. 52: 45 Geo. 3. c. 55: and 45 Geo. 3. c. 91. it enacts that the offices of comptroller of army accounts, and of auditor of public accounts, be henceforth distinct. His Majesty is empowered to appoint commissioners for auditing public accounts, not exceeding ten in the whole, and to grant salaries to the commissioners, viz. to the chairman 1500l. per annum, and 1200l. to each of the other commissioners. The lords of the treasury are empowered to allow salaries to officers, clerks, &c. out of the consolidated fund, and to subdivide commissioners into boards, and apportion their business .- But no vacancy is to be filled up without authority of parliament, until the number of commissioners shall be reduced to five; and the majority of commissioners of any board competent to act, &c. § 1—7.—Such commissioners are ineligible to a seat in parliament by § 22. of the said act.

See further provisions for enforcing these acts, 47 Geo. 3. st. 2. c. 9: 49 Geo. 3. c. 95:for extending them to accounts of the Paymaster-General, 48 Geo. 3. c. 49. 128:--to the Barrack Master General, 47 Geo. 2. st. 1. c. 13: 48 Geo. 3. c. 79. 90:-for the examination of the civil and military accounts of Ireland, 52 Geo. 3. c. 51, 52:-and for securing the due application of money in the hands of public

accountants there, 54 Geo. 3. c. 83.

Several recent statutes relating to these will be found under Public Accounts.

ACCRETION of land by Alluvion. See

tit. Occupancy.

ACCROCHE, from the Fr. accrocher, to hook or grapple unto.] It signifies to encroach, and is mentioned in the stat. 25 Ed. 3. c. 8. to that purpose. The French use it for delay; as accrocher un proces, to stay the pro-

ceedings in a suit.

ACCUMULATIVE JUDGMENT. As the law stood previous to the passing of a recent statute, Accumulative Judgment could only be given in cases of misdemeanor, but not in conviction for felony, because the party attainted was considered to be dead in law: the stat. 6 G. 4. c. 25. § 4. enacts that the allowance of the benefit of clergy to any person convicted of felony shall not render the party dispunishable for any act of felony committed before the time of such allowance; and now by the stat. 7 and 8 G. 4. c. 28. § 10. if a per-

made up to January 5, and laid before parlia- victed of felony, the court is empowered to ment on or before 25th March yearly .-- And pass a second sentence to commence after the expiration of the first; and by § 11. offenders committing felony after a previous conviction for felony, may be transported for life, or for not less than seven years, or imprisoned not exceeding four years; and, if a male, be once, twice, or thrice publicly or privately whipped in addition to such imprisonment.

ACCUSATION, accusatio.] The charging any person with a crime. By Magna Charta no man shall be imprisoned or condemned on any accusation, without trial by his peers, or the law. None shall be vexed upon any accusation, but according to the law of the land: and no man may be molested by petition to the king, &c. unless it be by indictment, or presentment of lawful men, or by process at common law. Stat. 25 Ed. 3. st. 5. c. 4: 28 Ed. 3. c. 3. None shall be compelled to answer an accusation to the king, without presentment, or some matter of record. Stat. 42 Ed. 3. c. 3. See stat. 38 Ed. 3. c. 9. By stat. 5 and 6 Ed. 6. c. 11. § 12; and 1 P. & M. c. 10, 11, in treason there must be two lawful accusers. As to self-accusation, see tit. Evidence. See tit. Malicious Prosecution.

ACEMANNES-CEASTER, Acemanni Ci-

vitas.] BATH, q. v.

ACEPHALI, the levellers in the reign of King Hen. 1; who acknowledge no head or superior. Leges H. 1: Du Cange.

AC ETIAM. These words are unnecessary, and are omitted in the process prescribed by

the 2 W. 4. c. 39.

AC ETIAM BILLÆ:-And also to a bill to be exhibited for 201. debt, &c.] Words in, or a clause of, a writ, where the action requires bail. The stat. 13 Car. 2. st. 2. c. 2. which enjoins the cause of action to be particularly expressed in the writ or process which holds a person to bail, hath caused the adding of this clause in writs to the usual complaints of trespass, which latter gives cognizance to the court, while that of debt authorises the arrest. See Tidd, 166. (9th ed.) This ought not to be made out against a peer of the realm, or upon a penal statute, or against an executor or administrator, or for any debt under 10l. in the superior courts; which sum is now raised to 20l. by 7 and 3 G. 4. c. 71. Nor in any action of account, action of covenant, &c., unless the damages are 10l. or more; nor in action of trespass, or for battery, wounding, or imprisonment, except there be an order of court for it, or a warrant under the hand of one of the judges of the court out of which the writ issues. 1 Lill. Ab. 13: see North's Life of Lord Keeper Guilford, fol. 90. 100: Impey's Instructor Clericalis, K. B. and C. P.: and this Dictionary, tit. Arrest, Bail, Process, Capias, Common Pleas: Tidd's Prac. 166. (9th ed.) And now by the rules of Hilary term, 1832, in all the courts, a variance between the ac etiam and the declaration, or the want of an son under sentence for another crime is con- | ac etiam, where the defendant is arrested, shall

not be ground for discharging the defendant | matter found by the grand jury, yet he may or the bail; but the bail-bond, or recognizance of bail shall be taken with a penalty or sum of 40l. only.

ACHAŤ, Fr. Achet.] A contract or bargain. Purveyors by stat. 34 Ed. 3. c. 2. were called Achators, which word is also used by Chau-

ACHELANDA, AUCHELANDIA, AUK-LANDIA. Aukland, in the bishoprick of Durham.

ACHERSET. An ancient measure of corn, conjectured to be the same with our quarter,

or eight bushels.

ACHOLITE, Acholitus.] An inferior church servant, who, next under the subdeacon, followed or waited on the priests and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance.

ACKNOWLEDGMENT-MONEY, is a sum paid in some parts of England by the copyhold tenants on the death of their landlords, as an acknowledgment of their new lords; in like manner as money is usually paid

on the attornment of tenants.

ACQUIETANDIS PLEGIIS. A writ of justices lying for the surety against a creditor who refuses to acquit him after the debt is satisfied. Reg. of Writs, 158.

ACQUIETANTIA DE SHIRIS ET HUNDREDIS. To be free from suits and

services in shires and hundreds.

ACQUIETARE, quietum reddere.] To acquit. Dr. Wilk. Gloss. It also sometimes signifies to pay. Mon. Angl. tom. 1. fol. 199.

ACQUITTAL, from the French word Aguitter, and the Latin compound Acquietare.] To free or discharge. It signifies, in one sense, to be free from entries and molestations of a superior lord for services issuing out of lands; (see Terms de Ley;) and in another signification (the most general) it is taken for a deliverance and setting free of a person from the suspicion of guilt; as he that on trial is discharged of a felony, is said to be acquietatus de felonia; and if he be drawn in question again for the same crime, he may plead auter foits acquit; as his life shall not be twice put in danger for the same offence. 2 Inst. 385.

Acquittal in fact, is when a person is found not guilty of the offence by a jury, on verdict, &c. But in murder, if a man was acquitted, appeal might formerly be brought against him. 3. Inst. 273. But appeals are now abo-

lished by 59 G. 3. c. 46.

If one be acquitted on an indictment of murder, supposed to be done at such a time; and after indicted again in the same county, for the murder committed at another time: here, notwithstanding that variance, the party may plead auter foits acquit, by averring it to be the same felony; so where a person is indicted a second time, for robbery upon the same person, but at another vill, &c. 2 Hawk.

be indicted de novo seven years afterwards, and cannot plead this acquittal; as he may upon the special matter found by the petty jury, and judgment given thereon. Ibid. 246. See

also Leach's Hawkins, c. 26. § 64.

If a person is lawfully acquitted on a malicious prosecution, he may bring his action, &c. for damages, after he hath obtained a copy of the indictment; but it is usual for the judges of gaol delivery to deny a copy of an acquittal to him who intends to bring an action thereon, when there was a probable cause for a criminal prosecution. Carth. Rep. 421: see Leach's Hawkins, c. 23. § 142. &c. And it is not settled whether a party tried for felony, and acquitted, has, or not, a right to have a copy of the record of acquittal. See 10 Barn. & Cres. 70. By stat. 3 Hen. 7. c. 1. if either principal or accessory be acquitted on an indictment for murder, the court may remit him to prison, or bail him, at their discretion, till the year and day (for appeal) be passed.

The statute 3 H. 7. c. 1. though not expressly repealed, has become a dead letter, as ap-

peals for murder are abolished.

ACQUITTANCE, Acquietantia.] Signifieth a discharge in writing, of a sum of money, or debt due; as, where a man is bound to pay rent, reserved upon a lease, &c. and the party to whom due, on receipt thereof, gives a writing under his hand, witnessing that he is paid; this will be such a discharge in law, that he cannot demand and recover the sum or duty again, if the acquittance be produced. de Ley, 15: Dyer, 6. 25. 51. An acquittance is a discharge and bar in the law to actions, &c. And if one acknowledges himself to be satisfied by deed, it may be a good plea in bar, without any thing received; see per Heath, J., 2 Taunt. 143; but an acquittance, without seal, is only evidence of satisfaction, and not pleadable.

It is observed, that a general receipt or acquittance in full of all demands, will discharge all debts, except such as are on specialty, viz. bonds, bills, and other instruments sealed and delivered; on which account those can be destroyed only by some other specialty of equal force, such as a general release, &c.; there being this difference between that and the general acquittance. See Cro. Jac. 650.

But in some cases a court of equity will order accounts to be opened, even after an ac-

quittance in full of all demands.

And now, in the superior courts of law, the producing an acquittance will not bar the action, if the plaintiff can by any means show a mistake, and that he has not been paid, or paid so much as the acquittance is for. Sec 5 Barn. & A. 607: 1 Dow. & Ry. 211: 3 Barn. & Cres. 421. acc.

In some cases payment may be refused, unless an acquittance is given. Thus the P. C. Where a man is discharged on special obligor is not bound to pay money upon a him by the obligee; nor is he obliged to pay the money before he hath the acquittance. But in case of an obligation with a condition, it is otherwise; for there one may aver payment. And by stat. 3 and 4 Ann. c. 16 if an action of debt is brought upon a single bill, and the defendant hath paid the money, such payment may be pleaded in bar of the action.

A servant may give an acquittance for the use of his master, where such servant usually receives his master's rents, &c. and a master shall be bound by it. Co. Lit. 112. See Bac. Ab. Master and Servant. (K.) (Ed. by Gwillim and Dodd.) The manner of tender and payment of money shall be generally directed by him who pays it, and not by him who receives it; and the acquittance ought to be given accordingly.

ACRE. See Measure.

ACRE, from the German Acker, Ager.] A quantity of land, containing in length 40 perches, and in breadth 4 perches; or in proportion to it, be the length or breadth more or less. By the customs of various countries, the perch differs in quantity, and consequently the acre of land. It is commonly about 16 feet and a half, but in Staffordshire it is 24 feet. According to the stat. 24 H. 8. c. 14. concerning the sowing of flax, it is declared that 160 perches make an acre, which is 40 multiplied by 4; and the ordinance of measuring land, 33 Ed. 1. st. 6. agrees with this account. The word acre formerly meant an open ground or field; as castle-acre, west-acre, &c. and not a determined quantity of land. The general calculation is that there are 4840 square yards in an acre. See Turner v. Probyn, 1 Anst. 66.

ACRE, or ACRE FIGHT; an old sort of duel fought by single combatants, English and Scotch, between the frontiers of their kingdoms, with sword and lance; this duelling was also called camp fight, and the combatants, champions, from the open field that

was the place of trial.

ACT BEFORE ANSWER, is when the lords ordain probation to be led, before they determine the relevancy, and then take both at once under their determination. Scotch Dict.

ACT OF CURATORY, is the act extracted by the clerk upon any one's acceptation of

being curator. Scotch Dict.

ACT OF GRACE. In Scotland the act so termed is 1696, c. 32. for providing maintenance for debtors imprisoned by their creditors. It is usually applied in England to insolvent acts and general pardons. See Debt-

ACT OF PARLIAMENT. See Statute. ACTILIA. Military utensils. Du Cange. ACTION, Actio.] Is the form of a suit given by law for recovery of that which is one's due; or it is a legal demand of a man's tion. But detinue is not an action mixed, not-right. Co. Lit. 285. The learned Bracton withstanding the thing demanded, and dam-

single bond, except an acquittance be given thus defines it, Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur. Actions are either criminal or civil; criminal to have judgment of death, as appeals of death, robbery, &c., or only to have judgment for damage to the party, fine to the king and imprisonment, as appeals of maihem, &c. Co. Lit. 284: 2 Inst. 40. But appeals are now abolished by 59 G. 3. c. 46. and all criminal proceedings are now at suit of the king, and are called prosecutions. Civil actions are such as tend only to the recovery of that which, by reason of any contract, tort, or wrong of another, is due to us; as action of debt upon the case, &c. 2 Inst. 61.

Under criminal actions may, perhaps, be classed actions penal, which lie for some pen-

alty on the party sued.

Actions upon statute, brought upon the breach of any statute, whereby an action is given to the person injured or grieved that lay not before; as, where one commits perjury to the prejudice of another, the party that is injured may have a writ upon the statute. Such action is now, however, obsolete. But there are many other such actions, as the action for an escape out of execution, on 1 R.2. c. 12; the action against a tenant for double value for not quitting according to notice, on 4 G. 2. c. 28. § 1; and if a statute prohibit a thing, and do not prescribe any mode of remedy, it may be remedied by an action on the statute. See 1 Chitt. Pl. 127: 4 Barn. & Cress. 962: 1 Mac Clel. & Y. 457.

Actions popular, given on the breach of some penal statute, which every man hath a right to sue for himself and the king, by information, action, &c. And because this ac-tion is not given to one especially, but generally to any that will prosecute, it is called action popular; and from the words used in the process (qui tum pro domino rege sequitur quam pro se ipso, who sues as well for the king as for himself) it is called a qui tam ac-

tion. See tit. Information.

Civil actions are divided into real, personal, and mixed. Action real is that action whereby a man claims title to lands, tenements, or hereditaments, in fee or for life: and these actions are possessory, or auncestrel; possessory, of a man's own possession and seisin; or auncestrel, of the possession or seisin of his ancestor.

Action personal is such as one man brings against another, on any contract for money or goods, or on account of any offence or trespass: and it claims a debt, goods, chattels,

&c. or damages for the same.

Action mixed is an action that lieth as well for the thing demanded, as against the person that hath it; in which the thing is recovered, and likewise damages for the wrong sustained; it seeks both the thing whereof a man is deprived, and a penalty for the unjust detenan action merely personal, brought only for

goods and chattels.

In a real action, setting forth the title in the writ, several lands held by several titles may not be demanded in the same writ; in personal actions several wrongs may be comprehended in one writ. 8 Rep. 87. A bar is perpetual in personal actions, and the plaintiff is without remedy, unless it be by writ of error or attaint: but in real actions, if the defendant be barred, he may commence an action of a higher nature, and try the same again. 5 Rep. 33. Action of waste sued sued against a tenant for life, is in the realty and personalty; in the realty, the place wasted being to be recovered, and in the personalty, as treble damages are to be recovered. Co. Lit. 284.

Real and mixed actions are now, with a few exceptions, abolished. See Limitations of Actions, II.

Many personal actions die with the person. Real actions survive. If lessee for years commit waste, and dies, action of waste may not be had against his executor or administrator, for waste done by the deceased. And where a keeper of a prison permits one in execution to escape, and afterwards dieth, no action will lie against his executors. This must be understood of that kind of keeper to whom the prison actually belongs, as the marshal, the warden of the Fleet, &c., not of a gaoler who acts as servant to a sheriff, &c.; for in such case, the death of the gaoler is not any bar to an action against the sheriff, to whom, in fact, the prison actually belongs. Co. Lit. 53. Action of debt lies not against executors upon a contract for the eating and drinking of the testator. 9 Rep. 87. But an action on the case on promises will lie against an executor or administrator on the promises of their testator or intestate.

In all actions merely personal arising ex delicto, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the action dies with the person; 4 Inst. 315; and it never shall be revived either by or against the executors or other represen-For neither the executors of the plaintiff have received, nor those of the defendant committed, in their own personal capacity, any manner of wrong or injury. But in actions arising ex contractu, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by, the executors. 3 Comm. 302.

Personal representatives may now maintain actions of trespass, as in cases for injuries committed to the real estate of the deceased within six months before his death, and the like actions may be brought against personal

ages for withholding it be recovered; for it is representatives for wrongs done by their testators to others in respect of their property, real or personal, under certain restrictions. Sec Executor, VI. 1.

> And with respect to the writs by which actions may now be commenced in the courts at Westminster, see Process. See also Limitation of Actions, Pleading, Trial, Venue,

> The true ground of this rule appears to be, that executors or administrators represent not so much the persons as the personal estate of their testators; and this leads to a qualification, with which the rule should be stated: that the action which dies with the person must be for a wrong which can, neither by implication of law, nor averment on the record, appear to operate to the injury of the personal estate. Accordingly, where an action was brought by an administrator for a breach of promise of marriage with the intestate, a female, the judgment was arrested, because loss of marriage in itself by no means implied an injury to the personal estate of a female, which the administrator represented (on the contrary, marriage was generally an extinction of it); and if any injury to that estate had in fact arisen by the defendant's conduct, none was stated on the record. Chamberlain v. Williamson, 2 M. & S. 408: and see Kingdom v. Nottle, 1 Maule & S. 355: King v. Jones, 1 Marsh, R. 107.

> Again, actions are either local or transitory. Actions real and mixed, ejectment, waste, trespasses quare clausum fregit, &c. are to be laid in the same county where the land lieth: personal and transitory actions, as debt, detinue, covenant, (except where founded on privity of estate only, in which cause they are local), assault and battery, &c, may be brought in any county. Co. Lit. 282. Except against justices and officers of corporations and parishes (under stat. 21 Jac. 1. c. 12.), or against officers acting under particular acts of parliament; which frequently direct actions against them to be laid in the respective counties where the facts happen. Actions transitory may be laid in any county, although the stat. 6 R. 2. enacted, that writs of debt, account, &c. should be commenced in the county where the contracts were made; for that statute was never put in use; and yet generally actions have been laid in the county where the cause of them was arising, except as above. If the cause of action arise in two counties, an action may be brought in either county; but if a nuisance be erected in one county, to the damage of a man in another, the assise must be brought in confinio comitatuum. Mich. 8 Ann. B. R. By stat. 21 Jac. 1. c. 4. all suits on penal statutes shall be laid in the county where the offence was committed. See tit. Venue.

An action for rent, for use and occupation, is not a local action. 5 W. P. T. 25.

Actions likewise are said to be perpetual

Vol. I.-5

and temporary. Perpetual, those which can- counts are of the same nature, and the same not be determined by time; and all actions may be called perpetual that are not limited to time for their prosecution: temporary actions are those that are expressly limited; and since the statute of limitations (21 Jac. 1. c. 16.), all actions seem to be temporary; or not so perpetual, but that they may in time be prescribed against; a real action may be prescribed against within five years, on a fine levied, or recovery suffered. See tit. Limitation of Actions.

Actions are also joint or several; joint, where several persons are equally concerned, and the one cannot bring the action, or cannot be sucd, without the other; several, in case of trespass, &c. done, where persons are to be severally charged, and every trespass committed by many is several. 2 Leon. 77.

As to joining several matters in one action,

the following is to be observed:-

In personal actions several wrongs may be joined in one writ; but actions founded upon a tort, and on a contract, cannot be joined, for they require different pleas and different process. 1 Keb. 847: 1 Vent. 366. So where there is a tort by the common law, and a tort by statute, they may not be joined; though where several torts are by the common law, they may be joined, if personal. 3 Salk. 202: see also post, tit. Joinder and Misjoinder.

Trover and assumpsit may not be joined; but in an action against a common carrier, the plaintiff may declare in case upon custom of the realm, and also upon trover and conversion; for not guilty answers to both. 1 Danv. Ab. 4. Debt upon an amerciament, and upon a mutuatus, may be joined in one declaration. Wils. p. 1. 248. So case for a misfeasance and negligence may be joined with a count in trover, in the same declara-tion. Ib. p. 2. 319. Two counts may be joined in the same declaration, where there is the same judgment in both. Ib. p. 2. 321. And any action may be joined, where the plea of not guilty goes to all. 8 Rep. 47. But, it seems, ejectment and battery cannot be joined; for after verdict, where several damages were found, the plaintiff was allowed to release those for the battery, and had judgment for the ejectment. 1 Danv. 3. If this is law, it shows that causes of action cannot in every instance be joined, where the same plea will go to the whole. The doctrine in Danvers seems to be law; for supposing ejectment, assault and battery, &c. joined in one action, and a general verdict on not guilty for the plaintiff, a new execution on such a judgment must be framed. Indeed the joining two such actions seems rather absurd. Various fallacious rules have been stated, on the result of the authorities, as to what actions may and may not be joined; but the result seems to be, that when the same plea may be pleaded, and the same judgment given on all the counts of the declaration, or where the in the right of the testator or intestate, though

judgment is to be given on them, although the pleas be different, as in case of debt on bond, and debt on simple contract, which may be joined, they may be joined; and perhaps the nuture of the cause of action is the best test to decide whether the counts may be joined. See 2 W. Saund. 117. e. f.: Bac. Ab. Actions in General (C.) (Ed. Gwillim and Dodd): Tidd, 10, 11. (9th ed.) Although persons may join in the personalty, they shall always sever in actions concerning the realty; and waste being a mixed action, savouring of the realty, that being worthy, draws over the personalty with it. 2 Mod. 62. A person cannot, as administrator, &c. join an action for the right of another, with any action in his own right; because the costs will be entire, and it cannot be distinguished how much he is to have as administrator, and how much for himself. 1 Salk. 10. See a variety of cases, well selected and digested on this subject, Com. Dig. tit. Action: see Joinder in Action.

It remains now to consider,

I. By whom, and against whom, Actions may be brought.

II. What particular Actions are adapted to

particular Cases.

It may be previously observed, that an action does not lie before a cause of action accrued; and if it be not pleaded in abatement, yet if it appears on the record, it may be moved in arrest of judgment; 2 Lev. 197: Carth. 114; vide Sho. 147; or assigned for error. Cro. Eliz. 325. See farther, Kyd's Com. Dig. tit. Abatement (G. 6.), and Action.

In some cases, certain things are required by act of parliament to be done by the plaintiff previous to the commencement of an action, or he cannot recover; as in actions against justices of the peace, &c. 24 G. 2.

c. 44. and many other acts.

I. In all actions there must be a person able to sue. Murray v. East India Company, 5 Barn. & A. 204. The party sued must be one suable for the thing laid; and the plaintiff is to bring his right and proper action which the law gives him for relief. 1. Shep. Abr. There are three sorts of damages or wrongs, either of which is a sufficient foundation for an action. 1. Where a man suffers damage in his fame and credit. 2. Where one has damage to his person, as by battery, imprisonment, &c. which respects his liberty. 3. Where a person suffers any damage in his property. Carth. Rep. 416.

A man attainted of treason or felony, convict of recusancy, an outlaw, excommunicated person, convict of præmunire, an alien enemy, &c. cannot bring an action, till pardon, reversal, absolution, &c. But executors or administrators, being outlawed, may sue not in their own right. A feme covert must | tend to his loss of preferment in marriage or sue with her husband; and infants are to sue by guardian, &c. Co. Lit. 128. Actions may be brought against all persons, whether attainted of treason or felony, a convict recusant, outlawed, or excommunicate, &c.; see Bac. Ab. Actions in General (B.); and a feme covert must be sued with her husband. A scire facias, or any writ to which the defendant may plead, or by which the plaintiff may recover, is an action. 6 Rep. 3: Salk. 5. See tit. Abatement, Baron, and Feme, &c.

II. There are various kinds of actions, suited to different cases, as actions of Cove-NANT, DEBT, DETINUE, TRESPASS, TROVER, &c., which see under their respective titles.

But where the law has made no provision, or, rather, where no general action could well be framed beforehand, the ways of injuring, and methods of deceiving being so various, every person is allowed to bring a special thereto. Cro. Eliz. 250. Likewise to say a action on his own case. 1 New. Abr. 44: man was in gaol for stealing any thing is not Co. Lit. 56. a: 6 Mod. 53, 54.

This action is, in practice, become the most universal of any; as most of the other actions may, under particular circumstances, be resolved into this, which it will be necessary, therefore, to consider somewhat largely.

ACTION UPON THE CASE is a general action given for redress of wrongs and injuries, done without force, and not particularly provided against by law, in order to have satisfaction for damage; and (by stat. 19 H. 7. c. 9) in actions upon the case, the like process is to be had as in actions of trespass or debt. It is called action on the case, because the whole cause or case, as much as in the declaration (except time and place), is set down in the writ; and there is no other action given in the case, save only where the plaintiff hath his choice to bring this or another action. Formerly, all civil actions were sued in the Court of Common Pleas, and there the foundation of the suit is a writ, called an original, whereupon the capias is grounded, and which original contains the nature of the plaintiff's complaint at large; and it is the same where suits are commenced in B. R. by original out of Chancery.

In all cases where a man has a temporal loss, or damage, by the wrong of another (not amounting to a trespass, for, if it do, his remedy is by action of trespass), he may have an action upon the case to be repaired in damages. But the particular damage must be specially

This action, as hath been intimated, lies in a great variety of instances, which are particularly enumerated in Comyns's Digest, and in Bacon's Abridgment, Action on the Case. (Ed. by Gwillim and Dodd.) Of these the chief are,

service, or to his disinheritance, or which occasion him any particular damage. This action, therefore, will lie for charging another with any capital or other crime. To say of another he is a traitor, action lies. 1 Bulster. 145. But if one call another a seditious, traitorous knave, no action lieth; because the words imply an intention only, and not an unlawful act. 4 Rep. 19. Nor to say of a man he deserves to be hanged; nor to call another a rogue generally, or say he will prove him to be a rogue; though it will lie to say a man is a rogue on record. 4 Rep. 15: Danv. 92. Words which charge a person with being a murderer, highwayman, or thief, in express terms, are held actionable. 1 Roll. Abr. 47. Though for saying such a one would have taken his purse on the highway, or have robbed him, an action lies not; for nothing is shown to be done in order thereto. Cro. Eliz. 250. Likewise to say a actionable, for the words do not affirm the theft. Danv. 140. But to say, I think A. B. committed such a felony; or, I dreamt he stole a horse, &c.; these words are actionable. Dal. 144: 1 Danv. 105. If a felony be done, and common fame is that such a person did it, although one may charge or arrest him on suspicion of that felony, yet a man may not affirm that he did the same, for he may be innocent all the while, and therefore affirming it hath been held actionable. Hob. 138. 203. 381.

It was heretofore held, that no action would lie for words importing a charge of murder, without an averment that the person said to be killed was dead; but the latter and better opinion is, that the party shall be intended to be dead, unless the contrary appears in the pleadings. 1 Vent. 117: Cro. Jac. 489: Sid. 53: Cro. Eliz. 560. 823. Though quære if the party is proved alive? So words accusing

of sodomy. 1 Sid. 373.

When such words are spoken of another maliciously, for which, if true, the party spoken of might be punished criminally, action lies; as, to say of a person, he hath perjured himself; or that he would prove him perjured; or that he was forsworn in the court of Chancery, Common Pleas, &c. are actionable; but not to call a person a forsworn man, unless it be said as to an oath in a court of record. 3 Inst. 163: Danv. 87. 89: 6 Term. Rep. 691: 8 East, 427: Bac. Ab. Slander. (B. 3.) To say a man hath forged an obligation, &c. and he will prove it; this is actionable. Danv. 130.

Some writers make a difference where the subsequent words are introduced by the word and; as, you are a thief, and have stolen, &c., which are additional, and shall not correct; and the word for; as you are a thief, for you 1. ACTION ON THE CASE FOR WORDS; which is brought for words spoken, which affect a person's life, reputation, office, or trade, or the words "thief," "stealing," take their be held to intend feloniously stealing, if a felony could be committed of the subjectmatter. Little doubts can now arise on these matters, which formerly occupied the courts. If it clearly appear that the words could not imply felonious stealing, the action will fail; if, for example, the defendant said, "You stole an acre of my land," the statement would be bad upon demurrer, if it appeared on the trial that the words had been applied in a sense not felonious, the plaintiff would be nonsuited; and, finally, if after verdict for the plaintiff, it appeared that the term as used was capable of a felonious sense, the verdict could be supported. See Starkie on Slander, 1. 93. (2d ed.) The words, he is a maintainer of thieves, and keeps none but thieves in his house, will not support an action, unless it be averred that he knew them to be thieves. · Cro. Eliz. 746.

To say an alchouse-keeper keeps a bawdy-house, action lies. Cro. Eliz. 582. Though to say of an innkeeper, that he harbours rogues, &c. is not actionable; for his inn is common to all guests. 2 Roll. Rep. 136. To say of another he hath (not that he had) the French pox, action will lie. Cro. Jac. 430. See Noy, 151. To call a man a whore-master, or a woman whore, no action lies; for these are merely spiritual offences. Danv. Abr. 80. But calling a woman a whore in London is actionable, as she is liable to be punished by the custom of the city. See Com. Dig. tit. Action upon the Case for Defamation. (D.10.) But this custom has never been proved, so as to maintain an action at Westminster. Doug.

380: Burr. 2032.

Words likewise are actionable which tend to the disgrace or detriment of a person in office, or of a man in the exercise of his pro-

fession or trade.

Calling an officer in the government, &c. Jacobite, hath been held actionable; not of a private person. 7 Mod. Ca. 107. To say a justice of peace doth not administer justice, is actionable. Cro. Eliz. 358. And so for other disgrace in his office. But words relating to a man's office must have a plain and direct meaning, to charge him with some crime that is punishable, and be spoken of his office, or otherwise they are not actionable. 6 Mod. 200. Thus the plaintiff, being a justice of peace, the defendant said, Mr. Stukely covereth and hideth felonies, and is not worthy to be a justice of peace; actionable, for though his office is not named, the words necessarily refer to it. 4 Rep. 16: 1 Leon. 335: 1 Vent. 50.

Slander, &c. brought by a doctor of the civil law, who was also a justice of peace, and chancellor of the bishoprick of Norwich, for these words, he is not fit to be a chancellor or justice of peace; he is a knave, a rascal, and a villain; he is not fit to practise; he ought to have his gown pulled over his ears; actiona-

ble. 2 Lutw. 1288.

The defendant spoke to an officer, (viz.)

complexion from the subject-matter, and will be held to intend feloniously stealing, if a felony could be committed of the subject-matter. Little doubts can now arise on these have foisted in words in the order of your com-

mission; actionable. Style, 436.

In offices of profit, for such words as impute the want either of understanding, ability, or integrity to execute them, this action lies. But in offices of honour, words that impute want only of ability, are not actionable; as to say of a justice of peace, he a justice of peace! he is an ass, and a beetle-headed justice; the reason is, because a man cannot help his want of ability, as he may his want of honesty; otherwise where words impute dishonesty or corruption. 2 Salk. 695. But as a magistrate may be removed for gross ignorance as well as for corruption, he ought to be allowed to bring an action for an imputation of such ignorance; and it is not clear now that such action will not lie. See Starkie on Slander, 1. 121. (2d ed.) If special damage can be proved, it is actionable; and indeed in every case, where special damage can be proved, an action will lie.

As to words tending to the disgrace or detriment of a man in his profession or trade; where the words are disgracing to a man's profession, they also must appear to be spoken precisely of it; for to say a person hath cozened one in the sale of certain goods, is not actionable; unless you show that the party lived by such selling; 1 Roll. Abr. 62; or derived emolument from it.

To say of a doctor in divinity, Doctor S. is robbing the church; and at another time, Doctor S. hath robbed the church; actionable.

Cro. Car. 301. 417.

In case, &c. in which the plaintiff declared, that he was instituted and inducted into a parsonage in, &c., and that he executed the office of a pastor in that church for the space of four years, and that the defendant said of him, You are a drunkard, a whore-master, a common swearer, and a common liar, and you have preached false doctrine, and deserve to be degraded; after a verdict for the plaintiff, it was objected that the words are not actionable, because they import no civil or temporal damage to the plaintiff; but adjudged actionable; for if true, he may be degraded, and so lose his freehold. Allen, 63.

These words spoken of a preaching parson, Parrat is an adulterer, and had two children by B. G's. wife, and I will cause him to be deprived for it; not actionable, for it is a spiritual defamation, and punishable in that court. Cro. Eliz. 502. But as such words might lead to his deprivation, it would seem they

would be held actionable.

To say of a counsellor, that he is no lawyer; that they are fools who come to him for law, and that he will get nothing by the law, action lies. 1 Danv. 113. And it is the same to say, he hath disclosed secrets in a cause.

To call a doctor of physic fool, ass, empiric,

and mountebank, or say he is no scholar, are | may bear an action; but if there be any actionable. Cro. Car. 270. So to say of a colour for what is said, they will not be acschoolmaster, put not your son to him, for he will come away as very a dunce as he went. Hetl. 71. Where one says of a midwife, that many have perished for her want of skill, an action will lie. Cro. Car. 211. If one calls a merchant bankrupt action lies. 1 Leon. And to call a trading person bankrupt or knave, is actionable. 1 Danv. 90. Also, if one say of a merchant that he is a beggarly fellow, and not able to pay his debts; or say of a person that he is a runaway, and dares not show his face, by reason whereof he is disgraced, and injured in his calling, these are actionable. Raym. 184. To say of a cornfactor, you are a rogue and swindling rascal; you delivered me 100 bushels of oats worse by six shillings a bushel than I bargained for, is actionable. Thomas v. Jackson, 3 Bing. R. 104. The action may be brought by any person in any lawful employment, but not in one which is not strictly lawful, as a jobber in the funds. 2 Boss. & Pull. 284. Words imputing insolvency to an innkeeper have been held actionable, though they were spoken when innkeepers were not within the bankrupt laws. Whittington v. Gladwin, 5 Barn. & C. 150.

Words tending to the loss of preferment in marriage, &c. are actionable. Thus, to say that a woman hath a bastard, or is with child; or that a certain person hath had the use of her body, whereby she loses her marriage, action lies, i. e. by reason of the special damage. If a man is in treaty with a woman to marry, and another tells him she is under a pre-contract; this doth not imply a scandal, but yet, if false, an action will lie if she loses her marriage by means of those words. To say of a man that he lay with a certain woman, &c. by which he loses his marriage, is actionable; for in these cases there is a temporal damage 1 Danv. 81. But such words could not be actionable unless they actually pooduced damage by the loss of the marriage.

As to words tending to a person's disinheritance, if one says of another that has land by descent, that he is a bastard; action upon the case lies, as it tends to his disinheritance. Co. Ent. 28. But to say of a son and heir apparent, that he is a bastard, action lies not until he is disinherited, or is prejudiced thereby. 1 Danv. 83. To slander the title of another person to his lands is actionable; but the words must be false, and be spoken by one that neither hath, nor pretendeth title to the land himself: and who is not of counsel to him that pretends right; qui immiscet se rei alienæ. 4 Rep. 17. If a man shall pretend title to the land another hath in possession, and hath no colour of title to it; and shall say he hath such a deed or conveyance of it, where in truth he hath none, or if he hath he knows it to be so; in this case the words & Cres. 473.

tionable. Cro. Jac. 163: Yelv. 80. 88: 1 Stark. on Slander, 288 (2d ed.): Bac. Ab. Slander. (C.) (7th ed.) And the party of whom the words are spoken must have, or be likely to have, some special damage by the speaking of them; as that he is hindered in the sale of his lands, or in his preferment in marriage, &c., without which it is said action doth not lie. 1 Cro. 99: Cro. Jac. 213. 397: Poph. 187: 2 Bulst. 90. The affirming that another hath title to the land, where actionable. See 4 Rep. 175.

If A. says, that B. said, that C. did a certain scandalous thing, C. shall have action against A. with averment that B. never said so, whereby A. is the author of the scandal, supposing B. did not in fact say so. Cro. Jac.

406: see 1 Roll. Abr. 64.

It is to be observed in general, that though scandalous words are spoken before a man's face, or behind his back, by way of affirmation or report, when drunk or sober; and although they are spoken in any other than the English language, if they are understood by the hearers, they are actionable; also, words may be actionable in one county which are not so in another, by the different construction, &c. 4 Rep. 15: Hob. 165. 236. But if the defendant can make proof of the words, he may, in an action for damages, plead a special justification. Co. Ent. 26. The words to maintain this action must be direct and certain, that there may be no intendment against them; but as some words separate, without others joined with them, are not actionable, so some words that are actionable may be qualified by the precedent or subsequent words, and all the words are to be taken together. 4 Rep. 17: 1 Cro. 127: Moor Ca. 174. 331: vide 4 Rep. 20: Hob. 126: Bac. Ab. Slander. (R.) Where words spoken are somewhat uncertain, they may, by apt averments, be made certain and actionable. 2 Bulst. 227. So by the pleadings of the parties, and verdict of a jury for the plaintiff. Cro. Jac. 107. The thing charged by the words must be that which is possible to have been done; for if it be of a thing altogether and apparently impossible, no action lies. 4 Rep. 16. No action will lie for words spoken in pursuit of a prosecution in an ordinary course of justice; as where a lawyer, in pleading his client's cause, utters words according to his instructions; as saying of one he is a bastard, when this is to defend the party's own title where he himself doth claim to be heir of the land that is in question, these words will not bear an action. Cro. Jac. 90: 4 Where the words are pertinent to the issue in the cause, no action lies against the advocate, although the words may be considered by the court too strong. Hodgson v. any, it is a counterfeit and forged deed, and Scarlett: 1 Barn. & A. 232: and see 4 Barn.

and when and where spoken, and before whom, and the damage thereby to the plaintiff; that his credit was, and how impaired, with the aggravating circumstances; but it matters not whether the plaintiff doth in his declaration set forth all the circumstantial words as they are spoken; so as to show the very words that are actionable, which must be set out accurately, and without any variation in the sense; for if the sense vary, it is fatal, and it is not sufficient to set out the words according to their substance and effect. 11 Mod. 78. 84: 3 Barn. & A. 503: Bac. Ab. Stander. (S.) The rule as to construing words in mitiori sensu is now exploded, and they are to be construed according to their ordinary and popular acceptation. Cowp. 275: 5 East, 463: 9 East, 96. In general, malice, in fact, need not be proved, since, if the words are slanderous, a malicious intention is inferred: but if the words are spoken in the honest discharge of social duties (whether legal or moral), as in giving the character of a servant, or in giving a bona fide caution to an employer, as to supposed malpractices committed by his steward, &c. &c., the action will not lie unless express malice is proved against the defendant. See Starkie, c. 13 (2d ed.): 4 Barn. & C. 274: 3 Camp. 282. 233: 1 Camp. 268: 2 Price.

There is no branch of the law in which the decided cases are so contradictory to each other, and the decisions so frequently irreconcileable to their avowed principles, as this action on the case for words; many cases in the old authors are certainly not law, and the fairest observation on the subject is, that "what words are actionable or not, will be more satisfactorily determined by an accurate application of the general principles on which such actions depend, than by a reference to adjudged cases, especially those in old authors." See the case of Onslow v. Horne, 3 Wils. 177. where the principles are well ex-

plained. 2. Action on the case likewise lies upon AN ASSUMPSIT OR UNDERSTANDING; and such action is founded on a contract either express or implied by law, and the verdict gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 Co. 92: Moor, 667. See tit. Assump-

3. It has been premised, that a special action on the case lies in all instances wherein no general action could be framed; it will be necessary, therefore, to point out some of those particular cases to which it is most peculiarly applicable.

It was formerly held, that if my fire, by misfortune, burnt the goods of another man, for this wrong he should have action on the case against me; and if my servant put a

In this action the nature of the words must and this burnt my house, and the house of be set forth, with the manner of speaking them, my neighbour, action of the case lay for him against me. 1 Danv. 10. But this action is now destroyed by stat. 6 Ann. c. 31. See tit. Fire, Waste.

Action on the case likewise lies against carriers and others upon the custom of England. See tit. Carrier.

A common innkeeper is chargeable for goods stolen in his house. See tit. Inns and

Innkeeper.

This action lies for deceit in contracts, bargains, and sales. If a vintner sells wine, knowing it to be corrupt, as good and not corrupt, though without warranty, action lies. Danv. 173. So if a man sells a horse, and warrants him to be sound of his limbs, if he be not, action on the case lies. A person warrants a horse, wind and limb, that hath some secret disease known to the seller, but not to the buyer, this action may be brought; though if one sell a horse, and warrant him sound, and he hath at the time visible infirmities, which the buyer may see, action on the case will not lie. Yelv. 114: Cro. Jac. 675: 2 Bing. 183: Bac. Ab. Action on the Case. (E.) (7th ed.) There must be an express warranty; for a sound price does not imply a warranty. 2 East, 322. Where one sells me any wares or commodities, and is to deliver that which is good, but delivers what is naught; or sells any thing by false or deceitful weights and measures, with or without warranty, action on the case lies; and so where a man doth sell corrupt victuals, as bread, beer, or other things for food, and knows it to be unwholesome. Dyer, 75: 4 Rep. 18: Cro. Jac. 270: 2 East. 314: 4 Barn. & Cres. 108: 6 Taunt. 108: Bac. Ab. Action on the Case. (E.) if the buyer or his servant shall see and taste the victuals, &c. and like and accept the same, no action can be maintained. 7 H. 4. 16. Nor will case lie upon a warranty of what is out of a man's power, or of a future thing; as that a horse shall carry a man thirty miles a day, or the like. Finch, 188. If a man sells certain packs of wool, and warrants that they are good and merchantable, if they are damaged, action on the case lies against him. 1 Danv. 187: Bac. Ab. ubi supra. The bare affirmation by the seller of a particular sort of diamond without warranting it to be such, will not maintain an action. And when a man warrants a horse sound, and at the same time misrepresents the place from whence the horse came, if the warranty is complied with, the sale will not be vitiated by the misrepresentation. 5 Dow. & Ry. 169: Cro. Jac. 4. 196. But where a man hath the possession of a personal thing, the affirming it to be his own is a warranty that it is so; though it is otherwise in case of lands, where the buyer at his peril is to see that he hath title. 1 Salk. 210. If a person sells to another cattle or goods that are not his own, candle or other fire in any place in my house, action on the case lies; so if he warrants cloth

to be of such a length, that is deficient of it. | tenance to him, being committed for debt.

For neglect or mulfeazance; as if a tailor, &c. undertakes to make a suit of clothes, and spoils them, action lies; and if a carpenter promises to repair my house before a certain day, and doth not do it, by which my house falls; or if he undertakes to build a house for me, and doth it ill, action on the case lies. 1 Danv. 32. If a surgeon neglects his patient, or applies unwholesome medicines, whereby the patient is injured, this action lieth. And if a counsel retained to appear on such a day in court, doth not come, by which the cause miscarries, action lies against him: so if, after retainer, he become of counsel to the adversary against the plaintiff. 11 H. 6. 18.

Where a smith promises to shoe my horse well, if he pricks him, action on the case lies; and so when he refuses to shoe him, on which I travel without, and my horse is damaged. For stopping up a water-course or way; breaking down a party-wall; stopping of ancient lights, and for any private nuisance to a man's water, light, or air, whereby a person is damnified, this action lieth. Cro. Eliz. 427: Yelv.

159.

This action lies also for killing another person's dogs, by means of traps placed near to the highway, and baited with flesh, for the purpose of leading the animal to its destruction. Townsend v. Wathen, 9 E. R. 277. And for firing at wild fowl in a decoy. Carrington v. Taylor, 11 E. R. 571. But not at rooks in a rookery, for they are noxious birds. 2 Barn. & C. 934.

Where any one personates another, for cheating at gaming, where a surety is not saved harmless, &c. 2 Inst. 193.

But not where the money was fairly won, and the action was not upon the statute. 1 Maule & Sel. Rep. 500. See tit. Gaming.

If I lend another my horse to ride so far, and he rides farther, or forward and backward, or doth not give him meat, this action lieth. Cro. Eliz. 14. And where one lends me a horse for a time, if he take him from me within that time, or disturb me before I have done what I hired him for; action on the case lies: and though I ride the horse out of the way in my journey, he may not take him 8 Rep. 146. See tit. Bailment. from me. This action lies for keeping a dog accustomed to bite sheep, if the owner knew the vicious quality of the dog. But not for a man's dog running at my sheep, though he kill them, if it be without his consent, and he did not know that the dog was accustomed to bite sheep. Vide 1 Danv. Ab. 19: Hetl. 171: 1 Stark. Ca. 286: 2 Ibid. 212.

Action on the case will lie against a gaoler for putting irons on his prisoner; or putting

See tit. Deceit. If the false representation is N. B. 83. The master may in many cases knowingly made, and the plaintiff is injured, have this action against his servant, steward, it is not necessary to show that the defendant or bailiff, for any special abuse done to him, intended to injure him. 7 Bing. 105.

Also it lies for taking or enticing away my servant, and retaining him; or threatening a servant, whereby I lose his service. Lane, 68: Cro. Eliz. 777: 1 Shep. Ab. 52. 59. The master of an apprentice seduced to work for another, may either sue in an action on the case for the seduction, or he may bring assumpsit for the work and labour done by his apprentice against the person who employed him. See 1 Taunt. 112: 3 Maule & S. 191: 5 East, 39 a: 4 Taunt. 876. A servant is trusted with goods and merchandize consigned to him by a merchant, to pay the customs for them, and dispose of them to profit; if he deceive the merchant, and have allowance for it on his account; and, to defraud the king, lands some of the goods without paying the customs, by which they are forfeited, action on the case lieth. Lane, 65.: Cro. Jac. 266: see Bac. Ab. Master and Servant (M.): and see Master and Servant.

If I trust one to buy a lease or other thing for me, and he buyeth it for himself, or doth not buy it, this action lies against him; but if he doth his endeavour it sufficeth. Bro. 117. If a man undertake to perform any work (e. g. to lay out money on security for another), and he from negligence do it ill, whereby there is damage, he is liable to an action on the case. 5 Term Rep. 149: 4 Barn. & C. 345: 3 Barn. & C. 738: and see Bailment. Where a man is disturbed in the use of a seat in the church, which he hath had time out of mind; 1 Term. Rep. 428: 5 Term Rep. 298: 5 Barn. & A. 356: 5 Barn. & C. 1; a steward is hindered in the keeping of his courts; a keeper of a forest disturbed in taking the profits of his office; a bailiff in distraining for an amerciament, or the like; action on the case will lie. Bendl. 89: Lib. Intr. 5: Moor, 987. But an action on the case does not lie for disturbing a solicitor retained in certain business if no tortious act be done. 15 E. R. 501. An action on the case lies for him in reversion, against a stranger, for damage to his inheritance, though there be a term in esse. 3 Lev. 360: 14 E. R. 489. But the damage must be such as affects the inheritance. 1 Maule & S. 233. If the plaintiff's house in Cheapside adjoins the defendant's, and the defendant pull his house down, and in consequence thereof the plaintiff's house in part falls, the plaintiff cannot have an action against him without alleging and proving a right to have his house to lean against the defendant's. But if the defendant pulls his house down without proper notice to the plaintiff, so that the plaintiff may protect his house, it seems an Peyton v. Mayor of London, 9 action lies. Barn. & C. 725.

The owner of a house may have an action him in the stocks; or not giving sufficient sus- on the cause against his tenant for opening a

though the house itself is not weakened or injured. 10 Barn. & C. 145: and see 1 Moo. Malk, 350. 405: Bac. Ab. Action on the Case. (F.) (Ed. by Gwillim and Dodd.) Also if a lessor comes to the house he has demised, to see if it be out of repair, or any waste be done, and meets with any disturbance therein; or if one disturbs a parson in taking his tithes, this action lies. Cro. Jac. 478: 2 Inst. 650. And for setting up a new mill on a river to the prejudice of another, who hath an ancient mill, an action will lie. Lib. Intr. 9. So for diverting or obstructing the water of a river or watercourse which a party has appropriated to a beneficial use. 6 East, 208: 1 Camp. 463: 2 Barn. & C. 910. So for setting up a new ferry to the injury of a party's ancient ferry. 4 Term. Rep. 666: 6 Barn. & C. 703. So for building a house near a party's ancient windows, whereby they are darkened. Bac. Ab. Action on the Case (F.): 3 Camp. 514: 3 Barn. & C. 332: 2 Barn. & C. 686.

Action on the case lies likewise for and against commoners, &c. for injuries done in commons. Sty. 164: Sid. 106: Cro. Jac. 165: Inst. 474. See tit. Common.

An action on the case for permissive waste does not lie against a tenant by léase who has not covenanted to repair. 4 Taunt. 764. See

tit. Waste. Action on the case may likewise be brought for malicious prosecutions: where a suit is without ground, and one is arrested, action on the case lies for unjust vexation. If some of the charges in the indictment are maliciously preferred, though others are not so, an action lies: 4 Taunt. 616; and it is no answer that the defendant proceeded by advice of counsel, if the advice were ill founded, or the facts were improperly stated to counsel. 5 Taunt. 277: 2 Barn. & C. 693. In general the plaintiff must give some evidence of want of probable cause for the prosecution, but this being a negative, very slight proof is sufficient to call on the defendant to show probable cause. 1 Barn. & Adol. 133. The action lies for falsely and maliciously arresting a person for more than is due (see 3 Barn. & C. 139.) whereby the defendant is imprisoned for want of bail. A stet processus is not such a determination of the action as is sufficient to support the action. 1 Moo. & Malk, 495. There must be an actual arrest of the body in order to maintain the action. If the party gives bail in consequence of a message from the officer having the writ, he cannot sue for a malicious arrest. 6 Barn. & C. 528: 2 New R. 211: Bac. Ab. Action on the Case. (H.) (7th ed.) If the party making the arrest, acted bona fide under the advice of competent counsel, and really believed he had a good cause of action, he is not liable to this action. 3 Barn. & C. 693: and see 1 Stark. Ca. 502. This action also lies for maliciously suing out a commission of bankrupt or lunacy. 1 Barn. & castle formerly belonging to the family of

new door, if the reversion is injured by it, Adol. 133: 1 Gow. Ca. 50. If a creditor, having his debtor in execution, refuse to accept from him the debt or costs when tendered, and to sign an authority for his discharge, he is liable to an action. 4 Barn. & C. 25. An action likewise lies against sheriffs, for default in executing writs, permitting escapes, &c.

Actions on the case likewise lie for conspiracy, escape, rescous, nuisances, &c. which see under the several titles. And for a general abridgement of the law on this subject, see Com. Dig. tit. Action: Bac. Ab. Action on the Case. (Ed. by Gwillim and Dodd.)

ACTION PREJUDICIAL (otherwise called preparatory or principal) is an action which arises from some doubt in the principal; as in case a man sues his younger brother for lands descended from his father, and it is objected against him that he is a bastard; now this point of bastardy is to be tried before the cause can any further proceed; and therefore it is termed prejudicialis, quia prias judicanda. Bract. lib. 3. c. 4. numb. 6: Cowel.

ACTION OF A WRIT, is a phrase of speech used, when one pleads some matter, by which he shows the plaintiff had no cause to have the writ he brought, yet it may be that he may have another writ or action for the same matter. Such a plea is called a plea to the action of the writ; whereas, if by the plea it should appear that the plaintiff hath no cause to have an action for the thing demanded, then it is called a plea to the action.

Cowel: Terms de Ley.

ACTION OF ABSTRACTED MUL-

TURES, is an action for multures against those who are thirled to a mill, and come not. Scotch Dict.—An action to compel persons to

grind at a mill according to their tenure.

ACTION FOR POYNDING OF THE GROUND, is so called because it is founded upon some infeoftment for an annuity (whether annual rent, life-rent, or feu duty, &c.) that affects the ground; and the ground being thus debitor, it is called debitum fundi, for which both moveables found upon the ground may be poynded (distrained), and these failing, the property affected by this servitude may be apprized or adjudged, even in prejudice of intervening singular successors. Scotch

ACTION IN THE SCOTCH LAW, is a prosecution by any party of their right, in order to a judicial determination thereof. Scotch Dict.

ACTIONARE, i. e. In jus vocare, or to prosecute one in a suit at law. Thorn's Chron.

ACTO, Acton, Aketon, Fr. Hauqueton.] A coat of mail. Du Fresne.

ACTON BURNEL. The statute of 11 Ed. 1. ann. 1283, ordaining the statute merchant: it was so termed from a place named Acton-Burnel, where it was made; being a shire. Cowel: Terms de Ley. See tit. Stat-

ute Merchant.

ACTOR. The proctor or advocate in civil courts or causes. Actor dominicus, was often used for the lord's bailiff or attorney. Actor ecclesia, was the ancient forensick term for the advocate or pleading patron of a church. Actor villa, was the steward or head bailiff of a town or village. Cowel.

ACTS DONE, are distinguished into acts of God, the acts of the law, and acts of men. The act of God shall prejudice no man: as, where the law prescribeth means to perfect or settle any right or estate, if by the act of God the means, in some circumstances, become impossible, no party shall receive any damage thereby. Co. Lit. 123: 1 Rep. 97. As in an action on the case a bargeman may justify, by pleading that there were several passengers in his barge, and a sudden tempest arising, all the goods in the barge were thrown overboard to save the lives of the passengers. See tit. Carrier.

The acts of the law are esteemed beyond the acts of man; and when to the perfection of a thing divers acts are required, the law hath most regard to the original act. 8 Rep. 78. The law will construe things to be lawfully done, when it standeth indifferent whether they should be lawful or not: but whatsoever is contrary to law is accounted not done. Co. Lit. 42: 3 Rep. 74. Our law doth favour substantial more than circumstantial acts; and regards deeds and acts more than words; and the law doth not require unnecessary things. Plowd. 10.

As to acts of men; that which a man doth by another, shall be said to be done by himself; but personal things cannot be done by another. Co. Lit. 158. A man cannot do an act to himself, unless it be where he hath a double capacity; no person shall be suffered to do any thing against his own act; and every man's acts shall be construed most strongly against himself. Plowd. 140. But if many join in an act, and some may not lawfully do it, it shall be adjudged the act of him who might lawfully do the same. Dyer, 192. Acts that men are forced by necessity and compulsion to do, are not regarded: and an act done between persons shall not injure a stranger not party or privy thereto. Plowd. 19: 6 Rep. 16.

Where mutual acts are to be done, who is to do the first act. See tit. Condition.

ACTS OF PARLIAMENT. See tit. Statute.

ACTS OF SEDERUNT, are ordinances of the Court of Session, under authority of the act 1540, c. 93. by which authority is given to make such statutes as may be necessary for the ordering of processes and the expediting of justice. The court is also authorised, by other acts of parliament, to make Vol. I.-6

Burnel, and afterwards of Lovel, in Shrop-I enactments relative to certain matters therein pointed out. Scotch Dict.

ACTS OF THE GENERAL ASSEM-BLY OF THE CHURCH OF SCOTLAND. The acts of the general assembly issued under their legislative powers, are binding on all the members and judicatories of the church. The form of their procedure in these enactments is regulated by an act of the church (1697) termed the barrier act. Scotch Dict.

ACTUARY, actuarius.] A clerk that registers the acts and constitutions of the Con-

ADCREDULITARE. To purge one's-self of an offence by oath. Leges Ina, c. 36.

ADDITION. The title or estate, and place of abode, given to a man besides his name.

See tit. Abatement, I. 3. c.

ADELING, Ethling or Edling, from the Saxon ædelan, noble or excellent.] A title of honour among the Anglo-Saxons; properly belonging to the king's children; it being usual for the Saxons to join the word ling to the paternal name, signifying a son, or the younger. King Edward the Confessor having no issue, and intending to make Edgar, his nephew, the heir of the kingdom, gave him the stile and title of Adeling. It was also used among the Saxons for the nobles in general. Spelm. Gloss. Lamb.

ADELINGIA. Athelney, in Somerset-

shire.

ADEMPTION. A taking away of a lega-

cy. See Legacy.

AD INQUIRENDUM. A judicial writ commanding inquiry to be made of anything relating to a cause depending in the king's courts. It is granted upon many occasions for the better execution of justice Reg. Judic.

See tit. Writ of Inquiry.

ADJOURNMENT, adjournamentum, Fr. adjournement.] A putting off until another time or place. An adjournment in cyrc (by stat. 2 E. 3. c. 11. and 25 E. 3. c. 18.), is an appointment of a day, when the justices in eyre will sit again. A court, the parliament, and writs, &c. may be adjourned; and the substance of the adjournment of courts is to give licence to all parties that have anything to do in court to forbear their attendance till such a time. Every last day of the term, and every eve of a day in term, which is not dies juridicus, or a law day, the court is adjourned. 2 Inst. 26. The terms may be adjourned to some other place, and there the King's Bench and other courts at Westminster be held: and if the king puts out a proclamation for the adjournment of the term, this is a sufficient warrant to the keeper of the Great Seal to make out writs accordingly; and proclamation is to be made, appointing all persons to keep their day, at the time and place to which, &c. 1 And. 279: 1 Lev. 176. Though by Magna Charta the court of Common Pleas is to be held at Westminster, yet necessity will

of a plague, a civil war, &c. In the first year of Charles I. a writ of adjournment was delivered to all the justices, to adjourn two returns of Trinity term: and in the same year Michaelmas term was adjourned until crastino animarum to Reading; and the king by proclamation signified his pleasure, that his court should be there held. Cro. Car. 13. 27. In the 17th of Charles II. the court of B. R. was adjourned to Oxford, because of the plague; and from thence to Windsor; and afterwards to Westminster again. 1 Lev.

On a foreign plea pleaded in assize, &c. the writ shall be adjourned into the Common Pleas to be tried; and, after adjournment, the tenant may plead a new plea pursuant to the first; but if he pleads in abatement a plea triable by the assize, on which it is adjourned, he cannot plead in bar afterwards, &c. 1 Danv. Ab. 289. The justices of assize have power to adjourn the parties to Westminster, or to any other place; and by the express words of Magna Charta (cap. 12.) they may adjourn, &c. into C. B. before the judges there. Dyer, 132.

If the judges of the court of King's Bench, &c. are divided in opinion, two against two, upon a demurrer, or special verdict (not on a motion), the cause must be adjourned into the Exchequer Chamber, to be determined by all the judges of England. 4 Mod. 156: 5 Mod.

ADIRATUS, strayed, lost. See Bract. l. 3. tract. 2. c. 32.

ADJUDICATION. The English use this term to express the act of giving judgment: but in Scotch law it is used to express the diligence by which land is attached in security and payment of debt, or by which a feudal title is made up in a person holding an obligation to convey without procuratory or precept. There is thus, 1st, The adjudication for debt; 2d, The adjudication in security; and 3d, The adjudication in implement. Scotch Dict.

ADJUDICATION SPECIAL, is when the lords of session, proportionably to the sums due, adjudge to the creditor some part of the creditor's lands, with a fifth part more, beside composition due to the superior, and the expences for obtaining infcoftment: but if the debitor do not consent to such an adjudication, in the terms of the act of Parl. 1672, all his lands and other heritable subjects are adjudged in the same manner as they were formerly apprized. Scotch Dict.

ADJUDICATION AFTER THE OLD FORM, is when the hareditas jacens (the heir having renounced) is adjudged to the creditor for payment of his money. Scotch Dict.

ADJUDICATION UPON OBLIGE-MENT, is when a man having obliged him-

sometimes supersede the law, as in the case | him, the lords adjudge upon his refusal to perform. Scotch Dict.

> AD JURA REGIS. A writ brought by the king's clerk presented to a living, against those that endeavour to eject him, to the prejudice of the king's title. Reg. of Writs, 61.

> ADIATION. A term used in the laws of Holland for the application of property by an executor. Knapp. Rep. Privy Council. p. 107.

AD LAPIDEM. Stoneham, in Hamp-

AD LARGUM, at large: it is used in the following and other expressions: title at large, assize at large, verdict at large; to vouch at large, &c.

ADLEGIARE, or aleier in Fr.] To purge himself of a crime by oath. See the laws of king Alfred, in Brompt. Chron. cap. 4. 13.

ADMEASUREMENT, Writ of admensuratio.] Is a writ brought for remedy against such persons as usurp more than their share. It lies in two cases; one is termed admeasurement of dower (admensuratio dotis), where a man's widow after his decease holdeth from the heir more land, &c. as dower, than of right belongs to her: and the other is admeasurement of pasture (admensuratio pasture), which lies between those that have common of pasture, where any one or more of them surcharge the common. Reg. Orig. 156. 171. In the first case the heir shall have this writ against the widow, whereby she shall be admeasured, and the heir restored to the overplus: and in the last case it may be brought against all the other commoners, and him that surcharged; for all the commoners shall be admeasured. Terms de Ley, 23. See tit. Common and Dower.

ADMINICLE, adminiculum.] Aid, help. or support. See stat. 1 E. 4. c. 1.

In the Scotch law adminicle is a term used in the action of proving the tenor of a lost deed; and applicable to any deed or even scroll tending to establish the existence or terms of the deed in question. Scotch Dict.
ADMINISTRATION OF JUSTICE, in

criminal cases, is improved and provided for in England by stats. 7 G. 4. c. 64. and 7 and 8 G. 4. c. 28; and in Ireland by 9 G. 4. c. 54. The effects of those acts may be thus shortly stated, referring to the various apposite titles

for minuter particulars.

The cases in which parties may or may not be admitted to bail, when taken before justices of peace, are defined :- The justices are to take the examinations in writing, and certify the bailment, and bind over witnesses to appear at the trial.-Like duties and powers are given to coroners on inquests for murder. The plea of not guilty shall put the prisoner on trial without more; and the court may order that plea to be entered if the offender refuse to plead .- The king shall only challenge for cause.—Peremptory challenges of the offender restrained.—Attainder of a former self to infeoft another in lands disponed by crime not pleadable in bar.-Jury shall not

inquire of the flight of a prisoner, nor of his temp. E. 1. and the first Admiral of England, lands.-The benefit of clergy abolished in all cases of felony .-- No felonies shall be capital but such as were excluded from clergy, or as shall be made punishable with death.-The court may order hard labour, or solitary confinement, as part of imprisonment.—Trial of accessories regulated (see tit. Accessories) .-Offences committed in the boundaries of counties may be tried in either; or in any county through which any coach or vessel may pass in any journey during which any offence may be committed.—Property of partners may be laid in any one of them.—Property in public buildings need not be laid in any one.-Indictments shall not be delayed by dilatory pleas of misnomer, &c., but shall be amended. After verdict judgment shall not be staid for immaterial omission in indictments, &c .-Effect of free or conditional pardons.—Recognizances to prosecute shall not be estreated

without judge's order.

By stat. 1. W. 4. c. 70. for the more effectual administration of justice in England and Wales, regulations are made for the appointment of additional judges of King's Bench, Common Pleas, and Exchequer, and for the performance of their duties, as also for the future commencement and continuance of the terms (as to which see also 1 W. 4. st. 2. c. 3.) and sittings from return of writ of errorpermitting attorneys of King's Bench and Common Pleas to practise in the Court of Exchequer-for extending the jurisdiction of the courts at Westminster to the courts Palatine of Chester and to Wales, putting an end to the peculiar jurisdiction in those parts of England—appointing the assizes to be held in Chester and Wales as in England-extending to those parts rules as to rendering defendants in discharge of their bail-regulating the passing of fines of lands there, and the accounts of sheriffs-regulating the time of holding Quarter Sessions—the proceedings in ejectment in cases of right of entry, accruing after Hilary and Trinity Terms. This act is very extensive and miscellaneous, and not remarkably well arranged or accurately worded.

ADMINISTRATOR, Lat.] He that hath the goods of a man dying intestate committed to his charge by the Ordinary, for which he is accountable when thereunto required. For matters relating to this title, and to Administration in general, see tit. Executor.

ADMINISTRATRIX, Lat.] She that hath goods and chattels of an intestate committed

to her charge, as an administrator.

ADMIRAL. Admiralius, admirallus, admiralis, capitaneus or custos maris, from the French ameral, or from the Saxon, aen mereal, over all the sea; and in ancient time the office of the admiralty was called custodia maritima Anglia. Co. Lit. 260. Many other fanciful derivations are recapitulated in Spelman's Glossary, and see Com. Dig. tit. Admiralty. The term appears to have been first used

by name, was Richard Fitz Alan, Earl of Arundel, 10 Ric. 2. A high officer or magistrate, having the government of the king's navy; and (in his court of Admiralty) the determining of all causes belonging to the sea, and offences committed thereon. The office is now usually executed by commissioners, who, by stat. 2 W. & M. st. 2. c. 2. are declared to have the same authorities, jurisdictions, and powers as the Lord High Admiral, who is usually understood by this term in law, not adverting to the naval distinctions. And by stat. 7 and 8 G. 4. c. 65. (the heirpresumptive to the crown being then Lord High Admiral) like powers were given to him as by any statutes are given to the commissioners.

Under this head therefore shall be included all that relates as well to such Admiral as to

the Court of Admiralty.

The warden of the Cinque Ports has the jurisdiction of Admiral within those ports exempt from the admiralty of England. Inst. 223: 2 Inst 556: 2 Jon. 67: 1 Jenk. 85. It appears that anciently the Admirals of Eng. land had jurisdiction of all causes of merchants and mariners, happening not only upon the main sea, but in all foreign parts within the king's dominions, and without them, and were to judge them in a summary way, according to the laws of Oleron and other sea laws. Inst. 75. In the time of king Ed. 1. and king John, all causes of merchants and mariners, and things arising upon the main sea, were tried before the lord Admiral: but the first title of Admiral of England, expressly conferred upon a subject, was given by patent of king Rich. 2. to the earl of Arundel and Surry. In the reign of Ed. 3. the court of admirally was established, and Ric. 2. limited its juris-

By the stat. 13 R. 1. st. 1. c. 5. it is enacted. that upon complaint of encroachments made by the admirals and their deputies, the admirals and their deputies shall meddle with nothing done within the realm, but only with things done upon the sea. For the construction of this statute, see 2 Bulstr. 323: 3 Bulstr. 205: 13 Co. 52.

By stat. 15 R. 2. c. 3. it is declared, that all contracts, pleas, and quarrels, and other things done within the bodies of counties by land or water, and of wreck, the admiral shall have no conusance, but they shall be tried, &c. by the law of the land; but of the death of a man, and of mayhem done in great ships, being in the main stream of great rivers beneath the points nearest the sea, and in no other place of the same river, the admiral shall have comusance; and also to arrest ships in the great flotes, for the great voyages of the king and the realm, saving to the king his forfeitures; and shall have jurisdiction in such flotes during such voyages, only saving to lords, &c. their liberties.

It has been held in the construction of these

boat which had struck on a sand-bank distant about 100 yards from the shore, the offender is properly tried at an Admiralty Sessions, for the offence is committed where the death happens, and not at the place from whence the cause of death proceeds. Leach, 432.

By the stat. 2 H. 4. c. 11. reciting 13 R. 2. c. 5. it is enacted, that he that finds himself aggrieved against the form of the statute, shall have his action by writ grounded upon the case against him that so pursues in the admiralty, and recover double damages against him, and he shall incur the pain of 10l. if he be at-

tainted.

By stat. 27 H. 8. c. 4. all offences of piracy, robbery, and murder done on the sea, or within the admiral's jurisdiction, shall be tried in such places of the realm as shall be limited in the king's commission, directed to the lord admiral, and his lieutenant and deputies, and other persons, to determine such offences after the common course of law, as if the same offences had been done on land.

By the stat. 28 H. 8. c. 15. " all treasons, felonies, robberies, murders, &c. upon the sea, or within the admiralty jurisdiction, shall also be tried in such shires and places in the realm as shall be limited by the king's commission, as if done on land, and the consequences of the offences are the same." See 3 Inst. 111, 112. But in cases which would be manslaughter at land, the jury is always directed to acquit. Foster, 288. See Homicide, under stat. 28 H. 8. c. 15.

ADMIRALTY. There are in fact two Courts of Admiralty, that which is properly called the Instance Court, which the statutes of R. 2. were made to restrain; and the Prize Court. Both courts have indeed the same judge, but in the former he sits by virtue of a commission under the great seal, which enumerates the objects of his jurisdiction, but specifies nothing relative to prize: in the latter court he sits by virtue of a commission which issues in every war, under the great seal, to the Lord High Admiral (or commissioners for executing that office), requiring the Court of Admiralty, and the lieutenant and judge of the same court, "to proceed upon all and all manner of captures, seizures, prizes, and reprisals of ships and goods, which are or shall be taken, and to hear and determine according to the course of the Admiralty and the law of nations;" and upon this a warrant issues to the judge. The manner of proceeding, and the system of litigation and jurisprudence, are different in the two courts. The jurisdiction of the Prize Court is exclusive; for it has been determined solemnly, that though for taking a ship on the high seas an action will lie at common law, yet when it is taken as prize, though wrongfully taken and without a war, for the taking no action can be maintained. Nor is the jurisdiction con-

statutes of R. 2. that if a loaded musket be i fined to captures at sea: captures in port or fired at the distance of 200 yards from the on land, where the surrender has been to a sea, and a man is by such shot killed in a naval force, or a mixed force of the army and navy, are equally and exclusively triable by the Prize Courts. See Douglas's Rep. 594.

> Although the Prize Court proceeds under a commission issuing at the commencement of a war, its jurisdiction is not peremptorily determined by peace. Where a vessel having been captured by an enemy's privateer in time of war, was recaptured after the period prescribed by a treaty of peace for the cessation of hostilities, and the commander of the privateer claimed the vessel to be restored to him by suit in the Prize Court, the jurisdiction of the court was affirmed, and a prohibition refused. Maddock's Rep. 15: Dodson's Rep. 2. 78: Case of the Harmony: see Bac. Ab. Court of Admiralty. Addenda E. vol. 2.855.

> It was held, Yelv. 134. that accessories to robbery, &c. could not be tried; but this is remedied by 11 and 12 W. 3. c. 7.; by which their aiders and comforters, and the receivers of their goods are made accessories, and to be tried as pirates by 28 H. 8. c. 15; also the said statute 11 and 12 W. 3. directs how pirates may be tried beyond sea, according to the civil law, by commission under the great seal of England. See tit. Piracy.

> Commissioners under 28 H. 8. c. 15. have jurisdiction of offences committed seven or eight miles from the river's mouth, or open sea, and sixteen miles below any bridge, and where men of war might ride at anchor; although such spot be within the body of a county, and where the common law tribunals have also a concurrent jurisdiction. G.C.B. 243. As to the boundary between the county and the high seas, see *Bac. Ab.* tit. *Piracy*. (Ed. by Gwillin and Dodd.)

> The stat. 10 A. c. 10. directs how the trial shall be had of officers and soldiers, that, either upon land out of Great Britain, or at sea, hold correspondence with a rebel enemy.

See tit. Piracy, Treason.

All ports and havens are infra corpus comitatus, and the admiral hath no jurisdiction of any thing done in them; but they are within the 28 H. 8. c. 15., and crimes committed in them may be tried by the commissioners under that act. See Rex v. Bruce, Russ. & Ry. c. 243: Bac. Ab. Piracy. (7th ed.) Between high and low water-mark, the common law and admiral have jurisdiction by turns; one upon the water, and the other upon the land. 3 Inst. 113. The admiralty have no jurisdiction where a vessel is injured in the Thames within the body of a county. 3 Term Rep. 315.

By the statutes for disciplining the navy, every commander, officer, and soldier of ships of war, shall observe the commands of the admiral, &c. on pain of death or other pun-

ishment. See tit. Navy.

Under these statutes the lord admiral hath

power to grant commissions to inferior vice-| agreement at land be under seal, so as to be admirals, &c. to call courts martial, for the trial of offences against the articles of war; and these courts determine by plurality of

voices, &c. See tit. Navy.

The admiralty is said not to be a court of record, by reason it proceeds by the civil law. 4 Inst. 135. But the admiralty has jurisdiction where the common law can give no remedy: and all maritime causes, or causes arising wholly upon the sea, it hath cognizance of. Vide as to the jurisdiction of the admiralty, 1 Com. Dig. tit. Admiralty: Bac. Ab. tit. Court of Admiralty. (7th ed.) admiralty hath jurisdiction in cases of freight, mariners' wages, breach of charter-parties, though made within the realm; if the penalty be not demanded; and likewise in case of building, mending, saving, and victualling ships, &c. so as the suit be against the ship, and not against the parties only. 2 Cro. 216: see Bac. Ab. Merchant (E.) of Mariners. (7th ed.) Mariners' wages are contracted on the credit of the ship, and they may all join in suits in the admiralty; whereas at common law they must all sever: the master of a ship contracts on the credit of the owners, and not of the ship; and therefore he cannot prosecute in the admiralty for his wages. 1 Salk. 33. It is allowed by the common lawyers and civilians, that the lord admiral hath cognizance of seamen's wages, and contracts, and debts for making ships; also of things done in navigable rivers, concerning damage done to persons, ships, goods, annoyances of free passage, &c.; and of contracts, and other things done beyond sea, relating to navigation and trade by sea. Wood's Inst. 218. But if a contract be made beyond sea, for doing of an act or payment of money within this kingdom; or the contract is upon the sea, and not for a marine cause, it shall be tried by a jury; for where part belongs to the common law, and part to the admiral, the common law shall be preferred. And contracts made beyond sea may be tried in B. R., and a fact be laid to be done in any place in England, and so tried here. 2 Bulstr. 322.

Where a contract is made in England, and there is a conversion beyond sea, the party may sue in the admiralty, or at common law, 4 Leon. 257. An obligation made at sea, it has been held, cannot be sued in the admiral's court, because it takes its course, and binds according to the common law. Hob. 12. The court of admiralty cannot hold plea of a matter arising from a contract made upon the land, though the contract was concerning things belonging to the ship: but the admiralty may hold plea for the seamen's wages, &c. because they become due for labour done on the sea; and the contract made upon land is only to ascertain them. 3 Lev. 60. Though where there is a special agreement in writing, by which seamen are to receive their wages in any other manner than usual; or if the 152: Denzen v. Jeffries: see as to hypotheca-

more than a parol contract, it is otherwise. 1 Salk. 31: see Hob. 79. In such cases the courts of common law will prohibit the admiralty from proceeding. Bac. Ab. Merchant

(E.) of Mariners. (7th ed.)

The case referred to from Hobart is that of Palmer v. Hope, but it does not seem to warrant the position. The libel in the admiralty court there stated an agreement, made super altum mare, that Pope should carry certain sugars, which agreement was afterwards put in writing in the port of Gado, on the coast of Barbary; a breach was then assigned. The court resolved "that a prohibition lay, because the original contract, though it was made at sea, yet was changed when it was put in writing sealed; which being at land, changed the jurisdiction: but if it had been a writing only, without seal, a mere memorandum of the agreement had made no change." By this is to be understood that the sealed contract destroyed the original parol contract, which a mere writing would not have done; and as that new contract was made on land, though out of the king's dominions, still it was not within the admiralty jurisdiction. It cannot, therefore, be inferred from this case, that the admiralty court cannot hold plea of any contract under seal. This rule, however, is positively laid down in other cases. Opy v. Addison, 12 Mod. 38: 1 Salk. 31: Day v. Searle, 2 Stra. 968: and lastly, in Howe v. Napier, 4 Burr. 1950. But on examination it may appear that the position is not warranted, "that the admiralty court has not jurisdiction" where the specialty contract is made on the sea, and to be performed on the sea, or when it relates to a subject matter over which the court has jurisdiction; and the case of Meristone v. Gibbons, 3 Term Rep. 267. entirely overruled former cases, and ascertained the principle to be, that whether the admiralty have or have not jurisdiction, depends on the subject matter. It was there determined that the admiralty court had jurisdiction respecting an hypothecation bond, though executed on land, and under seal, because it had jurisdiction over the subject matter of the hypothecation of ships: and it was expressly denied that the circumstance of the instrument being under seal could deprive them of their juris-

If the master pawns the ship on the high sea out of necessity for tackling or provision, without the consent of the owners, it shall bind them; but it is otherwise where the ship is pawned for the master's debt: the master can have no credit abroad, but upon the security of the vessel; and the admiralty gives remedy in these cases. 1 Salk. 35. The master hath a right to hypothecate the ship for any debt incurred on her account. Co. Lit. 134. 140. Though the agreement is made, and the money lent at land. 1 Lord Raym. tion, Abbott on Shipping, (5th ed.) p. 127: Bac. | the king's proctor may exhibit a libel in the Ab. Merchant (G.) of Hypothecation. (7th ed.) Sale of goods (taken by piracy) in open market is not binding by the admiralty law; the owner may therefore retake them; but at common law the sale is binding, of which the admiralty must take notice. 1 Roll. Ab .: 1 Vent. 308.

If a ship is taken by pirates upon the sea, and the master, to redeem the ship, contracts with the pirates to pay them 50l., and pawns his person for it, and the pirates carry him to the isle of S., and there he pays it with money borrowed, and gives bond for the money, he may sue in the admiralty for the 50l., because the original cause arose upon the sea, and what followed was but accessory and con-

sequential. Hard. 183.

If goods delivered on ship-board are embezzled, all the mariners ought to contribute to the satisfaction of the party that lost his goods, by the maritime law, and the cause is to be tried in the admiralty. 1 Lill. 368. By the custom of the admiralty, goods may be attached in the hands of a third person, in causa maritima et civili, and they shall be delivered to the plaintiff, after defaults, on caution to restore them, if the debt &c. be disproved in a year and a day; and if the party refuse to deliver them, he may be imprisoned quousque, March Rep. 204.

The court of admiralty may cause a party to enter into bond in nature of caution or stipulation, like bail at common law; and if he render his body, the sureties are discharged; and execution shall be of the goods, or of the body, &c. not of the lands. Godb. 260: 1 Shep. Ab. 129: see 1 Salk. 33: T. Ray, 78: 2

Lord Ray, 1286: Fitz. 197.

This fidejussory caution is only an accumulative remedy, the better to enable the court of admiralty to preserve the property, but it does not supersede the jurisdiction in rem.

3 Term Rep. 323, 342, 346,

A person in execution, on judgment in the admiral's court, upon a contract made on the land in New England, was discharged, being out of the admiralty jurisdiction. 3 Cro. 603: 1 Cro. 685. And where sailors' clothes were bought in St. Katherine's parish, near the Tower, London, which were delivered in the ship; on a suit in the admiralty for the money, prohibition was granted, for this was within the county: so of a ship lying at Blackwall, &c. Owen, 122: Hughes's Ab. 113. But the admiralty may proceed against a ship, and the sails and tackle, when they are on shore, although alleged to be detained at land; yet, upon alleging offer of a plea, claiming property therein, and refusal of the plea, on this suggestion a prohibition shall be had. 1 Show. 179.

If an English ship takes a French ship, the French being in enmity with us, and such ship is libelled against, and after due notice on the exchange, &c., declared a lawful prize,

admiralty court, to compel the taker (who converted the lading to his own use) to answer the value of the prize to the king; although it was objected, that by the first sentence, the property was vested in the king, and that this second libel was in nature of an action of trover, of which the court of admiralty cannot hold plea. Carth. 399 .- [This must be understood of a capture without the authority of letters of marque or reprisal.]

If the owner of a ship victuals it, and furnishes it to sea, with letters of reprisal, and the master and mariners, when they are at sea, commit piracy upon a friend of the king, without the notice or assent of the owner, yet by this the owner shall lose his ship by the admiralty law, and our law ought to take notice thereof. 1 Roll. Ab. 530: but see 1

Roll. Rep. 285.

By the civil law and custom of merchants, if the ship be cast away, or perish through the mariners' defaults, they lose their wages; so if taken by pirates, or if they run away; for if it were not for this policy, they would for-sake the ship in a storm, and yield her up to enemies in any danger. 1 Sid. 179: 1 Mod. 93: 1 Vent. 146. And as a seaman is bound to exert himself to the utmost for the ship, a promise made to him by the master, when the ship is in danger, to pay extra wages, is void. Peake's Ca. 72: 2 Camp. 317: 1 Camp. 527: and see Abbott on Shipping, 440.

The admiralty court may award execution upon land, though not hold plea of any thing arising on land. 4 Inst. 141. And upon letters missive or request, the admiralty here may award execution on a judgment given beyond sea, where an Englishman flies or comes over hither, by imprisonment of the party, who shall not be delivered by the common law. 1 Roll. Ab. 530. When sentence is given in a foreign admiralty, the party may libel for execution of that sentence here; because all courts of admiralty in Europe are governed by the civil law. Sid. 418. Sentences of any admiralty in another kingdom are to be credited, that ours may be credited there, and shall not be examined at law here; but the king may be petitioned, who may cause the complaint to be examined; and, if he finds just cause, may send to his ambassador where the sentence was given, to demand redress, and upon failure thereof, will grant letters of marque and reprisal. Raym. 473.

If one is sued in the admiralty, contrary to the statutes 13 R. 2. st. 1. c. 5; and 15 R. 2. c. 3. he may have a supersedeas, to cause the judge to stay the proceedings, and also have action against the party suing. 10 Rep. 75. If it appear that the court of admiralty is proceeding in a question over which it has no jurisdiction, a court of common law will grant a prohibition without imposing any terms on the party applying for it. 3 Term. Rep. 315.

A ship being privately arrested by admi-

ralty process only, and no suit, it was adjudged a prosecution within the meaning of the statutes; and double damages, &c. shall be

recovered. 1 Salk. 31, 32.

By stat. 8 Eliz. c. 5. if an erroneous judgment is given in the admiralty, appeal may be had to delegates appointed by commission out of chancery, whose sentence shall be final. See 5 Inst. 339. But from the Prize Court (see post) appeal lies to commissioners consisting of the privy council. Doug. 614. Appeals may be brought from the interior admiralty courts to the lord high admiral: but the lord warden of the Cinque Ports hath jurisdiction of admiralty exempt from the admiralty of England. A writ of error doth not lie upon a sentence in the admiralty, but an appeal. 4 Inst. 135. 339. There are also vice-admiralty courts in the king's foreign dominions, from which (except in case of prizes) appeals may be brought before the courts of admiralty in England as well as to the king in council. 3 Comm. 69.

The admiral, of right, had anciently a tenth part of all prize goods, but which is taken away by stat. 13 Geo. 2. c. 4; which vests the property of all ships taken and condemned as prize in the admiralty courts, in the admirals, captains, sailors, &c. being the captors, according to the proportions to be settled by the king's proclamation. This statute also enables the admiralty to grant letters of marque. (See tit. Privateers.) For the mode of proceeding in condemning prizes, see Doug. 614: and 4 Term Rep. 382: 2 H. B. 533: 6 Parl. Ca. 203. as to the commissioners of appeal.

Prize acts are usually passed at the commencement of every war, the provisions in which vary from time to time. The last act

was 55 G. 3. c. 160.

By the stat. 22 G. 2. c. 3. his majesty's commission to all the privy counsellors then and for the time being, and to the lord chief baron of the court of Exchequer, the justices of the King's Bench and Common Pleas, and barons of the said court of Exchequer, then and for the time being, for hearing, and determining appeals from sentences in causes of prizes pronounced in the courts of admiralty, in any of his majesty's dominions, declared valid, although such chief baron, justices, and barons are not of the privy council. But no sentence shall be valid, unless the major part of the commissioners present be of the privy council. See Com. Dig. tit. Admiralty; and this Dict. tit. Navy.

By stat. 39 G. 3. c. 37. all offences whatever committed on the high seas shall be liable to the same punishment as if committed on shore, and shall be tried and adjudged in the same manner as felonies, &c. are directed by the 28 H. 8. c. 15. See Bac. Ab. tit. Piracy.

Persons tried for murder or manslaughter, and found guilty of manslaughter only, shall be entitled to the benefit of clergy, and be subject to the same punishment as if committed on land: § 2.

39 and 40 G. 3. c. 80. § 35. offences committed upon the high seas may be prosecuted within the nearest county.

The admiralty have no jurisdiction to try offenders on the stat. 11 G. 1. c. 29. for procuring the destruction of a ship, if there is no evidence of such destruction having been procured by the owners of such ship upon the high seas within the admiralty jurisdiction, but only on shore within the body of a county. Easterby and Macfarlane, East's Pleas of the Crown (Addenda), p. xxx.: Abbot on Merchant

Ship, 153. n. 1.

By stat. 1 G. 4. c. 90. persons convicted of any capital offence on the sea, out of the body of any county, by virtue of 28 H. 8. c. 159. which, if committed on the land, would be clergyable, shall receive the benefit of clergy, and be punishable as if such offence had been committed on the land. See post, 7 and 8 G. 4. c. 28. § 12. and § 11. of the last mentioned stat, empowering the transportation for life, &c. of offenders having been previously convicted of felony. By stat. 7 G. 4. c. 38. an admiralty commissioner or justice of the peace is empowered to take the information of witnesses relating to offences committed on the seas within the admiralty jurisdiction, and to commit or bail the offender.

By stat. 7 G. 4. c. 64. § 27. the court of admiralty is empowered to order the payment of the costs and expences of prosecutors in cases of felony and misdemeanors committed

on the high seas.

By stat. 7 and 8 G. 4. c. 29. § 77. it is enacted, "That where any felony or misdemeanor punishable under this act shall be committed within the jurisdiction of the admiralty of England, the same shall be dealt with, tried, and determined in the same manner as any other felony or misdemeanour committed within that jurisdiction.

This section is enacted in the same words in § 43. of stat. 7 and 8 G. 4. c. 30. as to what

are offences within that act.

By stat. 7 and 8 G. 4. c. 28. § 12. it is enacted, "That all offences prosecuted in the high court of admiralty of England shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon land." (And as to Ireland, see 9 G. 4. c. 55. § 74; c. 56. § 55: 10 G. 4. c. 34. § 41.)

By 53 G. 3. c. 151. forging, &c. the name of the registrar of the high court of admiralty or high court of appeals for prizes, or his deputy, or any documents made by them, in order to receive the money of the suitors of such courts, or knowingly uttering the same,

are guilty of felony.

The powers of the High Court of Delegates in maritime cases have been transferred to his Majesty in council. See *Privy Council*.

ADMISSION, admissio.] Is properly the ordinary's declaration that he approves of the parson presented to serve the cure of any

a church has presented to it, the bishop upon examination admits the clerk by saving admitto te habilem. Co. Lit. 344. a. Action on the case will not lie against the bishop, if he refuse to admit a clerk to be qualified according to the canons (as for any crime or impediment, illiterature, &c.); but the remedy is by writ quære non admissit, or admittendo clerico, brought in that county where the refusal was. 7 Rep. 3. As to the causes of refusal by the ordinary to admit to a benefice, see tit. Parson, Quare Impedit.

ADMITTANCE. See Copyhold.

ADMITTENDO CLERICO. Upon the right of presentation to a benefice being recovered in quare impedit, or on assise of darrein presentment, the execution is by this writ; directed not to the sheriff, but to the bishop, or his metropolitan, requiring them to admit and institute the clerk of the plaintiff. 3 Comm. 402: Reg. Orig. 31. 33. See tit.

Parson and Quare Impedit.

If a person recovers an advowson, and six months pass; yet, if the church be void, the patron may have a writ to the bishop; and if the church is void when the writ comes to the bishop, the bishop is bound to admit his clerk. Vide Hut. 24: Hob. 152. 4: 2 Inst. 273: 3 Com. Dig. Where a man recovers against another than the bishop, this writ shall go to the bishop, and the party may have an alias and a pluries, if the bishop do not execute the writ, and an attachment against the bishop, if need be. New Nat. Br. 84. In a quare impedit betwixt two strangers, if there appears to the court a title for the king, they shall award a writ unto the bishop for the king.

ADMITTENDO IN SOCIUM. A writ for associating certain persons to justices of assize. Reg. Orig. 206. Knights and other gentlemen of the county are usually associated with judges, in holding their assizes on the

AD MURUM. Waltown or Walton.

ADNICHILED, from the Lat. nihil or nichil.] Annulled, cancelled, or made void. Stat. 28. H. 8.

AD PONTEM. Pawnton, in Lincoln-

AD QUOD DAMNUM. A writ to inquire whether a grant intended to be made by the king will be to the damage of him or others; F. N. B. 221, 2; and it ought to be issued before the king grants certain liberties; as a fair, market, &c. which may be prejudicial to others; it is directed to the sheriff.

Terms de Ley, 25.

Stat. 27 Ed. 1. st. 2. § 1. ordains that such

as would purchase new parks shall have writs out of chancery to inquire concerning the same. In like manner they shall do, that will purchase any fair, market, warren, or other

liberty. § 4.

This writ is likewise used to inquire of lands given in mortmain to any house of re-

church. Co. Lit. 344. a. When a patron of ligion, &c. And it is a damage to the country, that a freeholder who hath sufficient lands to pass upon assizes and jury, should alien his lands in mortmain, by which alienation his heir should not have sufficient estate after the death of the father to be sworn in assizes and juries. F. N. B. 221.

The writ of ad quod damnum is also had for the turning and changing of ancient highways; which could not be done without the king's licence obtained by this writ, on inquisition found that such a change will not be detrimental to the public. Terms de Ley, 26: Vaugh. Rep. 314. Although now a highway may, by the statute law, be diverted by order of two magistrates. Ways turned without the authority of this writ are not esteemed highways, so as to oblige the inhabitants of the hundred to make amends for robberies; nor have the subjects an interest therein to justify going there. 3 Cro. 267. If any one change an highway without this authority, he may stop the way at his pleasure. See tit. Highway.

The river Thames is an highway, and cannot be diverted without an ad quod damnum; and to do such a thing ought to be by patent

of the king. Noy, 105.

If there be an ancient trench or ditch coming from the sea, by which boats and vessels used to pass to the town, if the same be stopped in any part by outrageousness of the sea, and a man will sue the king to make a new trench, and to stop the ancient trench, &c. they ought first to sue a writ of ad quod damnum, to inquire what damage it will be to the king or others. F. N. B. 225. (E.)

And if the king will grant to any city the assize of bread and beer, and the keeping of weights and measures, an ad quod damnum shall be first awarded, and when the same is certified, &c. then to make the grant.

B. 225. (E.)

It appears by the writs in the register, that in ancient times, upon every grant, confirmation, &c. or licence made by the king, a writ ad quod damnum was to be first awarded, to inquire of the truth thereof, and what damage the king might have by the same; but now the practice is contrary, and in the patents of common grants of licence, a dispensation by non obstante is inserted. Though it be returned on an ad quod damnum, that there is no damage to the public, this is not conclusive that the act done may not be an indictable nuisance. See Rex v. Russell, 6 Barn. & C.

AD TERMINUM QUI PRETERIIT. A writ of entry that lay for the lessor or his heirs where a lease has been made of lands or tenements, for the term of life or years; and after the term is expired, the lands are withheld from the lessor by the tenant, or other person possessing the same. F. N. B.

Now by stat. 4 Geo. 2. c. 28. tenants wilful-

ly holding over, after demand and notice in ing or causing to be advertised any public writing for delivering possession, shall pay entertainment or meeting for debating on the double the yearly value. See tit. Ejectment.

AD TERMINUM QUI PRÆTERIT. Abolished. See Limitation of Actions, II. 1.

ADVENT, adventus.] A time containing about a month preceding the feast of the nativity (the advent or arrival) of our Saviour. It begins from the Sunday that falls either upon St. Andrew's day, being the 30th of November, or next to it, and continues to the feast of Christ's nativity, commonly called Christmas. Our ancestors showed great reverence and devotion to this time, in regard to the approach of the solemn festival; for in adventu domini nulla assisa debet capi. But the stat. West. 1. (3 E. 1.) c. 51. ordained that, notwithstanding the usual solemnity and times of rest, it should be lawful (in respect of justice and charity, which ought at all times to be regarded) to take assizes of novel disseisin, mort d'ancestor, &c. in the time of Advent, Septuagesima, and Lent. This is also one of the seasons, from the beginning of which to the end of the octave of the Epiphany, the solemnizing of marriages is forbidden, without special licence, as we may find from these

Conjugium adventus prohibit, Hilarique re-

Septuagena vetat, sed Paschæ octava reducit; Rogatio vetitat, concedit Trina potestas.

AD VENTREM INSPICIENDUM. See

Ventre Inspiciendo.

ADVERTISEMENTS. Under stat. 9 A. c. 6. § 5; and 10 A. c. 26. § 109. 100l. penalty is imposed on all persons (the latter particularly mentioning Printers) publishing the keeping of any office for illegal insurances on marriage, &c. or offices established under the pretence of improving small sums. The several penalties also under the lottery acts (see this Dictionary, tit. Lottery) extend to printers and publishers of newspapers in setting the advertisements of illegal lottery adventures; and to distributors of handbills, &c. 4 Term Rep. 414: and several printers of papers who had incurred such penalties ignorantly, were indemnified by stat. 32 G. 3. c. 61.

rantly, were indemnified by stat. 32 G. 3. c. 61. By stat. 7 and 8 G. 4. c. 29. § 59. any person publiely advertising a reward for the return of property stolen or lost, and using any words purporting that no question will be asked, or that a reward will be given for property stolen or lost without saying or making any inquiry after the person producing such property, or promising or offering in such advertisement to return to any pawnbroker, &c. having bought or advanced money upon such property, the money paid or advanced, or any other money or reward, for the return of such property, and any person printing or publishing such advertisement, shall forfeit 50l. Advertisements are liable to Stamp Dutics.

By stat. 21 G. 3. c. 49. any person advertis-

ing or causing to be advertised any public entertainment or meeting for debating on the Lord's day, to which persons are to be admitted by money or tickets sold, and any person printing or publishing any such advertisement, shall forfeit 50l. for each offence. § 3. See Unlawful Assemblies, Riot, Sunday, Reward, Newspapers.

AD VITAM AUT CULPAM. An office is expressed to be so held, which is to determine only by the death or delinquency of the possessor; or which, in other words, is held quamdiu se bene gesserit. See stat. 28 G.2.

c. 7. on Scotch jurisdiction.

ADULTERY, adulterium, quasi ad alterius thorum; Anno 1 H. 7. c. 7. and in divers old authors termed advowtry.] The sin of incontinence between two married persons; or if but one of the persons be married, it is nevertheless adultery: but in this last case it is called single adultery, to distinguish it from the other, which is double. This crime was severely punished by the laws of God, and the ancient laws of the land (see the laws of King Edmund, c. 4: laws of Canute, par. 2. c. 6. 50: Leg. H. 1. c. 12.); the Julian law, among the old Romans, made it death; but in most countries at this time the punishment is by fine, and sometimes banishment; in England it is punished ecclesiastically by penance, &c. It is a breach of the peace, and as such anciently indictable, but not now. Salk. 552. The usual mode of punishing adulterers at present is by action of crim. con. (as it is commonly expressed) to recover damages; which are assessed by the jury, in proportion to the heinousness of the crime, and are frequently very heavy and severe, when this action is maintainable, finding a separation. See 5 T. R. 357: 6 E. R. 244.

If the husband be privy to the illicit intercourse, he cannot sue the adulterer. 2 T. R. 166. Gross and open infidelity on the part of the husband, was held by Lord Kenyon a bar to the action. 4 Ep. Ca. 16. But Lord Alvanley subsequently held that it only went to reduce the damages. 4 Ep. Ca. 237. The defendant may show that the woman made the first advances, in order to reduce the damages; 1 Sel. N. P. 25; or that she has committed adultery with others. B. N. P. 296. The plaintiff must prove a legal and valid marriage; proof of cohabitation and reputation is insufficient. Burr. 2057: Doug. 170. See as to the proofs in the action, Ros-

coe on Evid. 358. (2d. cd.)

As to the dissolving marriages for adultery, by acts of parliament passed for that purpose; and the question how far the guilty party should be permitted to marry again, and particularly with the partaker of the crime, see a very curious tract, first published in 1801, and afterwards in 1821 and 1830, entitled, Nuptice Sacræ; or an Inquiry into the Scriptural Doctrine of Marriage and Divorce, by Doctor Ireland, Dean of Westminster."

Vol. I.-7

made malicious maining felony, it was a question whether cutting off the privy members of a man, taken in adultery with another | Nomination. man's wife, was felony or not? And it is now held that such provocation may justify the homicide of the adulterer by the injured husband, in the moment of injury. 1 Hale, 488. See tit. Baron and Feme, III.; and tion. Marriage.

DE ADURNI PORTU. Etherington or

Ederington.

ADVOCATE. The patron of a cause assisting his client with advice, and who pleads for him: it is the same in the civil and ecclesiastical law as a counsellor at the common law. The ecclesiastical, or church advocate, was originally of two sorts; either an advocate of the causes and interest of the church, retained, as a counsellor and pleader of its rights; or an advocate, advocatus, an advowee or avowee. Blount: Fleta, lib. 5. c. 14: Britt. c. 29. Both these offices at first belonged to the founders of churches and convents, and their heirs, who were bound to protect and defend their churches, as well as to nominate or present to them. But when the patrons grew negligent in their duty, or were not of ability or interest in the courts of justice, then the religious began to retain law advocates, to solicit and prosecute their causes. Vide Spelman; and this Dict. tit. Barrister.

ADVOCATIONE DECIMARUM. writ that lies for tithes, demanding the fourth part, or upwards, that belong to any church.

Reg. Orig. 29.

ADVOW, or Avow, advocare.] To justify or maintain an act formerly done; see Avowry; it also signifies to call upon or produce; anciently, when stolen goods were bought by one, and sold to another, it was lawful for the right owner to take them wherever they were found, and he in whose possession they were found, was bound advocare, i. e. to produce the seller to justify the sale; and so on till they found the thief. Afterwards the word was taken for any thing which a man ac-knowledged to be his own, or done by him, and in this sense it is mentioned in Fleta, lib. 1. c. 5. p. 4.

ADVOWSON, Advocatio.] The right of presentation to a church or benefice: and he who hath this right to present, is styled patron: because they that originally obtained the right of presentation to any church, were maintainers of, or benefactors to, the same church: it being presumed that he who founded the church will avow and take it into his protection, and be a patron to defend it in its just rights. When the Christian religion was first established in England, kings began to build cathedral churches, and to make bishops: and afterwards, in imitation of them, several lords of manors founded particular churches on some part of their own lands, and endowed them with glebe; reserving to them-

Before the stat. 22 and 23 Car. 2. which selves and their heirs, a right to present a fit person to the bishop, when the same should become void. See 2 Comm. 21-3: and tit.

Under this head shall be considered,

I. The several kinds of advowson. II. How advowsons may lapse.

III. How they may be gained by usurpa-

IV. Of the right of presentation.

For the law relating to appropriation and impropriations of benefices, see tit. Appropri-

I. Advowsons are of two kinds; appendant, and in gross: Appendant, is a right of presentation dependant upon a manor, lands, &c. and passes in a grant of the manor as incident to the same; and when manors were first created, and lands set apart to build a church on some part thereof, the advowson or right to present to that church became appendant to the manor. Advowson in gross, is a right subsisting by itself, belonging to a person, and not to a manor, lands, &c. So that when an advowson appendant is severed by deed or grant from the corporeal inheritance to which it was appendant, then it becomes an advowson in gross. Co. Lit. 121, 122.

If he that is seised of a manor, to which an advowson is appendant, grants one or two acres of the manor together with the advowson, the advowson is appendant to such acre; especially after the grantee hath presented.

Watson's Complete Incumbent, c. 7.

But this feoffment of the acre with the advowson ought to be by deed, to make the advowson appendant; and the acre of land and the advowson ought to be granted by the same clause in the deed; for if one, having a manor with an advowson appendant, grant an acre parcel of the said manor, and by another clause in the same deed grant the advowson; the advowson in such case shall not pass as appendant to the acre; but if the grant had been of the entire manor, the advowson would have passed as appendant. So if a husband, seised in right of his wife of a manor to which an advowson is appendant, doth alien the manor by acres to divers persons, saving one acre, the advowson shall be appendant to that acre. Or if a lessee for life of a manor to which an advowson belongs, alien one acre, with the advowson appendant, the advowson is thereby appendant to that acre. Wats. c. 7.

The right of advowson, though appendant to a manor, castle, or the like, may be severed from it in other ways, and being severed, becomes an advowson in gross; and this may be effected divers ways: as, 1. If a manor or other thing to which it is appendant is granted, and the advowson excepted. 2. If the advowson is granted alone, without the thing to which it was appendant. 3. If an advowson appendant is presented to by the patron, as an

advowson in gross. Gibs. 757.

A disappendancy may also be temporary; | cause such grants might (indeed inevitably that is, the appendancy, though turned into gross, may return: as, 1. If the advowson is excepted in a lease of a manor for life; during the lease it is in gross, but when the lease expires it is appendant again. 2. If the advowson is granted for life, and another enfeoffed of the manor with the appurtenances; in such case, at the expiration of the grant, it shall be appendant; and so in other cases.

But with respect to the king, by the statute of prærogativa regis, 17 E. 2. c. 15. the king giveth or granteth land, or a manor, with appurtenances; without he make express mention in his deed or writing, of advowson, the king reserveth to himself such advowsons, albeit that among other persons it hath been

observed otherwise.

Yet when he restoreth, as in case of the restitution of a bishop's temporalities; then advowsons pass without express mention, or any words equivalent thereto. 10 Co. 64.

The law, in the case of a common person. is thus set down by Rolle, out of the ancient books: if a man, seised of a manor to which an advowson is appendant, aliens that manor, without saying with the appurtenances (and even without naming the advowson), yet the advowson shall pass, for it is parcel of the manor. 2 Roll. Ab. 60.

An advowson being an inheritance incorporeal, and not lying in manual occupation, cannot pass by livery; but may be granted by deed, or by will, either for the inheritance, or for the right of one or more turns, for as many as shall happen within a time limited.

But this general rule, with regard to advowsons in gross, next avoidances, and the like, is to be understood with two limitations.

First, That it extends not to ecclesiastical persons of any kind or degree, who are seised of advowsons in the right of their churches; nor to masters and fellows of colleges, nor to guardians of hospitals, who are seised in right of their houses; all these being restrained (the bishops by the 1 Eliz. c. 19. and the rest by the 13 Eliz. c. 10.) from making any grants but of things corporeal, of which a rent or annual profit may be reserved: and advowsons and next avoidances, which are incorporeal and lie in grant, cannot be of that sort; and therefore such grants, however confirmed, are void against the successor; though they have been adjudged to be good against the grantors (as bishop, dean, master, or guardian) during their own times. See 45 G. 3. c. 101.

Secondly, A grant of the next avoidance may be assigned before the avoidance happens. 2 Roll. Ab. 45. &c. But an avoidance cannot be granted by a common person after it is fallen: while the church is absolutely void. Mo. 89: Dy. 129. b. 26. a. 283. a.: and see 2 Wils. 197; and a grant of the advowson made after the church is actually fallen vacant is equally void; not as is said in the old books, because it is a chose in action, but be- must be under seal. The presentation to a

would) encourage simony. 2 Burr. 1510, 11. See tit. Simony; and see Kyd's Com. Dig. tit. Advowson.

If two have a grant of the next avoidance, and one releaseth all right and title to the other while the church is void: such release is void. But the king's grant of a void turn hath been adjudged to be good. 3 Leon. 196:

Dy. 283. a: Hob. 141.

If one be seised of an advowson in fce, and the church doth become void, the void turn is a chattel; and if the patron dieth before he doth present, the avoidance doth not go to his heir, but to his executor. Wats. c. 9. When a prebendary having the advowson of a rectory in right of his prebend, dies while the church is vacant, his personal representative has the right of presentation for that term, and not his successor. Rennell v. Bishop of

Lincoln, 7 Barn. & C. 113.

But if the incumbent of a church be also seised in fee of the advowson of the same church and die, his heir, and not his executors, shall present; for although the advowson doth not descend to the heir at the death of the ancestor, and by his death the church become void, so that the avoidance may be said in this case to be severed from the advowson before it descend to the heir, and vested in the executor; yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more ancient and worthy. Wats. c. 9. fo. 72: sec Watkins on Descents, p. 62: 3 Lev. 47.

Tenant by the curtesy may be of an advowson, when the wife dies before avoidance. 1 Inst. 29. a.

By last will and testament, the right of presenting to the next avoidance, or the inheritance of an advowson, may be devised to any person; and if such devise be made by the incumbent of the church, the inheritance of the advowson being in him, it is good, though he die incumbent; for although the testament hath no effect but by the death of the testator, yet it hath an inception in his lifetime. And so it is, though he appoint by his will who shall be presented by the executors, or that one executor shall present the other; or doth devise that his executors shall grant the advowson to such a man.

Advowsons are either presentative, collative, or donative.

An advowson presentative is, where the patron does present or offer his clerk to his bishop of the diocese, to be instituted in his

This may be done either by word or writing. The king may present by word, or in writing under any seal; who, otherwise, cannot do any legal act, but by matter of record, or by letters patent under the great seal. But where a coporation aggregate doth present, it parson. If a feme coveret hath title to present, the presentation may be by husband and wife, and in both their names, except in case of the Wood's Inst. 155. &c. queen consort.

An advowson collative is that advowson which is lodged in the bishop; for collation is the giving of a benefice by a bishop, when he is the original patron thereof, or he gains a

right by lapse.

Collation differs from institution in this; that institution is performed by the bishop upon the presentation of another, and collation is his own act of presentation, and it differeth from a common presentation, as it is the giving of the church to the parson; and presentation is the giving or offering the parson to the church. But collation supplies the place of presentation and institution; and amounts to the same as institution, where the bishop is both patron and ordinary. 1 Lil. Ab. 273.

A bishop may either neglect to collate, or he may make his collation without title; but such a wrongful collation doth not put the true patron out of possession; for after the collatee of the bishop is instituted and inducted, the patron may present his clerk; collation in this case being to be intended only as a provisional incumbency to serve the church. 1 Inst. 344.

Where a bishop gives a benefice as patron, he collates by writ jure pleno; when by lapse, jure devoluto. The collation by lapse is in the right of the patron. F. N. B. 31. See

post, Lapse, II.

An advowson donative is, when the king or other patron (in whom the advowson of the church is lodged) does, by a single donation in writing, put the clerk into possession without presentation, institution, or induction.-Donatives are either of churches parochial, chapels, prebends, &c. and may be exempt from all ordinary jurisdictions, so that the ordinary cannot visit them, and consequently cannot demand procurations. If the true patron of a church or chapel donative doth once present to the ordinary, and his clerk is admitted and instituted, it becomes a church presentative, and shall never have the privilege of a donative afterwards. Yet if a stranger presents to such a donative, an institution is given, all is void. 1 Inst. 158: see contra, 1 Salk. 541: 2 Con. 23.

The right of donation descends to the heir (the ancestor dying seised, where the church became void in his lifetime) and not to the executor; which it would had it been a presentative benefice. 2 Wilson, 150, 1.

There is not any case in the books to exclude the heir of a donative from his turn in this case. And a patron of a donative can never be put out of possession by an usurpa-Id. Ibid.

II. A Lapse is a title given to the ordinary, to collate to a church by the neglect of the patron to present to it within six months after

vicarage doth of common right belong to the of presenting from the patron to the bishop; from the bishop to the archbishop; from the archbishop to the king. The term in which the title by lapse commences, from one to the other successively, is six months, or half a year, according to the calendar, not accounting twenty-eight days to the month, as in other cases, because this computation is by the ecclesiastical law; and because tempus semestre, in the stat. of West. 2. chap. 5. is intended of half a year, the whole year containing 365 days; which being divided, the half year for the patron to present is 182 days. The for the patron to present is 182 days. day in which the church becomes void is not to be reckoned as part of the six months. Wood's Inst. 160: Hob. 30: 4 Rep. 17:6

> Where a patron presents his clerk before the bishop hath collated, the presentation is good notwithstanding the six months are past, and shall bar the bishop, who cannot take any advantage of the lapse: and so if the patron makes his presentation before the archbishop hath collated, although twelve months are past; but if the bishop collates after twelve months, this bars not the archbishop. 2 Roll. Ab. 369: 2 Inst. 273. If a bishop doth not collate to benefices of his own gift, they lapse at the end of six months to the archbishop; and if the archbishop neglects to collate within six months to a benefice of his gift, the king shall have it by lapse. Dr. & Stud. c. 36. And if a church continues void several years by lapse, the successor of the king may present. Cro. Car. 258. But if the king hath a title to present by lapse, and he suffers the patron to present, and the presentee dies, or resigns before the king hath presented, if the presentation is real, and not by covin, he hath lost his presentation; for lapse is but for the first and next turn, and by the death of the incumbent a new title is given to the patron; though it hath been adjudged that the king in such case may present at any time as long as that presentee is incumbent. 2 Cro. 216: Moor, 244. When the patronage of the church is litigious, and one party doth recover against the other in a quare impedit, if the bishop be not named in the writ, and six months pass while the suit is depending, lapse shall incur to the bishop; if the bishop be named in the writ, then neither the bishop, archbishop, or king, can take the benefice by lapse: and yet it is said, if the patron, within the six months, brings a quare impedit against the bishop, and then the six months pass without any presentation by the patron, lapse shall incur to the bishop. 2 Roll. Ab. 365: 6 Rep. 52: 1 Inst. 344: Hob. 270.

Where the bishop is a disturber, or the church remains void above six months by his fault there shall be no lapse. 1 Inst. 344. A clerk presented being refused by the bishop for any sufficient cause, as illiterature, ill life, &c. he is to give the patron notice of it, that another voidance. Or a lapse is a devolution of a right | may be presented in due time; otherwise the

bishop shall not collate by lapse; because he shall not take advantage of his own wrong, in not giving notice to the patron as he ought to do by law. Dyer, 292. And if an avoidance is by resignation, which must necessarily be to the bishop, by the act of the incumbent, or by deprivation, which is the act of the law, lapse shall not incur to the bishop till six months after notice given by him to the patron: when the church becomes void by the death of the incumbent, &c. the patron must present in six months, without notice from the bishop, or shall lose his presentation by lapse. Dyer, 293, 327: 1 Inst. 135: 4 Rep. 75. And it is expressly provided, by stat. 13 Eliz. c. 12. that no title conferred by lapse shall accrue upon any deprivation ipso facto, but after six months' notice of such deprivation given by the ordinary to the patron.

In the cases of deprivation and resignation, where the patron is to have notice before the church can lapse, the patron is not bound to take notice from any body but the bishop himself, or other ordinary, which must be personally given to the party, if he live in the same county; and such notice must express in certain the cause of deprivation, &c. If the patron live in a foreign country, then the notice may be published in the parish church, and affixed on the church door. Cro. Eliz. 119: Dyer, 328. And this notice must be given, even though the patron himself prosecute the incumbent to deprivation. 6 Rep. 29.

There are avoidances by act of parliament, wherein there must be a judicial sentence pronounced to make the living void: if a man hath one benefice with cure, &c. and take another with cure, without any dispensation to hold two benefices, in such case the first is void by the stat. 21 H. 8. c. 13. if it was above the value of 8l. During an avoidance, it is said that the house and glebe of the benefice are in abeyance: but by the stat. 28 H. S. c. 11. the profits arising during the avoidance are given to the next incumbent towards payment of the first fruits; though the ordinary may receive the profits to provide for the service of the church, and shall be allowed the charges of supplying the cure, &c., for which purpose the church-wardens of the parish are usually appointed.

If a clerk is instituted to a benefice of the yearly value of 8l. and, before induction, accepts another benefice with cure, and is instituted, the first benefice is void by the stat. 21 H. 8. c. 13: for he who is instituted only, is properly said to have accepted a benefice within the words of the act. 4 Rep. 78. See title Cession.

But if he is inducted into a second benefice, the first is void in facto et jure, and not voidable only, quoad, the patron, and until he presents another; and in such case the patron ought to take notice of the avoidance at his peril, and present within the six months. Cro. Car. 258,

In cases where there ought to be notice, if none is given by the bishop or archbishop in a year and a half, whereby lapse would come to the king if it had been given; here the lapse arises not to the king, where no title arose to the inferior ordinary. Dyer, 340. And it has been adjudged, that lapse is not an interest, like the patronage, but an office of trust reposed by law in the ordinary; and the end of it is, to provide the church a rector, in default of the patron; and it cannot be granted over; for the grant of the next lapse of a church, either before it falls, or after, is void. F. N. B. 34. Also if lapse incurs, and then the ordinary dies, the king shall present, and not the ordinary's executors, because it is rather an administration than an interest. 25 E. 3. 4. A lapse may incur against an infant or feme covert, if they do not present within six months. 1 Inst. 246. But there is no lapse against the king, who may take his own time; and plenarty shall be no bar against the king's title, because nullum tempus occurrit regi. 2 Inst. 273: Dyer, 351. By presentation and institution a lapse is prevented; though the clerk is never inducted: and a donative cannot lapse either to the ordinary or the king. 2 Inst. 273: see 2 Comm. 276, and 4 Comm.

III. The usurpation of a church benefice is when one that hath no right presents to the church; and his clerk is admitted and instituted into it, and hath quiet possession six months after institution before a quare impedit brought. It must commence upon a presentation, not a collation, because by collation the church is not full; but the right patron may bring his writ at any time to remove the usurper. 1 Inst. 227: 6 Rep. 30.

No one can usurp upon the king; but an usurpation may dispossess him of his presentation, so as he shall be obliged to bring a quare impedit. 3 Salk. 389. One copareener or joint-tenant cannot usurp upon the other; but where there are two patrons of churches unit-ed, if one presents in the other's turn, it is an usurpation. Dyer, 259. A presentation which is void in law, as in case of simony, or to a church that is full, makes no usurpation. 2 Rep. 93.

In this case of usurpation the patron lost, by the common law, not only his turn of presentment, but also the perpetual inheritance of the advowson; so that he could not present again upon the next avoidance, unless, in the mean time, he recovered his right by a real action, viz. a writ of right of advowson. 3 Comm. 243. See farther, tit. Darrein Presentment, Quare Impedit.

The writ of advowson and an assize of darrein presentment have been abolished, and advowsons are within the recent statute of limitation. See Limitation of Actions, II. 1; also Quare Impedit.

But bishops in ancient times, either by carelessness or collusion, frequently instituting thereby defrauding the real patrons of their right of possession; it was in substance enacted by stat. Westm. 2. (13 E. 1.) c. 5. § 2, "that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation;" which gives back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous process of a writ of right; to remedy which it was farther enacted by stat. 7 A. c. 18. "that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened." So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy; it cannot indeed be remedied after six months are past; but during those six months it is only a species of disturbance. 3 Comm. 244.

IV. Advowsons were formerly most of them appendant to manors, and the patrons parochial barons; the lordship of the manor, and patronage of the church, were seldom in different hands till advowsons were given to religious houses; but of late times the lordship of the manor and the advowson of the church have been divided; and now not only lords of manors, but mean persons, have, by purchase, the dignity of patrons of churches, to the great prejudice thereof. By the common law the right of patronage is the real right fixed in the patrons or founders, and their heirs, wherein they have as absolute a property as any other man hath in his lands and tenements: for advowsons are a temporal inheritance and lay fee; they may be granted by deed or will, and are assets in the hands of heirs or executors: Co. Lit. 119. A recovery may be suffered of an advowson; a wife may be endowed of it; a husband tenant by the curtesy; and it may be forfeited by treason or felony. 1 Rep. 56: 10 Rep. 55. If an advowson descends to coparceners, and the church after the death of their ancestors becomes void (by stat. Westm. 2. (13 E. 1.) st. 1. c. 5.) the eldest sister shall first present. And when coparceners, joint-tenants, &c. are seised of an advowson and partition is made, to present by turns; by stat. 7 A. c. 18. each shall be seised of their separate estate.

Presentation is properly the act of a patron offering his clerk to the bishop of the diocese,

clerks upon the presentation of usurpers, and to be instituted in a church or benefice of his thereby defrauding the real patrons of their wift, which is void. 2 Lil. Ab. 351.

An alien born cannot present to a benefice in his own right; for if he purchases an advowson, and the church becomes void, the king shall present after office found that the patron is an alien. 2 Nels. 1290. And by stat. 7 R. 2. c. 12. no alien shall purchase a benefice in this realm, nor occupy the same, without the king's licence, on pain of a premunire.

Papists are disabled to present to benefices, and the universities are to present, &c. But a popish recusant may grant away his patronage to another, who may make presentation, where there is no fraud. See stat. 3 Jac. 1. c. 5. § 18, 19: 1 W. & M. c. 26: 12 A. c. 14: and 1 Jon. 19. But by stat. 11 G. 2. c. 17. § 5, grants of advowsons by papists are void, unless made for a valuable consideration to a protestant purchaser, and only for the benefit of protestants; and devises of advowsons by papists are also void. And see the Catholic Relief Act, 10 G. 4. c. 7. which leaves these provisions in force.

A guardian by socage or by nurture cannot present to a vacant living in right of the infant heir, or in his name, because he can make no benefit of it, or account for it, though it is sometimes practised, and made good by time. Therefore the infant shall present, of whatsoever age. Vide Co. Lit. 17. b. If a common patron presents first one clerk, and then another, the bishop may institute which he pleases; unless he revokes the presentation of one of them before he is admitted by the bishop. If there is a right of nomination in one, and a right of presentation in another, to the same benefice; he that has the right of nomination is the true patron, and the other is obliged to present the clerk which is nominated. 1 Inst. 156.

All persons who have ability to purchase or grant, have likewise ability to present to vacant benefices; but a dean and chapter cannot present the dean; nor may a clergyman who is patron present himself, though he may pray to be admitted by the ordinary, and the admission shall be good. It seems a prebendary, having the advowson of a living annexed to his prebend, may present himself. 7Barn. & C.303.

Coparceners are but as one patron, and ought to agree in the presentation of one person; if they cannot agree, the eldest shall present first alone, and the bishop is obliged to admit his clerk, and afterwards the others in their order shall prefer their clerks; jointtenants and tenants in common, must regularly join in presentation, and if either present alone, the bishop may refuse his clerk; as he may also the clerk presented by the major part of them; but if there are two joint-tenants of the next avoidance, one may present the other, and two joint-tenants may present a third, but not a stranger.

If a rector is made bishop, the king shall

present to the rectory unless he grant to the and he hath a right to present on an avoidbishop, before he is consecrated, a dispensation to hold it with his bishoprick; but if an incumbent of a church is made a bishop, and the king presents or grants that he should hold the church in commendam, which is quasi a presentation, a grantee of the next avoidance or presentation hath lost it, the king having the next presentation. See 2 Stra. 841. that this presentation is not confined to the lifetime of the bishop promoted. If the king present to a church by lapse, where he ought to present pleno jure, and as patron of the church, such a presentation is not good; for the king is deceived in his grant, by mistaking his title, which may be prejudicial to him; the presenting by lapse entitling only that presentation: the lord chancellor presents to the king's benefices under 201. &c. 2 Roll. Ab. 354: 3 Inst. 156: Co. Lit. 186: 2 Nels. Ab. 1288. 1290: 2 Lil. 351.

The king may repeal a presentation before his clerk is inducted; and this he may do by granting the presentation to another, which, without any farther signification of his mind, is a revocation of the first presentation.

Dyer, 290. 360.

If two patrons present their clerks to a church, the bishop is to determine who shall be admitted by a jus patronatus, &c. Moor,

A clerk may be refused by the bishop, if the patron is excommunicate, and remains in contempt 40 days. 2 Ro. Ab. 355. As to refusal for the insufficiency of the clerk presented, see tit. Parson.

If the bishop refuses to admit the clerk presented, he must give notice of his refusal, with the cause of it, forthwith; and on such notice the patron must present another clerk, within six months from the avoidance, if he thinks the objection against his first clerk contains sufficient cause of refusal; but if not, he may bring his quare impedit against the bishop. 2 Rol. Ab. 364. See ante, Lapse II.

If a defendant, or any stranger, presents a clerk pending a quare impedit, and afterwards the plaintiff obtains judgment, he cannot by virtue of that judgment, remove him who was thus presented; but he is to bring a scire facias against him to show cause quare executionem non habet; and then, if it be found that he had no title, he shall be amoved. The way to prevent such a presentation, is to take out a ne admittas to the bishop; and then the writ quare incumbravit lies, by virtue whereof the incumbent shall be amoved, and put to his quare impedit, let his title be what it will; but if a ne admittas be not taken out, and another incumbent should come in by good title, pendente lite, he shall hold it. Sid. 93: Cro. Jac. 93.

When a bishop hath a presentation in right of his bishoprick, and dies, neither his executor may present, but then he must enter for tor, nor heir, shall have the void turn, but the forfeiture of the grantee, in the life time

ance after the seizure, on death of the bishop.

Tenant in tail of an advowson, and his son and heir joined in the grant of the next presentation, tenant in tail died; this grant was held void as to the son and heir, because he had nothing in the advowson at the time he joined with his father in the grant. Hob. 45.

If a presentation itself bears date while the church is full, of another clerk, it is void; and where two or more have a title to present by turn, one of them presents, his clerk is admitted, instituted, and inducted, and afterwards deprived, he shall not present again, but that presentation shall serve his turn: though where the admission and institution of his clerk is void, there the turn shall not be served; as if, after induction, he neglects to read the thirty-nine articles, &c. his institution is void by the stat. 13 Eliz.; and the patron may present again. F. N. B. 33: 5

The right of presenting to a church may pass from one seised of the same by the patron's acknowledging of a statute, &c. which being extended, if the church becomes void, during the conusee's estate, the conusee may

present. Owen, 49.

Where a common person is patron, he may present by parol, as well as by writing, to the bishop. Co. Lit. 120. A presentation doth not carry with it the formality of a deed; but it is in the nature of a letter missive by which the clerk is offered to the bishop; and it passeth no interest, as a grant doth, being no more than a recommendation of a clerk to the ordinary to be admitted. But where a plaintiff declared upon a grant of the next presentation, and on over of the deed, it appeared to be only a letter written by the patron to the father of the plaintiff, that he had given his son the next presentation; adjudged that it would not pass by such letter, without a formal deed. Owen, 47.

Right of presentation may be forfeited in several cases; as by attainder of the patron, or by outlawry, and then the king shall present: and if the outlawry be reversed where the advowson is forfeited by the outlawry, and the church becomes void after, the presentation is vested in the crown; but if at the time of the outlawry, the church was void, then the presentation was forfeited as a chattel, and on reversing the same, the party shall be restored to it. By appropriation without licence from the crown, right of presentation may be forfeited; though the inheritance in this case is not forfeited, only the king shall have the presentation in nature of a distress, till the party hath paid a fine for his contempt. By alienation in fee of the advowson by a grantee for life of the next avoidance, a presentation is forfeited; and after such alienation the granking, in whose hands are the temporalities; of the incumbent, to determine his estate before the presentation vests in him on the in-299: 2 Roll. Ab. 352: Stat. 31 Eliz. c. 6. § 5.

See Simony, &c.
ADVOWSON OF THE MOIETY OF THE CHURCH, advocatio medietatis ecclesiæ.] Is where there are two several patrons, and two several incumbents in one and the same church, the one of the one moiety, the other of the other moiety thereof. Co. Lit. 17. b. Medictas advocationis, a moiety of the advowson is where two must join in the presentation, and there is but one incumbent: but see stat. 7 A. c. 18. mentioned in tit. Ad-

ÆBUDŒ, the Isles of Hebrides, or Wes-

tern Isles of Scotland.

ÆGLESBURGUS. Ailsbury, in Bucking-

ÆGYPTIANS. See Egyptians.

AERIE, aeria accipitrum.] An airy of goshawks, is the proper term for hawks, for that which of other birds we call a nest. And it is generally said to come from the French word aire, a hawk's nest. Spelman derives it from Sax. eghe, an egg, softened into eye (used to express a brood of pheasants), and thence eyrie, or, as above, aerie, a place or repository for eggs. The liberty of keeping these aeries of hawks was a privilege granted to great persons: and the preserving the aeries in the king's forests was one sort of tenure of lands by service.

ÆSŤIMATIO CAPITIS, pretium homi-King Athelstane ordained that fines should be paid for offences committed against several persons according to their degrees and quality, by estimation of their heads. Cress.

Ch. Hist. 834: Leg. Hen. 1.

ÆTATE PROBANDA. A writ that lay to inquire whether the king's tenant holding in chief by chivalry, was of full age to receive his lands into his own hands. It was directed to the escheator of the country; but is now disused, since words and liveries are taken away by the statute. Reg. Orig. 294.

AFFEERER'S, afferatores, from the Fr. affier, to affirm, or affeurer, to set the price or assize.] Are those who, in courtsleet, upon oath, settle and moderate the fines and amercements; and they are also appointed for moderating amercements in courts-baron.

See tit. Leet.

AFFIANCE, from the Lat. affidare, i. e. fidem dare.] The plighting of troth between a man and a woman, upon agreement of mar-

riage. Lit. sect. 39.

AFFIDARE. To plight one's faith, or give or swear fealty, i. e. fidelity. Affidari to be mustered and enrolled for soldiers. M. S. Dom. de Farendon, 22. 55.

AFFIDATIO DOMINORUM. An oath taken by the lords in parliament, anno 3 Hen.

6. Rot. Parl.

AFFIDATUS. A tenant by fealty.

AFFIDAVIT. An oath in writing; and cumbent's death. And by simony it may be to make affidavit of a thing, is to testify it likewise forfeited and lost. Moor, 269: Ploud. upon oath. An affidavit, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath: and the true place of habitation, and true addition of every person who shall make an affidavit, is to be inserted in his affidavit. 1 Lill. Ab. 44. 46. Affidavits ought to set forth the matter of fact only, which the party intends to prove by his affidavit; and not to declare the merits of the cause, of which the court is to judge. 21 Car. 1. B. R. plaintiff or defendant (having authority to take affidavits) may take affidavit in a cause depending; yet it will not be admitted in evidence at the trial, but only upon motions. Lill. 44. When an affidavit hath been read in court, it ought to be filed, that the adverse party may see it, and take a copy. Pasch. 1655. An affidavit taken before a master in Chancery, will not be of any force in the court of King's Bench, or other courts, nor ought to be read there; for it ought to be made before one of the judges of the court wherein the cause is depending, or a commissioner in the country, appointed for taking affidavits. Sty. 455. By stat. 29 Car. 2. c. 5. the judges, &c. of the courts at Westminster by commission may empower persons in the several counties of England to take affidavits concerning matters depending in their several courts, as masters in Chancery extraordinary used to do. Where affidavits are taken by commissioners in the country according to the stat. 29 Car. 2. and it is expressed to be in a cause pending between two certain persons, and there is no such depending, those affidavits cannot be read, because the commissioners have no authority to take them (and for that reason the party cannot be convicted of perjury upon them); but if there is such a cause in court, and affidavits taken concerning some collateral matter, they may be read. Salk. 461.

Stealing affidavit from the place of its deposit is a transportable felony. 7 and 8 G.4.

c. 29. § 21. See tit. Records.

Affidavits are usually for certifying the service of process, or other matters touching the proceedings in a cause; or in support of, or against motions, in cases where the court determines matters, &c. in a summary way.

If a person exhibits a bill in equity for the discovery of a deed, and prays relief thereupon, he must annex an affidavit to his bill, that he has not such deed in his possession, or that it is not in his power to come at it; for otherwise he takes away the jurisdiction of the common law courts, without showing any probable cause why he should sue in equity. 1 Chan. Ca. 11. 231: 1 Vern. 59. 180. 247.

But if he seeks discovery of the deed only, or that it may be produced at a trial at law, he need not annex such affidavit to his bill; for it is not to be presumed that in either of these cases he would do so absurd a thing, as exhibit a bill if he had the deed in his possession. 1 Vern. 180, 247.

In bills of interpleader, the party who prefers it must make affidavit that he does not collude with either of the other parties. 1 New. Ab. 66.

An affidavit must set forth the matter positively, and all material circumstances attending it, that the court may judge whether the deponent's conclusion be just or not. 1 New. 4h. 66.

And therefore on motion to put off a trial for want of a material witness, it must appear that sufficient endeavours were made use of to have him at the time appointed, and that he cannot possibly be present, though he may on farther time given. 7 Mod. 121: Comb. 421, 422: Tidd, 771. (9th ed.)

There being one affidavit against another relating to a judgment, the matter was referred to a trial at law upon a feigned issue, to satisfy the conscience of the court as to the

fact alleged. Comberb. 399.

See stat. 17 G. 2. c. 7. for taking and swearing affidavits to be made use of in any of the courts of the county palatine of Lancaster.

Where there is a good cause of action and a proper affidavit, defendant may be held to bail; and the court (of K. B.) will not go out of the affidavit or prejudice the cause, by entering into the merits. I Salk. 100. Plaintiff therefore must stand or fall by this affidavit, it being the constant and uniform practice not to receive a supplemental or explanatory affidavit on the part of plaintiff; nor a counter or contradictory one on the part of defendant. 2 Str. 1157; 1 Wils. 335.

AFFIDAVITS. By the 3 and 4 W. 4. c. 42. § 42. the powers of the courts of law and equity at Westminster to grant commissions to take affidavits, have been extended to Scotland and Ireland. Some other regulations with respect to affidavits, particularly those to hold to bail, have been introduced by the recent rules of court, which will be found in the books of practice.

AFFIDAVIT TO HOLD TO BAIL. An affidavit to hold to bail stated that the debt arose on a bill of exchange or order for, &c. drawn by A. upon and accepted by the defendant, payable to the plaintiff; upon this affidavit alone the court refused to order the bail-bond to be delivered up. Wills v. Ad-

cock, T. R. 27.

But the instrument declared upon appearing not to be a bill of exchange, the court, on reading the affidavit and the declaration, ordered the bail-bond to be given up upon the defendant's filing common bail. Ibid.

An affidavit to hold to bail upon a promissory note is insufficient, unless it state the date of the note, or that it was payable on demand, or was due or payable at a day then past. 2 Maule & Sel. Rep. 141. 475: see Tidd. 184. (9th ed.)

Vol. I .-- 8

It is sufficient to state in an affidavit to hold to bail, that the defendant is indebted to the plaintiff in such a sum, "for money had and received on account of the plaintiff," without adding "received by the defendant." Coppinger v. Beaton, 8 T. R. 338.

So also an affidavit to hold to bail stating that the defendant "was justly indebted to the plaintiff in 1001. upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficient without stating in what character the bill was due to the plaintiff, whether as payee or indorsee. Bradshaw v. Saddington, 7 E.

R. 94.

But such an affidavit, merely stating that the defendant was "indebted to the plaintiff in 54l. for goods sold and delivered;" (without adding by the plaintiff to the defendant) is insufficient. Perks v. Severn, 7 E. R. 194: Cathrow v. Hagger, 8 E. R. 106: Taylor v. Forbes, 11 E. R. 315: 2 Maule & Sel. Rep. 603.

So is an affidavit stating that the debt was due for interest of money under and by virtue of an agreement. 10 E. R. 358. And so it is when it only states the goods to be bargained and sold without saying delivered. 12 E. R. 338. An affidavit must state on what account the money is due. 4 Taunt. 154. By the rules of the three courts, Hilary Term, 1832, affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient, unless they state the money to have been paid, or the work and labour to have been done at the request of the defendant, and no supplemental affidavit is to be allowed to supply any deficiency in the affidavit to hold to

A co-assignee of a debt arising out of bills of exchange in his possession may sue in the name of the original creditor, and hold the defendant to bail on his own affidavit, swearing positively as to all the facts required which are within his own knowledge, and to the best of his knowledge and belief as to such as are within the knowledge of his principal and co-assignees. Creswell v. Lovell, 8 T. R. 418: Tidd, 182. (9th ed.)

The court will not discharge a defendant on a common appearance under 34 G. 2. c. 9. § 7. on the ground of the plaintiff's residing in Holland. Pieters and another v. Luyt-

jes, 1 B. & P. 1.

An affidavit of debt contracted abroad, made by a plaintiff in a foreign country before a magistrate of that country, is a sufficient foundation for a judge's order to hold the defendant to special bail. Omealy v. Newell, 8 E. R. 364. So is such an affidavit made before the chief justice of K. B. in Ireland signed by him and properly verified here. 1 Maul. & Sel. Rep. 302.

The court refused to discharge a defendant out of custody on the ground that the affidaentitled in the cause. Clarke v. Cawthorne, 7 T. R. 321.

In an affidavit to hold to bail in trover for a bill of exchange, it should be stated that the bill remains unpaid. Ibid. (Tidd's Prac. 188.

In E. 37 G. 3. similar rules had been obtained in Levi v. Ross, and Gaunt v. Marsh; on a similar objection, court inquired into the practice, and consulted the other judges; and when Clarke v. Cawthorne was disposed of, the court discharged the rules in both these cases; in support of which rules were cited R. v. Jones, 2 Str. 704: R. v. Pierson, And. 313: Bevan v. Bevan, 3 T. R. 601: R. v. Harrison, 6 T. R. 642. n; against the rules was cited King, q. t. v. Coles, 6 T. R. 640.

It is now settled that affidavits of any causes of action before process sued out must not be entitled in any cause. Reg. Gen. T .:

37 G. 3: 7 T. R. 454.

But an affidavit not entitled in any court, and only with the words "by the court" written under the indictment, is insufficient.

3 Maul. & Sel. 157.

If a defendant, on being informed that a bailable writ has been issued against him, voluntarily give a bail-bond, he cannot afterwards object to the insufficiency of the affidavit to hold to bail. Norton v. Danvers, ibid.

Such an objection cannot be taken advantage of after plea. Levy v. Duponte, ibid. 376. n.

An affidavit to hold to bail sworn in Ireland, but made for the purpose of being used in this country, ought to contain all the essential requisites of such an affidavit made in England; amongst others (according to a late act), that the defendant had not made a tender of the money in notes of the Bank of England. Nesbitt v. Pym, ibid. 376. n.

It is no objection to an affidavit to hold to bail, that it is not entitled "in the King's Bench," or that it appears to have been taken before "A. B. commissioner, &c." without adding "of the court of King's Bench," if in fact he were a commissioner of that court. Kennet and Avon Canal Company v. Jones,

ibid. 451.

Affidavit to hold to bail in trover, stating, "That the plaintiff's cause of action against the defendant was for converting and disposing of divers goods of the plaintiff, of the value of 250l. which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant, or any person on his behalf, had offered to pay to the plaintiff the 250l. or the value of the goods," was holden to be insufficient. Wooley v. Thomas,

The plaintiff in an affidavit to hold to bail, must give himself an addition, otherwise the

vit on which he had been holden to bail was | gul generales of Hilary Term, 2 W. 4. the addition of any person making an affidavit shall be inserted therein.

By stat. 37 G. 3. c. Affidavit to hold to bail. "No person shall be holden to special bail, unless the affidavit to hold to bail contain therein, that no offer has been made to pay the sum of money in such affidavit mentioned, &c. in notes of the governor and company of the Bank of England expressed to be payable on demand (fractional parts of the sum of 20s. only excepted,)" and court of King's Bench held an affidavit to hold to bail for 1190l. 11s. 3d. defective, on the grounds, that the tender of the debt in Bank notes was not properly negatived, according to the provisions of the above act. Jennings v. Mitchell, 1 East, 17. But see now 43 G. 3. c. 18. § 2. and this Dict. title Bank of England. But by the 59 G. 3. c. 49. § 1. the restrictions on payments in cash under the Bank acts ceased on the 1st May, 1823. So that it is no longer necessary to negative a tender of the debt in Bank notes in an affidavit to hold to bail. See as to the affidavit, Tidd's Prac. 178. et. seq.

AFFIDAVIT IN CRIMINAL CASES. See Affirmation. When a person convicted is about to receive judgment, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial, which affidavits the defendant may an-

swer. 1 T. R. 228: 6 T. R. 627.

As to the precedence in reading the affidavits, and hearing of counsel after verdict and by default, when a defendant is brought up for judgment, see 2 T. R. 683; and as to the admissibility of certain affidavits in such cases, see 2 T. R. 203. n: 2 E. R. 357: 3 T. R. 428: 4 B. & A. 314: 11 E. R. 457.

AFFINAGÉ, Fr. affinage.] Refining of metal, purgatio metalli; hence, fine and refine.

AFFINITY, is the tie arising from marriage betwixt the husband and the blood-relations of the wife, and betwixt the wife and the blood relations of the husband. Thus the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity; but there is no affinity betwixt the kinsmen themselves; thus the husband's brother and the wife's sister have no affinity. See Consanguinity.

To AFFIRM, affirmare.] To ratify or confirm a former law or judgment; so is the substantive affirmance used, stat. 8 Hen. 6. c. And the verb itself, by West. Symbol. part 2. tit. Fines, § 152. 19 H. 7. c. 20. See

also the next word.

AFFIRMATION. An indulgence allowed by law to the people called Quakers, who, in cases where an oath is required from others, may make a solemn affirmation that what they say is true. By stat. 9 G. 4. c. 32. Quakers or Moravians required to give evidefendant will be discharged on common bail. dence in any criminal or civil case, may, in-Jarrett v. Dillon, 1 East. 18. And by the re- stead of the usual oath, make solemn affirma-

tion or declaration. Persons falsely affirm- and unusual weapons, in such a manner as ing, &c. are declared liable to the penalties of perjury.—Quakers and Separatists are now permitted to affirm in every case where an oath is required by law. See Oaths, Quakers. Separatists.

AFFORARE. To affeer (which see); to set a value or price on any thing. Du Cange.

AFFORATUS. Appraised or valued, as things vendible in a fair or market. Cartular. Glaston. MS. fol. 58.

AFFORCIAMENT, afforciamentum.] A fortress, strong hold, or other fortification.

Pryn. Animad. on Coke, fol. 184.

AFFORCIARE. To add, to increase, or make stronger; Bract. lib. 4. c. 19; viz. in case of disagreement of the jury, let the assize be increased.

AFFOREST, afforesture.] To turn ground into a forest. Chart. de Forest. c. 1. When forest ground is turned from forest to other uses, it is called disafforested. Vide Forest.

AFFRAY, is derived from the Fr. word effrayer, to affright, and it formerly meant no more; as where persons appeared with armour or weapons not usually worn, to the terror of others. See stat. 2 Ed. 3. c. 3. But now it signifies a skirmish or fighting between two or more, and there must be a stroke given, or offered, or a weapon drawn, otherwise it is not an affray. 3 Inst. 158. An affray is a public offence to the terror of the king's subjects; and so called, because it affrighteth and maketh men afraid. 3 Inst. 158.

From this last definition it seems clearly to follow, that there may be an assault, which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be the ter-

ror of the people.

Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties.

Also, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections and insinuating a desire to fight. See, on this subject, Leach's Hawkins, i. c. 63; and ii. c. 10. § 17. c. 13. § 8. c. 14. § 8.

But admitting that bare words do not, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain that, in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous of The Company of Merchants trading to Af-

will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute 2 Ed. 3. c. 3: 7 R. 2. c. 13: 20 R. 2. c. 1. See tit. Riding Armed. To make an affray in any of the king's inferior courts of justice is highly finable. 3 Inst. 141: 12 Co.

As to the power of constables and others in cases of affray, see this Dictionary, tit. Con-

stable, III. 1.

A justice of peace may commit affrayers. until they find sureties for the peace. And there is no doubt but that a justice of peace may and must do all such things to that purpose, which a private man or constable are either enabled or required by the law to do: but it is said, that he cannot without a warrant authorize the arrest of any person for an affray out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. See Leach's Hawkins, P. C. i. c. 63.

It is requirable in the court leet; and punishable by justices of peace in their sessions, by fine and imprisonment. And it differs from assault, in that it is a wrong to the public; whereas assault is of a private nature. Lamb. lib. 2. Yet indictment lies, as being a breach of the public peace. See Quarrel-

ing in a Church, &c.

AFFREIGHTMENT, affretamentum.] The freight of a ship, from the French, fret, freight.

Stat. 11 H. 4. See Charter-party.

AFFRI, vel Afra.] Bullocks, or horses, or beasts of the plough.—Mon. Angl. par. 2. f. 201. And in the county of Northumberland, the people to this day call a dull or slow horse, a false aver or afer. Spelm. Gloss.
AFRICAN COMPANY. In the ni

In the ninth year of King William III. the trade to a great portion of Africa was in the hands of The Royal African Company, which, under a charter from Charles II., enjoyed an exclusive trade from the port of Sallce, in South Barbary, to the Cape of Good Hope, both inclusive, with all the islands near adjoining to those coasts. A new arrangement of this trade was made by stat. 9 and 10 W. 3. c. 26. by which the trade was opened; but this act continued in force only thirteen years; and not being renewed, the whole trade reverted again to the exclusive claim of the company.

This African trade was put on a new footing by stat. 23 G. 2. c. 31. which made it lawful for all the king's subjects freely to trade between the port of Sallee, in South Barbary, and the Cape of Good Hope. Thus was the trade taken out of the hands of the Royal African Company. The act then goes on to provide, that all persons trading to that coast, between Cape Blanco and the Cape of Good Hope, should be a body corporate, by the name

rica; the admission to which company was ty-one years; and no man can be ordained made very easy, namely, by the payment of only 40s. The trade between the port of Sallee and Cape Blanco was left open to all persons whatsoever. By stat. 25 G. 2. c. 40. (see stat. 24 G. 2. c. 49.) all the forts, castles, and factories on the coast, from the port of Sallee to the Cape of Good Hope, belonging to the old company, were transferred to, and vested in, the new company, for the like purpose of protecting and facilitating the trade.

The fort of Senegal had been ceded to France by the peace of 1783; and the French king guaranteed to Great Britain the possession of fort James, and the river Gambia, both lying between the fort of Sallee and Cape Rouge. On that occasion it was thought more beneficial for the trade, that the forts, settlements, and factories between those ports, which, by stat. 5 G. 3. c. 44. had been vested in the king, should be revested in the company; this was accordingly done by stat. 23 G. 3. c. 65. By 1 and 2 G. 4. c. 28. the African Company is abolished, the grants made to them are annulled, and their forts, castles, and possessions are vested in the crown.

AFRICAN SLAVE-TRADE. See this

Dict. tit. Slaves.

AGALMA. The impression or image of any thing on a seal. Chart. Edg. Reg. pro

Westmonast. Eccles. anno 698.

AGE, atas, Fr. age.] In common acceptation signifies a man's life from his birth to any certain time, or the day of his death; it also hath relation to that part of time wherein men live. But in the law it is particularly used for those special times which enable persons of both sexes to do certain acts, which before, through want of years and judgment, they are prohibited to do. As for example; a man at twelve years of age ought to take the oath of allegiance to the king: at fourteen, which is his age of discretion, he may consent to marriage, and choose his guardian: and at twenty-one he may alien his lands, goods, and chattels: a woman at nine years of age is dowable; at twelve she may consent to marriage; at fourteen she is at years of discretion, and may choose a guardian; and at twenty-one she may alienate her lands, &c. Co. Lit. 78.

There are several other ages mentioned in our ancient books, relating to aid of the lord, wardship, &c. now of no use. Co. Lit. The age of twenty-one is the full age of man or woman; which enables them to contract and manage for themselves, in respect to their estates, until which time they cannot act with security to those who deal with them; for their acts are in most cases either void or voidable. Perk.

Fourteen is the age by law to be a witness; and in some cases a person of nine years of age hath been allowed to give evidence. 2 Hawk. P. C. c. 46. § 27. None may be a member of parliament under the age of twen- 576.

priest till twenty-four; nor be a bishop till thirty years of age See tit. Infant; also tit. Baron and Feme, Dower, Pleading. (As to the age of criminal responsibility, see tit. In-

By stat. 9 G. 4. c. 31. § 17, 18, carnally knowing and abusing a girl under ten years, is declared felony, without benefit of clergy: and to carnally know and abuse a girl above ten, and under twelve, is declared to be a misdemeanor, punishable by imprisonment

AGE-PRIER, ætatem precari, or ætatis precatio.] Is when an action being brought against a person under age for lands which he hath by descent, he, by petition or motion, shows the matter to the court, and prays that the action may stay till his full age, which the court generally agrees to. Terms de Ley, 30. See Parol, Demurrer.

AGENFRIDA. The true lord or owner of any thing. Leg. Inc. c. 50: apud Brompt. c. 45. AGENHINE. See Third-Night-Awn-hinde.

AGENT AND PATIENT. When the same person is the doer of a thing, and the party to whom done; as where a woman endows herself of the best part of her husband's possessions, this being the sole act of herself to herself, makes her agent and patient. Also if a man be indebted unto another, and afterwards he makes the creditor his executor, and dies, the executor may retain so much of the goods of the deceased as will satisfy this debt; and by his retainer he is agent and patient, that is, the party to whom the debt is due, and the person that pays the same. But a man shall not be judge in his own cause, quia iniquum est aliquem suæ rei esse judicem. 8 Rep. 118. 138. These words are also used in the criminal law, to designate the two offenders who are guilty of unnatural practices together.

AGENT. By stat. 7 and 8 G. 4. c. 29. § 49. any banker, merchant, broker, attorney, or other agent, converting to his own use any money, security for money, chattel, power of attorney, or valuable security, or the proceeds of the same, or any share in any fund to which such power of attorney relates, is declared guilty of a misdemeanor, and liable to be transported for fourteen years, or punished by imprisonment, &c. See tit. Factor, Mer-

chant, Embezzlement.

AGILD. Free from penalties, not subject to the customary fine or imposition. Sax. a gild, sine mulcta. Leges Aluredi, c. 6.

AGILER, from the Sax. a gilt (without fault), an observer or informer. Blount.

AGILLARIUS. Anciently an hey-ward, herd-ward, or keeper of cattle in a common field, sworn at the lord's court by solemn oath.—There were two sorts, one of the town or village, the other of the lord of the manor. Cowel. See Kennett's Paroch. Antiq. 534.

AGIST (from the Fr. giste, a bed or rest- nerally incapable of contracting, except for ing place), signifies to take in and feed the cattle of strangers in the king's forest, and to gather up the money due for the same. Chart. de Foresta, 9 H. 3. c. 9. The officers appointed for this purpose are called agisters or gist1 takers, and are made by the king's letters patent: there are four of them in every forest wherein the king hath any pawnage. Manw. Forest-Laws, c. 11 to 30. They are also called agistators, to take account of the cattle agisted.

AGISTMENT, Agistamentum, from Fr. geyser, gister (jacere), because the beasts are levant and couchant during the time they are on the land.] Is where other men's cattle is taken into any ground, at a certain rate per week: it is so called, because the cattle are suffered agiser, that is, to be levant and couchant there: and many great farms are employed to this purpose. 2 Inst. 643. Our graziers call cattle which they thus take into keep gisements; and to gise or juice the ground, is when the occupier thereof feeds it not with his own stock, but takes in the cattle of others to agist or pasture it. Agistment is likewise the profit of such feeding in a ground or field; and extends to the depasturing of barren cattle of the owner, for which tithes shall be paid to the parson. There is agistment of seabanks, where lands are charged with a tribute to keep out the sea. Terræ Agistatæ are lands whose owners are bound to keep up the sea-banks. Spelm. in Romney-Marsh. See tit. Tithes.

AGITATIO ANIMALIUM IN FORES-TA. The drift of beasts in the forest. Leg. Forest.

AGIUS, Gr. i. e. holy. Mon. Angl. p. 15. 17. AGNATES, Agnati.] Relations by the father: as cognates (cognati), are relations by the mother. Scotch Dict. See Consan-

AGREEMENT, agreamentum, aggregatio mentium.] A joining together of two or more minds in any thing done, or to be done. Plowd. 17. The joint consent of two or more parties to a contract or bargain; or rather the effect of such consent.

The subject seems to divide itself in the following manner :-

I. Who may be parties to, or bound by an agreement.

II. The various kinds of agreements; and of the assent and disagreement of parties.

III. Of the operation of the statute of frauds; and herein of evidence to explain agreements.

IV. Of compelling the performance of agreements; and herein of fraud in

making them.

I. A person non compos is not capable of entering into any agreement. See tit. Idiots and Lunatics.

necessaries, &c. See tit. Infant.

A wife during the intermarriage is incapable of entering into any agreement in pais, being under power of her husband. See tit. Baron and Feme.

The ancestor seised in fee may, by his agreement, bind his heir; therefore if A. agrees to sell lands, and receives part of the purchase money, but dies before a conveyance is executed, and a bill is brought against the heir, he will be decreed to convey, and the money shall go to the executor; especially if there are more debts due than the testator's personal estate is sufficient to pay. 2. Vern. 215: Abr. Eq. 265. But if tenant in tail agrees to convey, or bargains and sells the lands for valuable consideration, without fine or recovery, and dies before the fine or recovery be levied or suffered, the issue is not bound either in law or equity: for equity cannot set aside the statute de donis, which says, That voluntas donatoris observetur; nor can the court set up a new manner of conveyancing, and thereby supersede fines and recoveries; for thereby the king would lose the perquisites by fines, or the writs of entry and fines for alienation, Hob. 203: 1 Chan. Ca. 171: 1 Lev. 239: 2 Vent. 350: Bac. Ab. Agreement. (A.) (Ed. by Gwillim and Dodd.) Yet;

If there be tenant in tail in equity as of a trust, or under an equitable agreement, and he for valuable consideration bargains and sells the land without fine or recovery, this shall bind his issue, because the statute de donis doth not extend to it, being an entail in equity, and a creature of the court. 1 Chan. Ca. 234: 2 Chan. Ca. 64: 1 Vern. 13. 440: 2 Vern. 133. 583. 72. And so it seems as to the tenant in tail of a copyhold. Bac. Ab. Agreement. (A.)

II. On this head shall be considered,

1st. An Agreement executed already at the beginning; as where money is paid for the thing agreed, or other satisfaction made. 2dly. An agreement after an act done by another; as where one doth such a thing, and another person agrees to it afterwards, which is executed also; and 3dly. An agreement executory, or to be performed in futuro. This last sort of agreement may be divided into two parts; one certain at the beginning, and the other when, the certainty not appearing at first, the parties agree that the thing shall be performed upon the certainty known. Terms de Ley. 31. See tits. Condition, Contract, Covenunt.

Every agreement ought to be perfect, full, and complete, being the mutual consent of the parties; and should be executed with a recompense, or be so certain as to give an action or other remedy thereon. Plowd. 5. Any thing under hand and seal, which imports an agreement, will amount to a cove-Also an infant, for the same reason, is ge- | nant; and a proviso, by way of agreement, may be brought upon them. 1 Lev. 155.

If any estate in possession or reversion be made to me, I must agree to it before it will be settled; for I may refuse, and so avoid it: a release, deed, or bond, is made and delivered to another to my use; this will vest in me without any agreement of mine; but, if I disagree to it, I make the deed void. Dyer. 167. And regularly, where a man hath once disagreed to the party himself, he can never after agree: and obligation being made to my use, and tendered to me, if I refuse it, and after agree again and will accept it; now this agreement afterwards will not make the obligation good that was void by the refusal. Co. Lit. 79: 5 Rep. 119.

An agreement may be as well in the party's absence as in his presence; but a disagreement must be to the person himself to whom made. 2 Rep. 69. When an estate is made to a feme covert, it is good, till disagreement, without any agreement of the husband: though a new estate granted to the wife where she hath an estate before, as by the taking of a new lease, and making a surrender in law, will not vest till the husband agree

to it. Hob. 204.

That an assent on the part of the person who takes, is also essential to all conveyances and contracts; for where a man is to be vested with an interest, his acceptance is necessary. See 2 Ventr. 198: 2 Salk. 618: 2 Leon. p. 72. pl. 97: 5 Vin. Ab. 508. pl. 1. See Thompson v. Leach, 2 Ventr. 108. in which this subject is very elaborately discussed by Ventris, J. See also Butler and Baker's case, 3 Co. 26.

III. Besides the bare words of an agreement, the common law, to prevent imposition, ordained certain ceremonies where an interest was to pass; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet in equity, where there was a consideration, the want of ceremonies was not regarded. However, in former times, courts of equity were very cautious of reliev-ing bare parol agreements for lands, not signed by the parties, nor any money paid; 2 Freem. 216; although they would sometimes give the party satisfaction for the loss he had sustained. But now by the Statute of Frauds, 29 Car. 2. c. 3. § 1. all leases of messuages, lands, &c. created without writing, signed by the parties or their agents, shall only have the effect of estates at will (which is held to be mean estates from year to year, determinable by notice), except leases not exceeding the term of three years, whereon the rent shall be 2s. 3d. of the improved value of the thing demised.

By § 3. no leases, estates, or uncertain interest in any messuages or lands shall be assigned, granted, or surrendered, unless by

amounts likewise to a covenant; and action or by act or operation of law. See farther Bac. Ab. Agreement. (C. 1.) (Ed. by Gwillim and

By § 4. no action shall be brought thereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or thereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made, upon consideration of marriage, or upon any contract or sale of lands, &c. or any interest therein, or upon any agreement not to be performed within one year, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized. (See as to promises by executors or administrators, Bac. Ab. ubi supra.) As to promises to answer for the debt, &c. of another, it is held, that in order to render writing necessary, both parties must be liable; for if only the party making the promise is liable, it is not a case within the statute. Thus, if A. is hiring a house, and B. to induce the owner to let it, promises to see it delivered safe, this promise requires writing. But if B. comes to the owner, and desires him to let A. have his house, or to sell him goods, and he B. will see him paid, this is an original liability in B., and he alone is liable, and no writing is necessary. See Bac. Ab. ubi su-pra: 2 Term. Rep. 80: Cowp. 227: 2 Wils. 94: 2 Barn. & A. 613: 4 Bing. 474. If one promise to pay the debt of a debtor, in consideration of his being discharged out of custody, this is not within the statute, since the debt by the discharge is extinguished, and therefore the promiser only is liable. 1 Barn. & A. 297: and see 2 Wils. 308: 2 East, 325: Ry. & Moo. 348. Buc. Ab. ubi supra. The word agreement in the fourth section means not merely the promise on one side, but the consideration for it on the other, and therefore the consideration must appear in writing as well as the promise, where the case is within the statute. 5 East, 10: 9 East, 348: 4 Barn. & A. 595: 3 Bro. & Bing. 14: 3 Bing. 107: 4 Bing. 455. As to agreements in consideration of marriage-it is held that the statute does not apply to mutual promises to marry. Bac. Ab. Agreement. (C. 3.) As to contracts for sale of lands, tenements, &c .- it is held that an agreement for abatement of rent, is within the clause. 1 Scho. & Sef. 306. So also a contract for a growing crop of grass, to be mown and made into hay by the buyer, but no time being fixed for the mowing. 6 East, 602. So also a sale of growing underwood, to be cut by the purchaser. 1 Younge & J. 396. So a sale of growing potatoes. Bro. & Bing. 99: but see 9 Barn. & C. 561. But where the contract was for a crop of podeed or note in writing, signed by the party, tatoes to be taken immediately out of the

ground, it was considered a sale of personal | bargain, this is not a part payment within the chattels, not within the statute. 11 East, 362: 2 Maule & S. 205: 5 Barn. & C. 836: 9 Barn. & C. 561. A deposit of title deeds by way of security, constitutes an equitable mortgage without writing. 1 Bro. C. R. 269: and see farther Bac. Ab. ubi supra. As to agreements not to be performed within one year from the making.—The clause extends only to cases when, by express agreement, the contract is not to be performed within one year, and not to agreements depending on a contingency, which may happen in a year or not. Bac. Ab. ubi supra. A contract to hire a carriage for four years, paying an annual sum for it, and determinable on paying a year's hire, is within the clause. 9 Barn. & C. 392:

and see 1 Barn. & A. 722. By § 17. no contract for the sale of any goods, wares, and merchandise, for the price of 10l. or upwards, shall be allowed to be good, except the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain, be signed by the parties or their agents. This section is held to apply not merely to the present and immediate sale of goods, but also to goods bespoken, to be delivered and paid for in future, and even where the goods are not yet in esse, at least in the state in which they are to be delivered. Thus a sale of flour not yet ground, and of timber at so much per foot, not yet cut, are held to be within the clause. 5 Barn. & A. 614: 9 Barn. & C. 361: 10 Barn. & C. 446: Bac. Ab. Agree. ment. (C. 3.) A contract for purchase of several articles at the same time, and each under 10l., and at separate prices, but in the whole amounting to above 10l., is within the section. 2 Barn. & C. 37: 1 Barn. & C. 156. As to the acceptance of goods and part payment altering the clause. It is held that where goods are bulky and ponderous, the statute may be satisfied by delivery of the key of the warehouse, or other indicum of property. 1 East, 192. The offering by the buyer to sell the goods to another who refuses, is an act which ought to be left to the jury, to say whether it is an acceptance or not. 7 Taunt. 597. The acceptance of a sample is an acceptance within the statute, if it is part of the bulk, not otherwise, 7 East, 558. As long as the lien of the vendor remains, the possession of the goods is not so transferred to the vender as to amount to an acceptance within the statute. 2 Barn. & C. 44: 3 Barn. & C. 1. 357: and see 4 Barn. & C. 511: Bac. Ab. ubi supra. An acceptance by a wharfinger to carry the goods to the buyer, is not an acceptance within the statute. 5 Barn. & A. 557. If the purchaser draw a shilling across the hand of the vendor, and return the money into his own pocket, which is

statute. 7 Taunt. 597. As to the memorandum in writing within this section .- It is held that the consideration need not be expressed, since note or memorandum of the bargain is different from agreement in the fourth section. 6 East, 307. Where the seller only signed the memorandum, and the buyer's name did not appear, this was held insufficient. 1 New. R. 252. The memorandum may be made of two separate writings, if they refer sufficiently to each other. 2 Bos. \$\frac{1}{2}\$ I'ull. 238: 1 Bing. R. 9: 15 East, 103: 6
Barn. \$\frac{1}{2}\$ C. 437. The place of signature is immaterial. "I., A. B., agree," &c.; or the writing of the party has been held sufficient. 1 Esp. Ca. 190: 3 Meriv. 2. A party may sign by printing his name. 2 Bos. & Pull. 238. Sales by auction are within this section, and the auctioneer is the agent of both parties, and a memorandum by him binds both. 2 Barn. & C. 945: Bac. Ab. ubi supra. In sales by brokers, the entry in the broker's book, and the bought and sold notes transcribed therefrom, and signed by the broker, and delivered to the parties, are held a sufficient compliance within the statute. East, 569: 2 Camp. 337: 5 Barn. & C. 436. For the cases on this point, see Bac. Ab. ubi

By the stat. of 29 Car. 2. c. 3. the Statute of Frauds, if an agreement be by parol, and not signed by the parties, or somebody lawfully authorized by them (Pre. Ch. 402), if such agreement be not confessed in the answer, it cannot be carried into execution. But where, in his answer, the defendant allows the bargain to be complete, and does not insist on any fraud, there can be no danger of perjury; because he himself has taken away the necessity of proving it. Pre. Ch. 208. 374: 1 Vez. 221. 441: Amb. 586. So if it be carried into execution by one of the parties; 2 Vern. 455: Pre. Chan. 519: 2 Freem. 268: Amb. 586: 2 Stra. 783: Bunb. 65. 94: 9 Mod. 37: 1 Vez. -2. 221. 297. 441: 3 Atk. 4: 1 Bro. Rep. 404: 2 Bro. Rep. 566. MSS. 4th July, 1786; as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed. See 2 Bro. Rep. 566. And it is unconscionable, that the party that has received the advantage, should be admitted to say, that such contract was never made. So, if the signing by the other party, or reducing the agreement into writing, be prevented by fraud, it may be good. Pre. Ch. 526: 5 Vin. Ab. 521. pl. 31: 1 Vern. 296. And although parol agreements are bound by the statute, and agreements are not to be part parol, and part in writing; yet a deposit or collateral security, for the performance of the written agreement, is not within the purview of the called in the North of England, striking of a statute. 2 Vern. 617: 1 Bro. Rep. 269: 19th

164-175.

It was determined, very soon after the passing of the statute of frauds, that an agreement signed by one of the parties, should be binding on the party signing it. 2 Ch. Ca. 164, And in Sir James Lowther v. Carill, 1 Vern. 221. the court appears to have thought, that one of the parties making alterations in the draft, and sending it to the other to execute, who did execute it, would bring the case out of the statute. But the authority of this latter decision seems to be done away by Lord Macclesfield's decree in Hawkins v. Holmes, 1 P. Wms. 770; by which his lordship held, that unless in some particular cases, where there has been an execution of the contract, by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for completing it; and that to put a different construction upon it would be to repeal it; and his lordship therefore held, that the defendant having altered the draft with his own hand, was not a signing to take it out of the statute; though the vendor afterwards executed the conveyance and caused it to be registered. But this question received more particular consideration in the case of Stokes v. Moore, at Serjeant's-Inn Hall, March 1, 1786, in which case the court delivered their opinions that the signature required by the statute is to have the effect of giving authenticity to the whole of the instrument: and where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found; as in the formal introduction to a will. [Thus, "This is the last will and testament of me A. B."-written with the testator's own hand, has been deemed a sufficient signing.] But it could not be imagined, that a name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required:-Ithus, in notes of an agreement, "Mr. A. to do so and so," though written by A. himself, not a sufficient signing;] upon which, as well as upon another ground, the bill was dismissed. See Mr. Cox's note (1) to Hawkins v. Holmes, 1 P. Wms. 770: 1 Rep. Ca. 190: 2 Meriv. 2: 2 Bos. & Pull. 238.

If a defendant confess the agreement charged in the bill, there is certainly no danger of fraud or perjury in decreeing the performance of such agreement. But it is of considerable importance to determine whether the defendant be bound to confess or deny a merely parol agreement, not alleged to be in any part executed; or if he do confess it, whether he may not insist on the statute, in bar of the performance of it? See Treatise of Equity, p. 168, note (d), where the subject is very accurately and ably discussed. To allow a object to be interposed in bar of the perform- templation of them.

April, 1785. MSS. See Treatise of Equity, i. | ance of a parol agreement, in part performed, were evidently to encourage one of the mischiefs which the legislature intended to prevent. It is therefore an established rule, that a parol agreement, in part performed, is not within the provisions of the statute. See Whitchurch v. Bevis, 2 Bro. Rep. 566.

As to what acts amount to a part performance, the general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory, or ancillary to it. Gunter v. Halsey, Amb. 586: Whitbread v. Brockhurst, 1 Bro. Rep. 412. giving of possession is therefore to be considered as an act of part performance. Fonbl. 38; 3 Ves. I. 378; 18 Ves. 328; 1 Swanst. 172: Bac. Ab. Agreement (D.): Stewart v. Denton, MSS. 4th July, 1786. But giving directions for conveyances, and going to view the estate, are not. Clerk v. Wright, 1 Atk. 12: Whaley v. Bagnal, 6 Bro. P. C. 45. Nor is payment of auction duty on a sale. 13 Ves. 456. Payment of money has been also said to be an act of part performance.

Lacons v. Martins, 3 Atk. 4. But it seems now held that in case of lands, payment of money is not a part performance: as to goods, it is expressly declared so. 1 Scho. & Lef. 22; 4 Ves. 720; 14 Ves. 388; Bac. Ab. Agreement, (D.) But it seems that payment of a sum, by way of earnest, is not. Seagood v. Meale, Pre. Ch. 560. Lord Pengall v. Ross, 2 Eq. Ca. Ab. 46. pl. 12; Simmons v. Cornelius, 1 Ch. Rep. 128. But see Voll v. Smith, 3 Ch. Rep. 16: and Anon, 2 Freem. 128.

In the case of Seagood v. Meale, Pre. Ch. 561. it is said, that, " where a man, on promise of a lease to be made to him, lays out money in improvements, he shall oblige the lessor afterwards to execute the lease; because it was executed on the part of the lessee." This dictum is sanctioned by the spirit of equity, and seems to do away the decisions which require, even under the circumstance of premises being improved, an averment of its being part of the parol agreement, that it should be reduced into writing. But see 14 Ves. 386: 2 Scho. & Lef. 1.

A letter not only takes an agreement in consideration of marriage out of the statute, but also agreements respecting lands, &c. Ford v. Crompton, 2 Bro. Rep. 32: Tawny v. Crowther, 2 Bro. Rep. 318. But whenever a letter is relied on as evidence of an agreement, it must be stamped before it can be read. Ford v. Crompton. It must also distinctly furnish the terms of agreement. Seagood v. Meale, Pre. Ch. 560; Stra. 426: Clark v. Wright, 1 Atk. 12. Or it must at least refer to some written instrument, in which the terms are set forth. Tawney v. Crowther, supra. It must likewise appear, that the other statute having the prevention of frauds for its party accepted such terms, and acted in con-

Where an agreement in writing is executed, ments, for the non-performance of which the it were not only against the express provisions party would be entitled to damages at law: of the statute of frauds, but also against the but as the decreeing of specific performance policy of the common law, to allow of parole evidence, for the purpose of adding to, or varying the terms of the agreement. 2 Alk. 383: 3 Atk. 8: Bunb. 65: 3 Wils. 275. But if it be alleged, that some material part of the agreement was omitted, by fraud, or that the intention of the parties was mistaken and misapprehended by the drawers of the deed. in such cases, it seems, evidence will be admissible, even though the agreement be executed; 2 Atk. 203: 2 Vern. 98: 2 Vern. 547: 2 Ch. Ca. 180; a fortiori, such evidence will be admissible where the agreement is executory. 3 Atk. 388: 1 Vez. 456. It may be material to observe, where evidence dehors the deed is admitted to show what was the consideration of the agreement, that the consideration to be proved must be consistent with the consideration stated. 3 Term. Rep. 474: Fulbeck's Parallel, p. 9. And if the deed specify the consideration to have been a sum of money, evidence is not admissible, in order to superadd another consideration, as natural love and affection, &c. 2 P. Wms. 204: 1 Vez. 128. Nor if the consideration fail, can evidence be admitted to support the conveyance as a gift. 2 Vez. 627: 1 Atk. 294: 3 Bro. Rep. 156. And though the deed specify a particular consideration and other considerations, generally, no consideration but that expressed shall be intended; Cro. Eliz. 242, 3; but qu. whether other considerations might not be proved.

An agreement to lease, and that the lessor would not turn out the tenant so long as he adhered to the terms of the agreement, will operate as a tenancy from year to year, and may be determined by either party giving the regular notice to quit. 8 E. R. 165; and see

5 T. R. 471. there cited.

If a party, entitled under an agreement to receive a certain thing from another, by his own act renders it impossible to the other party to supply what he was to receive, he vacates the agreement. 2 Taunt. 150.

IV. It has been said that where the contract is good at law, equity will carry it into execution; but this proposition is too generally stated; for though equity will enforce the specific performance of fair and reasonable contracts where the party wants the thing in specie, and cannot have it in any other way; yet, if the breach of the contract can be, or was intended to be compensated in damages, courts of equity will not interpose. See Errington v. Annesley, 2 Bro. Rep. 341: Cudd v. Rutter, 1 P. Wms. 570: Capper v. Harris, Bunb.

It is assuredly a general rule, that courts of equity will, under certain circumstances, enforce the specific performance of agree-Vol. 1.-9

is in the discretion of the court, it must not be considered as an universal rule; for if the plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance: though perhaps, he might at law be subject to damages for not completing his purchase. See Marlow v. Smith, 2 P. Wms. 198: Shapland v. Smith, 1 Bro. Rep. 75: Cooper v. Denne, 21st July, 1792, MSS.

Qu. Whether courts of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed (but not executed), varying the terms expressed in the letter? See Coke v. Mascall. 2 Vern. 34. Or if the terms be varied by parole. Jordan v. Sawkins, 3 Bro. Rep. 388. And as a letter setting forth the terms of an agreement, takes the agreement out of the statute, it being a sufficient signing; so, it seems, it is a sufficient signing, if a person, knowing the contents, subscribe the deed as a witness only.

Welford v. Beazely, 3 Atk. 503.

In the civil law, counter-letters, and all secret acts which make any change in agreements, are of no manner of effect with respect to the interest of a third person; 1 Vern. 240. 348. 475: 2 Vern. 466: 1 P. Wms. 768: 2 Vez. 375: 1 Bla. Rep. 363; for this would be an infidelity contrary to good manners and the public interest. In cases of this nature it is not necessary that the fraud respect an article expressly contracted for: but any representation, misleading the parties contracting on the subject of the contract, is within the principle which governs this class of cases. See 1 Bro. Rep. 543; and stated in Mr. Cox's note to Roberts v. Roberts, 3 P. Wms. 74.

The principle of the rule there laid down, though it has been most frequently applied to agreements in fraud of marriage, extends to every other species of agreements; therefore, where a tradesman compounding his debts, privately agreed with some of his creditors to pay them the whole of their debts, by which they were induced to appear to accept of the composition; such private agreement was held to be a fraud on the other creditors; 2 Vern. 71. 602: 1 Atk. 105; and it seems that such fraud is now relievable at law, 2 Term Rep. 763. The case of Lewis v. Chase, 1 P. Wms. 620. is, however, irreconcilcable with this principle; it may therefore be material to observe, that it is very much shaken, if not over-ruled, by several subsequent cases, particularly Smith v. Bromley, Doug. 670. But though private agreements in fraud of third persons be void, yet if a bond or note be given by A. the more effectually to enable B. to bring about a match, &c., such bond or note may be recovered upon at law. Montefiori v. Montefiori, 1 Bla. Rep. 363. And a conveyance of land for such purpose, notwithstand- | abateth or entereth the same day, and dispos-13 Vin. Ab. 525: 2 Bro. P. C. 88.

AGRI. Arable lands in the common fields.

Fortescue.

AID. See tit. Taxes; Tenure, I. 8. II. 6. AID-PRAYER, auxilium petere.] A word made use of in pleading, for a petition in court to call in help from another person that gives strength to the party praying in aid, and to the other likewise, by giving him an opportunity of avoiding a prejudice growing towards his own right. As tenant for life, by the courtesy, for term of years, &c. being impleaded, may pray in aid of him in reversion; that is, desire the court that he may be called by writ to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. F. N. B. 50.

Aid shall be granted to the defendant in ejectione firmæ, when the title of the land is in question: lessee for years shall have aid in trespass; and tenants at will: but tenant in tail shall not have aid of him in remainder in fee; for he himself hath the inheritance. Danv. Ab. 292. In a writ of replevin, the avowry being for a real service, aid is granted before issue; and in action of trespass after issue joined, if there be cause, it shall be had for the defendant, though never for the plaintiff. Jenk. Cent. 64: Fitz. Ab. 7. There ought to be privity between a person that joins in aid and the other to whom he is joined; otherwise joinder in aid shall not be suffered. Danv. 318. There is a prayer in aid of patrons, by parsons, vicars, &c. And between coparceners, where one coparcener shall have aid of the other to recover pro rata. Co. Lit. 341. b. And also servants having done any thing lawfully in right of their masters shall have aid of them. Terms de Ley, 34.

AID OF THE KING, auxilium regis.] Is where the king's tenant prays aid of the king, on account of rent demanded of him by others. A city or borough, that hold a fee farm of the king, if any thing be demanded against them which belongs thereto, may pray in aid of the king: and the king's bailiffs, collectors, or accountants shall have aid of the king. In these cases the proceedings are stopped till the king's counsel are heard to say what they think fit, for avoiding the king's prejudice; and this aid shall not in any case be granted after issue; because the king ought not to rely upon the defence made by another. Jenk. Cent. 64: Terms de Ley, 35. See stats. 4 Ed. 1. c. 1, 2: 14 Ed. 3. st. 1. c. 14: and 1 H. 4. c. 8. See also Com. Dig. tit. Aide.

AIDERS, Aydowers (stat. 25 H. 8. c. 22 & 8.), from advoyer, an advocate, an abetter.

See tit. Accessory.

AILE, or aiel of the French, aieul, avus.] A writ which lies where a man's grandfather being seised of lands and tenements in fee simple the day that he died, and a stranger

ing a deseasance, will be sustained in equity. sesses the heir of his inheritance. F. N. B. 222. See tit. Assize of Mort d' Ancestor.

AL or ALD, from Saxon eald, age.] This syllable in the beginning of the names of places denotes antiquity; as Aldborough, Aldworth, &c. Blount.

ALA CAMPI. Wingfield.

ALÆ ECCLESIÆ. The wings or sidehath an interest in the thing contested; this aisles of the church; from the French, Les aisles de l' Eglise.

ALÆNUS. The river Ax in Devonshire. ALANERARIUS. A manager and keeper of dogs, for the sport of hawking, from alanus, a dog known to the ancients. Du Fresne. But Mr. Blount renders it a faulconer.

ALAUNA, Æ. Alnwick, in Northumber-

land.

ALAUNA. Alcester, in Warwickshire. ALBA, the alb.] A surplice or white sacer-

dotal vest anciently used by officiating priests. ALBA FIRMA. When quit-rents, payable to the crown by freeholders of manors, were reserved in silver or white money, they are anciently called white rents or blanch farms. reditus albi; in contradistinction to rents reserved in work, grain, &c. which were called reditus nigri, or black mail. 2 Inst. 19; and vide 2 Inst. 10. where it seems used for a species of tenure. See tit. Blanch firmes.

In Scotland this kind of small payment is called Blench-holding, or reditus alba firma,

2 Comm, 43.

In these blanch charters, where the duty consists of some trifling payment in acknowledgment of the right of superiority, it is usually expressed to be nomine albæ firmæ; and it is also usual to find the words si petatur tantum added, by which, if the duty be not demanded within the year, the right to demand it is lost. Scotch Dict.

ALBA MARLA. Albemarle.

ALBINEIO, DE ALBENETO, D'AUBENEY. Albiney.

ALBERGELIUM, halsherga.] An habergeon; a defence for the neck. Hoveden, 6.1.

ALBINATUS JUS, is the droit d'aubaine in France, whereby the king, at the death of an alien, is entitled to all he is worth, unless he has peculiar exemption. Com. m. 372. Albinatus is derived from alibi natus. Spelm. Gloss. 24. This was repealed by the laws of France in June 1791.

DE ALBO MONASTERIO. Whitchurch. ALBREA and ALBERICUS. Aubrey.

ALBUM, see Alba Firma.

ALDER, the first; as alder best, is the best

of all; alder liefest, the most dear.

ALDERMAN, Sax. ealderman, Lat. aldermannus.] Hath the same signification in general as senator, or senior: but at this day, and long since, those are called aldermen who are associates to the civil magistrates of a city or town corporate See Spelm. Gloss. 25. An alderman ought to be an inhabitant of the place, and resident where he is chosen; and

if he removes he is incapable of doing his duty in the government of the city or place, for which he may be disfranchised. Mod. Rep. 36. Alderman Langham was a freeman of the city of London, and chosen alderman of a ship in any such business; as also owners of the city of London, and chosen alderman of a ship in any such business; as also owners of ward, and being summoned to the court of aldermen, he appeared, and the oath to serve the office was tendered to him, but he refused to take it in contempt of the court, &c. whereupon he was committed to Newgate; and it was held good. March. Rep. 179.

The aldermen of London, &c. are exempted from serving inferior offices; nor shall they be put upon assises, or serve on juries, so long as they continue to be aldermen. 2 Cro.

585. See tit. London.

In Spelman's Glossary we find that we had anciently a title of aldermannus totius Anglia; mentioned in an inscription on a tomb in Ramsey Abbey. And this officer was in nature of Lord Chief Justice of England. Spelm. Alderman was one of the degrees of nobility among the Saxons, and signified an earl; sometimes applied to a place, it was taken for a general, with a civil jurisdiction as well as military power; which title afterwards was used for a judge; but it literally imports no more than elder.

There was likewise aldermannus hundredi (the alderman of the hundred), which dignity was first introduced in the reign of Hen. 1. Du Fresne: Cowel.

ALDERNEY. See Jersey.

DE ALDITHELEIA. Audley.

ALECENARIUM. A sort of hawk called

a lanner. See Putura.

ALEHOUSES. By the last act (9 G. 4: c. 61.) passed on this subject (which extends to England only,) it is enacted that in every division, &c. of counties, cities, and towns, a general annual meeting shall be held for granting licences, to persons keeping or about to keep inns, alehouses, and victuallinghouses, to sell exciseable liquors by retail to be consumed in such inns, &c.

In Middlesex and Surrey these licensing meetings are to be held within the first ten days in March; and in all other counties between the 20th of August and 14th of September; at which meetings the justices (not by the act disqualified from granting such licenses) may grant such licences to such persons as such justices, in the exercise of the powers of the act, and in the exercise of their discretion, shall think fit and proper.

The days for holding every such general meeting are to be fixed at a petty sessions, twenty-one days at least before the meeting.

The general meeting may be adjourned to other times and places; the time of adjournment to be not less than five days, and the meeting to be held within the months before mentioned.

Eight special sessions are to be held in the year for transferring licences.

The persons disqualified from acting or

any house to be licensed, and any manager or agent of any owner of such house. Every person is also disqualified to act as such justice in the case of any house in the whole or in part the property of any brewer, &c. to whom such justice shall be either by blood or marriage the father, son, or brother, or of whom such justice shall be partner in any trade or calling. The penalty for any justice acting if so disqualified is 1001.: the only exception being that of legal trustees of any such house being wholly disinterested.

Sheriff's officers or officers executing the legal process of any court of justice are de-

clared incapable of being licensed.

No licence for the sale of exciseable liquors by retail to be drunk or consumed on the premises of the person licensed shall be granted by the excise officer to any person not licensed to keep an inn, alchouse, and victuallinghouse under this act.

Penalty on persons not duly licensed according to this act, who shall sell any exciseable liquors by retail to be drank or consumed on their premises, 20l. to 5l. on conviction before one justice.

Licensed persons shall use the standard

measures in the sale of such liquors.

Two justices of any place (where any riot or tumult shall happen or be expected to take place) may order any party licensed to close his house at any time: persons keeping their house open after any hour when ordered to be closed deemed disorderly.

Persons convicted of any offence against the tenor of their licence shall for the first offence forfeit 5l., the second 10l., the third 50l., or if thought fit to be tried before the Quarter Sessions 100l., or forfeiture of the

These are the general provisions of the act, the execution of which is provided for by the usual details, for which the act itself will be consulted by all parties concerned. See tit. Beer, for the new act as to retailing beer.

ALLER SANS JOUR, Fr.] To go without day; viz. to be finally dismissed the court, because there is no farther day assigned

for appearance. Kitch. 146.

ALE-SILVER. A rent of tribute annually paid to the lord mayor of London, by those that sell ale within the liberty of the city.

Antiq. Purvey, 183.

ALE-STAKE. A may-pole called alestake, because the country people drew much ale there: but it is not the common may-pole, but rather a long stake drove into the ground, with a sign on it, that ale was to be sold.

ALE-TASTER, is an office appointed in every court leet, sworn to look to the assise and goodness of ale and beer, &c. within the precincts of the lordship. Kitch. 46. In ally repealed. An alien may bring an action London there are ale conners, who are officencerning personal property; and may make cers appointed to tast ale and beer, &c. in the a will and dispose of his personal estate.

limits of the city.

ALFET, Sax. Alfath.] A cauldron or furnace, wherein boiling water was put for a criminal to dip his arm in up to his elbow, and there hold it for some time. Du Cange. See tit. Ordeal.

ALIAS. A second or farther writ, issued from the courts at Westminster, after a

capias, &c. sued out without effect.

ALIAS DICTUS, is the manner of description of a defendant, when sued on any specialty: as a bond, &c., where, after his name, and common addition, then comes the alias dict. and describes him again by the very name and addition, whereby he is bound in the writing. Dyer, 50: Jenk. Cent. 119, See Misnomer.

ALIBI, Elsewhere.] This term is used to express that defence in a criminal prosecution, where the party accused, in order to prove that he could not have committed the crime charged against him, offers evidence that he was in a different place at the time.

ALIEN, Alienus, Alienigena.] Generally speaking, one born in a foreign country, out of the allegiance of the king. Under this head shall be briefly introduced the present state of the law, in particular, as to I. Aliens. III. Denizens. III. Naturalized Subjects. IV. Of the general effect of the Laws on Aliens.

I. An Alien born may purchase lands or other estates, but not for his own use, for the king is thereupon entitled to them. 1 Inst. 2. and the notes there. But under the stat. 13 G. 3. c. 14. aliens are enabled to lend money on the security of mortgages of estates in the West India Colonies, and may have every remedy to recover the money lent, except foreclosing the mortgage and obtaining possession of the land; which is positively prohibited by the statute. Nor shall a woman alien, wife of a natural born subject, be endowed. 7 Rep. 25. a: 1 Inst. 31. b; but see the note there contra. Nor a Jewess, wife of a husband converted to the Christian religion. Id. ib. See this Dict. tit. Dower. An alien may however acquire a property in goods, money, and other personal estate, or may hire a house for his habitation. 7 Rep. 17. For personal estate is of a transitory or moveable nature, and this indulgence is necessary for the advancement of trade. Aliens also may trade as freely as other people, but they are subject to certain higher duties of Customs. See tit. Customs. There are also some obsolete statutes (14 H. 8. c. 2: 21 H. 8. c. 16: 22 H. 8. c. 13: 32 H. 8. c. 16.) prohibiting alien artificers to work for themselves in this kingdom, and making void all leases of houses or shops to aliens; see tit. Artificers;

concerning personal property; and may make a will and dispose of his personal estate. maintained by an alien enemy, but not in favour of one, though the party to the record be a subject. 6 Term Rep. 23: 15 East, 260. If a contract be made with an alien enemy while he is such, it cannot be enforced in England even after peace is restored. Taunt. 439: 4 East, 410. The Court of Chancery will not protect the copyright of a foreigner. 2 Term Rep. 237. An alien cannot hold land as a trustee, or make good conveyance of it to a purchaser. 2 Meriv. Rep. 431. These rights of aliens must be understood of alien friends only; for alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war. 1 Comm. 372: and see Cro. Eliz. 683: Skin. 370: Anstr. Rep. Scac. 462.

Where it is said that an alien is one born out of the king's dominions or allegiance, this must be understood with some restrictions. The common law was absolutely so, with only a very few exceptions; so that a particular act of parliament (stat. 29 Car. 2. c. 6.) was necessary after the restoration to naturalize children of English subjects born in foreign parts during the rebellion. This maxim of law proceeded on a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances at once. Yet the children of the king's ambassadors born abroad were always held to be natural born subjects; 7 Rep. 11. § 18; the father owing no local allegiance to the foreign prince, and representing the king of England; and by the stat. 25 Ed. 3. st. 2. it is declared to be the law of the crown of England, that the king's children wherever born are of ability to inherit the crown. And, apparently in consistence with this principle, it is by stat. 4 A. c. 4. enacted that all persons succeeding to the crown, as descendants of the Princess Sophia shall be considered as natural born subjects, as if the Princess and the issue of her body and all lineally descending from her, had been born within this realm. To encourage foreign commerce it is enacted by the stat. 25 Ed. 3 st. 2. before referred to, that all children born abroad, provided both their parents were at the time of the child's birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England. See Cro. Car. 601: Mar. 91: Jenk. Cent. 3.

subject to certain higher duties of Customs. See tit. Customs. There are also some obsolete statutes (14 H. 8. c. 2: 21 H. 8. c. 16: 22 H. 8. c. 16.) prohibiting alien artificers to work for themselves in this kingdom, and making void all leases of houses or shops to aliens; see tit. Artificers; but it is generally held that these are virtumed.

natural born subjects themselves to all intents incommunicable branch of the royal prerogaand purposes, unless their said ancestor were attainted, or banished beyond sea for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. See stat. 4 G. 2. c. 21. [The issue of an English woman by an alien born abroad is an alien. 1 Vent. 422: 4 Term Rep. 300. solemnly decided.] But grand children of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens born here in England are, generally speaking, natural born subjects, and entitled to all the privileges of such. 1 Comm. 373. See tit. Descent.

Aliens residing in any place surrendered to his majesty, may act as merchants or factors, on taking oath of allegiance. 37 G. 3. c. 63. § 5. This act does not abridge the rights of the East India Company. See also 45 G. 3. c. 32.

All lands, &c. held in Great Britain and its dependencies, by American citizens on 28 October, 1795, shall be enjoyed agreeably to the 9th article of the treaty of Amity, Commerce, and Navigation. See 37 G. 3. c. 97. §

It has been holden that upon the recognition by king George III. of the United States of America to be free, sovereign, and independent states, in the treaty of Paris in 1783, under the sanction of the British legislature, in stat. 22 G. 3. c. 46. the natural born subjects of his majesty adhering to the United States, ceased to be subjects of the crown of England, and became aliens, and incapable of inheriting lands in England. Doe, d. Thomas v. Acklam, 2 B. & C. 779. That the natives of Great Britain are aliens and incapable of inheriting lands in the United States, had been previously holden in the case of Bright's Lessee v. Rochester, 7 Wheaton's American Reports, 535.

The children of an American loyalist, who continued his allegiance to the crown of Great Britain, after the colonies were separated from the mother country, and settled in America, were held entitled to take lands by descent in England within the operation of stat. 4 G. 2. c. 21. as natural born subjects of the crown of Great Britain. Doe, d. Achmuty v. Mulcaster, 8 D. & R. 593: 5 B. & C. 771: and see Doe, d. Birtwhistle v. Vardill, 8 D. & R. 185. Aliens are entitled to be tried by a jury de medietate linguæ. 6 G. 4. c. 50. § 47. They are disqualified as jurors except on juries de medietate linguæ. 6 G. 4. c. 50. § 3. As to the provisions for registration of aliens, see 7 G. 4. c. 54.

II. A DENIZEN is an alien born, but who has obtained, ex donatione regis, letters patent to make him an English subject: a high and tive. 7 Rep. 25. A denizen is in a kind of middle state between an alien and natural born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but could not take by inheritance; 11 Rep. 67; for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen born before denization could not inherit to him; but his issue born after might, to the exclusion of that born before. 1 Inst. 8: Vaugh. 285. But now, by stat. 11 and 12 W. 3. c. 6. all persons being natural born subjects, may inherit as heirs to their ancestors, though those ancestors were aliens. See also stat. 25 G. 2. c. 39; by which this statute of W. 3. is restrained to persons in being at the death of the ancestor; and the estate is divested from daughters in favour of after-born sons. these acts are extended by stat. 16 G. 3. c. 52. to Scotland. See more particularly tit. Descent.

And no denizen can be of the privy council, or either house of parliament, or have any office of trust civil or military, or be capable of any grant of lands, &c. from the crown. Stat. 12 W. 3. c. 2.

III. NATURALIZATION cannot be performed but by act of parliament; for by this an alien is put in the same state as if he had been born in the king's ligeance: except only that he is (by the stat. 12 W. 3. c. 2.) incapable, as well as a denizen, of being a member of the privy council or parliament, holding offices, grants, &c. No bill for naturalization can be received without such disabling clause in it; stat. 1 G. 1. c. 4; nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country, unless he shall have resided in Great Britain for seven years next after the commencement of the session in which he is naturalized. Stat. 14 G. 3. c. 84. By a temporary act (58 G. 3. c. 97.), to guard against some evils which had been found to arise from the powers of certain corporations to admit aliens to the privileges of natural born subjects, it was enacted that no alien should become entitled to the privileges of a natural born subject or denizen in any other manner, or by any other authority, than by act of parliament or the king's letters of denization.

These are the principal distinctions between Aliens, Denizens, and Natives; distinctions which it hath been frequently endeavoured within the present century to lay almost totally aside by one general naturalization act for all foreign protestants; an attempt which was once carried into execution by stat. 7 A. c. 5; but this, after three years' experience, was repealed by stat. 10 A. c. 5. except the clause for naturalizing the children of English parents born abroad. But in Ire-

land 14 and 15 Car. 2. (I.) c. 13: 4 G. 1. (I.) the martial law; and not be indicted at the c. 9. However, every foreign scaman who, in time of war, serves two years on board a British ship, by virtue of the king's proclamation, is by stat. 13 G. 2. c. 3. ipso facto naturalized, under the like restrictions as in stat. 12 W. 3. c. 2. And all foreign protestants and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign protestants serving two years in a military capacity there, and none of these falling within the incapacities declared by stat. 4 G. 2. c. 21. (viz. attaint, &c.) shall, on taking the oath of allegiance and abjuration, or in some cases an affirmation to the same effect, be naturalized to all intents and purposes as if they had been born in this kingdom; except as to sitting in parliament or the privy council, and holding offices or grants of land, from the crown, in Great Britain or Ireland. Stat. 13 G. 2. c. 7: 20 G. 2. c. 44: 2 G. 3. c. 25: 13 G. 3. c. 25: 20 G. 3. c. 20. They, therefore, are admissible to all other privileges which protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to Jews in particular, was the subject of very high debate about the time of the famous Jew bill, stat. 26 G. 2. c. 26., which enabled all Jews to prefer bills of naturalization in parliament without receiving the sacrament, as ordained by stat. 7 Jac. 1. c. 2; but this act continued only a few months, and was then repealed by stat. 27 G.

By stat. 6 G. 4. c. 67. it is expressly enacted that it shall not be necessary for persons naturalized (or restored in blood) to receive the sacrament, a rite formerly required in all such cases.

Where an alien trustee joins in a conveyance, and afterwards obtains an act of naturalization, by which it is declared that he is from thenceforth naturalized, and shall be enabled to "ask, take, have, retain, and enjoy all lands which he may or shall have by purchase or gift of any person whatsoever," and "shall be to all intents and purposes as if he had been a natural born subject," this act cannot retrospectively confirm the title of the purchaser under a conveyance previous to the Fish v. Klein, 2 Meriv. 431.

While the occupation of a dwelling-house by an alien continues, it carries with it all the advantages and charges of an occupation by a native; thus an alien renting a dwellinghouse of the value of 10l. and residing in it for forty days, was held to gain a settlement under the poor laws. R. v. Eastbourne, 4 East, 103.

If an alien hold as tenant from year to year he is liable to an action for use and occupation. Pilkington v. Peach, 2 Show. 135.

IV. An alien enemy coming into this kingdom, and taken in war, shall suffer death by

common law, for the indictment must conclude contra ligeantiam suam, &c. and such was never in the protection of the king. Molloy de Jur. Marit. 417. Aliens living under the protection of the king, may have the benefit of a general pardon. Hob. 271. No alien shall be returned on any jury, nor be sworn for trial of issues between subject and subject, &c.; but where an alien is party in a cause depending, the inquest of jurors are to be half denizens and half subjects; but in cases of high treason this is not allowed. 2 Inst. 17. See stat. 27 E. 3. c. 8. that where both parties are aliens the inquest shall be all aliens; and stat. 28 E. 3. c. 13. as to trials between denizens and aliens. See also I Com. Dig. tit. Alien. (C. 8.)

Though aliens are subject to the laws, and in enormous offences (as murder, &c.) are liable in the ordinary course of justice, yet it may be too harsh to punish them on a local statute. Thus, a French prisoner, indicted for privately stealing from a shop, was acquitted of that by the direction of the judge, and found guilty of the larceny only. Frost, 188.

A very great influx of foreigners into Eng. land having been caused in the years 1792 and 1793, by the troubles on the continent, certain acts were passed (stat. 33 G. 3. c. 4. and 34 G. 3. c. 43. 67.), commonly called the Alien Acts, compelling the masters of ships arriving from foreign parts, under certain penalties, to give an account at every port of the number and names of every foreigner on board to the custom-house officers; appointing justices and others to grant passports to such aliens; and giving the king power to restrain and to send them out of the kingdom, on pain of transportation, and, on their return, of death. The same act also directed an account to be delivered of the arms of aliens, which, if required, were to be delivered up, and aliens were not to go from one place to another in the kingdom without passports. These regulations were from time to time altered and amended by various temporary acts. See 54 G. 2. c. 155. passed on the expiration of war; 55 G. 3. c. 54. on the renewal of war; and 56 G. 3. c. 86. containing provisions similar to those of the act 54 G. 3.

The following is an abstract of the last act (7 G. 4. c. 54.) passed on this subject, and which supersedes all the former enactments. and may be termed the Peace Alien Act:-Masters of vessels arriving from foreign parts shall declare what aliens are on board or have landed; penalty 20l. and 10l. for each alien; not to extend to foreign mariners navigating the vessel: § 2. Alien arriving from abroad, or passing from Great Britain into Ireland, shall declare his name, description, &c. and deliver up his passport to officer of customs; penalty 51.: § 3. Officer of customs shall register the alien's declaration, dedeliver him a certificate, and transmit decla-

ration, &c. to chief secretary's office: § 4, 5. | life, by livery, alien in fee, or make a lease Such alien, within one week after arrival in Ireland, shall transmit certificate to the chief secretary, and make declaration where he intends to reside: § 6. Alien shall transmit declaration of residence half-yearly, within one week after 1st January and 1st July: § 7. Chief secretary may require more frequent declarations: § 8. Penalty on alien for false declarations, or neglecting to make the same, not exceeding 50l. or six months' imprisonment, on conviction by two justices: § 9. Certificate shall be sent from chief secretary's office to the alien, setting forth his name, place of abode, &c. Penalty on alien not having, or refusing to produce, certificate, or residing elsewhere, 201.: § 10. Alien, on departure, may have his passport returned, and sent to the port, to be delivered to him on making declarations of departure to officer of customs, to be transmitted to chief secretary: § 11. New certificates to be issued in lieu of such as are lost: § 12. Certificate to be granted without fee; penalty 201.: § 13. Penalty for forging, &c. of certificate, &c. 501.: § 14. Prosecution of offences before two justices of peace: § 15. Not to affect foreign ministers, or their registered domestic servants; nor aliens having been resident seven years, and obtained certificate thereof; nor (in respect of penalties) any alien under four-teen years: § 16. Proof of not being an alien shall lie on the party: § 16.

By stat. 45 G. 3. c. 32. aliens residing (during the war) in any place surrendered to his majesty, were empowered to act as merchants or factors, taking the oath of allegiance.

See 58 G. 3. c. 97. (a temporary act) that no alien shall become a naturalized subject or denizen in any other manner, or by any other authority, than by act of parliament or letters of denization.

By the various acts of parliament abovementioned, most, if not all, of the niceties of the old law relative to aliens are obviated, and reduced to plain and intelligible rules. See 1 Comm. 366-375: 1 Inst. 2. and 8. and the notes there: and 7 Rep. Calvin's case. to descents between aliens collaterals, Collingwood v. Place, 1 Vent. 413: 1 Sid. 193: and this Dict. tit. Descent. See also tit. Abatement.

ALIENATION, from alienare, to alien.] A transferring the property of a thing to another: it chiefly relates to lands and tenements; as to alien land in fee, is to sell the fee-simple thereof, &c. And to alien in mortmain, is to make over lands or tenements to a religious house or body politic. Fines for alienations are taken away by stat. 12 Car. 2. c. 24. except fines due by particular customs of manors. All persons who have a right to lands may generally alien them to others: but some alienations are forbidden: as an alienation by a particular tenant, such as tenant for life, &c. which incurs a forteiture of the estate. Co. Lit. 118. For if lessee for case.

for the life of another, or a gift in tail, it is a forfeiture of his estate: so if tenant in dower, tenant for another's life, tenant for years, &c. do alien for a greater estate than they lawfully may make. Co. Lit. 233. 251. Conditions in foeffments, &c., that the foeffee shall not alien, are void. Co. Lit. 206: Hob. 261. And it is the same where a man, possessed of a lease for years, or other thing, gives and sells his whole property therein, upon such condition: but one may grant an estate in fee, on condition that the grantee shall not alien to a particular person, &c. And where a reversion is in the donor of an estate, he may restrain an alienation by condition. Lit. 361: Wood's Inst. 141. Estates in tail, for life, or years, where the whole interest is not parted with, may be made with condition not to alien to others, for the preservation of the lands

granted in the hands of the first grantee.

ALIMENT. A fund of maintenance.

Parents and children are reciprocally bound to aliment each other; in like manner, liferenters are bound to aliment the heirs, and creditors their imprisoned debtors, where they are unable to support themselves. Scotch Dict.

ALIMONY, alimonia, nourishment or maintenance.] In a legal sense, it is taken for that allowance which a married woman sues for and is entitled to, upon separation from her husband. Terms de Ley, 38. See tit. Baron and Feme, XI.

ALLAUNDS, ab alanis, Scythiæ gente, Hare-hounds.

ALLAY, Lat. allaya. The mixture of other metals with silver or gold. This allay is to augment the weight of the silver or gold, so as it may defray the charge of coinage, and to make it the more fusile. A pound weight of standard gold, by the present standard in the mint, is twenty-two carats fine, and two carats allay: and a pound weight of right standard silver consists of eleven ounces two pennyweight of fine silver, and eighteen pennyweight of allay. Lowndes's Essay upon Coins, p. 19: and 9 H. 5. st. 1. c. 11. st. 2. c. 4.

ALLEGIANCE, allegiantia, formerly called ligeance, from the Latin alligare, and ligare; i. e. ligamen fidei.] The natural, and lawful, and faithful obedience which every subject owes to his prince. It is either perpetual, where one is a subject born, or where one hath the right of a subject by naturalization, &c.; or it is temporary, by reason of residence in the king's dominions. To subjects born, it is an incident inseparable; and, as soon as born, they owe by birth-right obedience to their sovereign: and it cannot be confined to any kingdom, but follows the subject wheresoever he goeth. The subjects are hence called liege people, and are bound by this allegiance to go with the king in his wars, as well within as without the kingdom. 1 Inst. 129, a: 2 Inst. 741: 7 Co. 4 Carvin's

age of twelve years were required to take the

oath of allegiance in courts-leet.

There are several statutes requiring the oath of allegiance and supremacy, &c., to be taken under penalties: justices of peace may summon persons above the age of eighteen years to take these oaths. 1 Eliz. c. 1: 1 W. & M. c. 1. 8: 1 A. st. 1. c. 22.

ALLEGIARE. To defend or justify by due course of law. Leges Alured, cap. 4.

Spelm.

This word (from the German) ALLER. is used to make what is added to signify superlatively: as aller good is the greatest good. See Alder. Aller sans jour, see Aler.

ALLEVIARE. To levy or pay an accus-

tomed fine. Cowel.

ALLOCATION, allocatio.] In a legal sense, an allowance made upon account in the Exchequer: or more properly a placing or

adding to a thing.

ALLOCATIONE FACIENDA. A writ for allowing to an accountant such sums of money as he hath lawfully expended in his office; directed to the lord treasurer and barons of the Exchequer, upon application made. Reg. Orig. 206.

ALLOCATIO COMITATU. A new writ of exigent allowed, before any other county court holden, on the former not being fully served or complied with, &c. Fitz. Exig. 14.

ALLOCATUR, it is allowed .- A practical term applied to the certificate of allowance of costs by the master on taxation, &c. See

tit. Coste, IV ALLODIAL. This is where an inheritance is held without any acknowledgment to any lord or superior; and therefore is of another nature from that which is feodal. Allodial lands are free lands, which a man enjoys without paying any fine, rent, or service, to any other. Allodium. In Domesday book it signifies a free manour; and alodarii Lords Paramount. Kent. Co. Lit. 1. 5: and see 2 Comm. 45. &c.; and this Dict. tit. Tenure.

ALLUMINOR, from the Fr. allumer, to enlighten.] One who anciently illuminated, coloured, or painted upon paper or parchment, particularly the initial letters of ancient char-The word is used in the old ters and deeds.

stat. 1 R. 3. c. 9.

See tit. Occupancy. ALLUVION.

ALMANACK, is part of the law of England, of which the courts must take notice, in the returns of writs, &c., but the almanack to go by is that annexed to the Book of Common Prayer. 6 Mod. 41. 81. See tit. Year.

The diversity of fixed and moveable feasts was condemned per. tot. cur. for we know neither the one nor the other but by the almanacks, and we are to take notice of the course of the moon. 6 Mod. 150. 160: Pasch. Ann. B. R. in the case of Harvey v. Broad, ibid. 196. S. C.; and Holt, Ch. J. said, that

By the common law, all persons above the | moveable for Easter for ever, and that is received here in England, and become part of the law; and so in the calender establishment by act of parliament. 2 Salk. 626. pl. 8. S. C. accordingly; per. cur.

Whether such a day of the month was on a Sunday or not, and so not a dies juridicus, is triable by the country or the almanack.

Dyer, 182. pl. 55. But,

It was said that the court might judicially take notice of almanacks, and be informed by them; and cited Robert's case in the time of Lord Cutline; and Coke said, that so was the case of Galery v. Banbury, and judgment accordingly; 1 Leo. 242. pl. 328: Pasch. 29 Eliz. B. R. Page v. Fawcett. Cro. Eliz. 227. pl. 12. S. C.; and held that examination by almanacks was sufficient, and a trial per pais not necessary, though error assigned, viz. that the 16th Feb., on which day judgment was said to be given, was on a Sunday, was an error in fact; and the judgment was reversed. Almanacks are liable to a stamp duty under several statutes.

ALMARIA, for armaria. The archives, or, as they are sometimes styled, muniments of a church or library. Gervas, Dorob. in R. 2.

ALMNER, or ALMONER, eleemosynarius.] An officer of the king's house, whose business it is to distribute the king's alms every day. He ought to admonish the king to bestow his alms, especially upon saints' days and holidays; and he is likewise to visit the sick, widows that are poor, prisoners, and other necessitous people, and to relieve them under their wants; for which purpose he hath the forfeitures of deodands, and the goods of felo's de se, allowed him by the king. Fleta, lib. 2. c. 22. The lord almoner has the disposition of the king's dish of meat, after it comes from the table, which he may give to whom he pleases; and he distributes four-pence in money, a two-penny loaf of bread, and a gallon of beer; or instead thereof, three-pence daily at the court-gate to twenty-four poor persons of the king's parish, to each of them that allowance. This officer is usually some

ALMSFEOH, or almesfeoh, Saxon for alms-money: it has been taken for what we call Peter-Pence, first given by Ina, king of the West Saxons, and anciently paid in England on the first of August. It was likewise called romefeoh, romescot, and heorthpen-Selden's Hist. Tithes. 217.

ALMUTIUM. A cap made with goats' or lambs' skins, the part covering the head being square, and the other part hanging behind to cover theneck and shoulders.

ticon, tom. 3. p. 36. W. Thorn, 1330.
ALNAGE, Fr. dulnage.] A measure,

particularly the measuring with an ell.

ALNAGER, or aulnager, Fr. alner, Lat. ulniger.] Is properly a measure by the ell; and the word aulne in French signifieth an at the council of Nice they made a calculation ell. An aulnager was heretofore a public sworn officer of the king's, whose place it was, into private hands, by whom they may be alto examine into the assise of cloths made throughout the land, and to fix seals upon them; and another branch of his office was to collect a subsidy or aulnage duty granted to the king on all cloths sold. He had his power by stat. 25 Ed. 3. st. 4. c. 1., and several other ancient statutes; which appointed his fees, and inflicted a punishment for putting his seal to deceitful cloth, &c. viz. a forfeiture of his office, and the value. 27 Ed. 3. st. 1. c. 4: 3. R. 2. c. 2. There were afterwards three officers belonging to the regulation of clothing, who bear the distinct names of searcher, measurer, and aulnager; all which were formerly comprised in one person. 4 Inst. 31: Cowel.

By 11 and 12 W. 3. c. 20. alnage duties are taken away in England, and in Ireland by 57 G. 3. c. 109.

DE ALNET. D'Auney.

ALNETUM. A place where alders grow; or a grove of alder trees. Domesday Book.

ALODIUM. See Allodium.

ALOVERIUM, a purse. Fleta, lib. 2. c. 82. par. 2.

DE ALTA ripa. Dantry.

ALTERAGE, altaragium.] The offerings made upon the altar, and also the profit that arises to the priest by reason of the altar, obventio altaris. Mich. 21 Eliz. It was declared that by altarage is meant tithes of wool, lambs, colts, calves, pigs, chickens, butter, cheese, fruits, herbs, and other small tithes, with the offerings due: the case of the vicar of West Haddon, in Northamptonshire. But the word altarage at first is thought to signify no more than the casual profits arising to the priest from the people's voluntary oblations at the altar; out of which a portion was assigned by the parson to the vicar: since that, our parsons have generally contented themselves with the greater profits of glebe, and tenths of corn and hav; and have left the small tithes to the officiating priests: and hence it is that vicarages are endowed with Terms de Ley, 39: 2 Cro. 516.

It seems to be certain that the religious. when they allotted the altarage in part, or in whole, to the vicar or chaplain, did mean only the customary and voluntary offerings at the altar, for some divine office or service of the priest, and not any share of the standing tithes, whether predial or mixt. Kenn. Pa-

roch. Antiq. Gloss.

In the case of Franklyn, and the master and brethren of St. Cross, T. 1721, it was decreed, that where altaragium is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. Bunb. 79.

ALTERATION, alteratio.] Is the changing of a thing: and when witnesses are examined upon exhibits, &c., they ought to remain in the office, and not to be taken back

Vol. I.-10

tered. Hob. 254.

ALTO and BASSO. Ponere se in arbitrio in alto et basso, means the absolute submission of all differences.

AMABYR, vel AMVABYR. A custom in the honour of Clun, belonging to the earls of Arundel: Pretium virginitatis domino solvendum. LL. eccl. Gul. Howeli Dha, regis Wallia. This custom Henry carl of Arundel released to his tenants, anno 3 and 4 P. & M.

AMBACTUS. A servant or client, Cowel. AMBASSADOR, legatus.] A person sent by one sovereign [power] to another with authority by letters of credence, to treat on affairs of state. 4 Inst. 153. And ambassadors are either ordinary or extraordinary; the ordinary ambassadors are those who reside in the place whither sent; and the time of their return being indefinite, so is their business uncertain, arising from emergent occasions; and commonly the protection and affairs of the merchants is their greatest care: the extraordinary ambassadors are made pro tempore, and employed upon some particular great affairs, as condolements, congratulations, or for overtures of marriage, &c. Their equipage is generally very magnificent: and they may return without requesting leave, unless there be a restraining clause in their commission. Molloy, 144.

An agent represents the affairs only of his master: but an ambassador ought to represent the greatness of his master, and his affairs. Ibid. By the laws of nations, none under the quality of a sovereign prince can send any ambassador; a king that is deprived of his kingdom and royalty, hath lost his right of legation. No subject, though ever so great, can send or receive an ambassador; and if a viceroy does it, he will be guilty of high treason: the electors and princes of Germany have the privilege of sending and reception of ambassadors; but it is limited only to matters touching their own territories, and not of the state of the empire. It is said there can be no ambassador without letters of credence from his sovereign, to another that hath sovereign authority: and if a person be sent from a king or absolute potentate, though in his letters of credence he is termed an agent, yet he is an ambassador, he being for the public.

Ambassadors may, by a precaution, be warned not to come to the place where sent; and if they then do it, they shall be taken for enemies; but being once admitted, even with enemies in arms, they shall have the protection of the laws of nations, and be preserved as princes. Moll. 146. If a banished man be sent as an ambassador to the place from whence he is banished, he may not be detained or molested there. 4 Inst. 153. But if he be not received or admitted as ambassador. he has no privilege as such; and an ambassador

sent; or in respect of the person sent; as if ties and corporate punishments as the lord he is notoriously flagitious; or if he be disagreeable to the state to which he is sent. An ambassador ought not, however, to be refused without cause. See Grotius and Molloy, cited Com. Dig. tit. Ambassador. The killing of an ambassador has been adjudged high treason. 3 Inst. 8. Some ambassadors are allowed, by concession, to have jurisdiction over their own families; and their houses permitted to be sanctuaries; but where persons, who have greatly offended, fly to their houses, after demand and refusal to deliver them up, they may be taken from thence. Ambassadors cannot be defended when they commit any thing against the state, or the person of the king with whom they reside. 4 Inst. 152. An ambassador guilty of treason against the king's life, may be condemned and executed; but for other treasons he shall be sent home, with demand to punish him, or to send him back to be punished. 4 Inst. 152: 1 Roll. Rep. 185.

If a foreign ambassador commits any crime here, which is contra jus gentium, as treason, felony, &c. or any other crime against the law of nations, he loseth the privilege of an ambassador, and is subject to punishment as a private alien; and he need not be remanded to his sovereign, but of courtesy. Danv. Ab. But if a thing be only malum prohibitum by an act of parliament, private law or custom of the realm, and it is not contra jus gentium, an ambassador shall not be bound by them. 4 Inst. 153. And it is said umbassadors may be excused of practices against the state where they reside (except it be in point of conspiracy, which is against the law of nations), because it doth not appear whether they have it in mandatis; and then they are excused by necessity of obedience. Bac. Max. 26. See on the subject of an ambassador's responsibility for crimes, Bac. Ab. Ambassadors, vol. 1. 186. (Ed. by Gwillim and Dodd.)

By the civil law, the person of an ambassador may not be arrested; and the moveable goods of ambassadors, which are counted an accession to their persons, cannot be seized on, as a pledge, nor for payment of debts, though by leave of the king or state where they are resident; but on refusal of payment, letters of request are to go to his master, &c. Molloy, 157: Danv. 328. The law of nations touching ambassadors in its full extent, is part of the law of England; and the act 7 A.c. 12. is only declaratory. Barbuit's Case, Rep. temp. Ld. Talb. 281: and see 3 Burr. 1748.

By our statute law (stat. 7 A. c. 12.) an ambassador or public minister, or his domestic servants registered in the office of the principal secretaries of state, and thence transmitted to the sheriff's office of London and Middlesex, are not to be arrested; if they are, the process shall be void, and the persons suing

may be refused in respect of him by whom out and executing it shall suffer such penalchancellor or either of the chief justices shall think fit. Also the goods of an ambassador shall not be distrained. Stat. ibid. See 1 Comm. 254. The persons claiming privilege as servants of an ambassador must be such as are really and bona fide retained and registered in that capacity; and the act itself (by sect. 5.) expressly prohibits its extension to merchants and traders liable to the statutes of bankruptcy. See Fitzgib. 200: Stra. 797: 1 Wils. 20. 78, 79: 3 Wils. 33: 2 Stra. 797: 2 Ld. Raym. 1524: 3 Burr. 1676: 4 Burr. 2016, 17: and Com. Dig. tit. Ambassador.

A resident merchant of London, who is appointed and acts as consul to a foreign prince, is not thereby exempted from arrest. 3 Maule

Where the wife of a foreign ambassador's secretary was arrested on a writ issued against husband and wife, the court refused to quash the writ, though the husband swore that before and at the time of the arrest he was in the actual employment of the ambassador. English v. Caballero, 3 D. & R. 25.

Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings, it was held that his goods in that house not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates. Novello v. Towgood, 1 Barn. 4 C. 554.

AMBIDEXTER, Lat. One that plays on both sides. In a legal sense it is taken for a juror or embraceor, who takes money of the parties for giving his verdict. See tit. Juries. stat. 5 Ed. 3.

AMBOGLANNA. Ambleside, in Westmorland, and Burdoswold, in Cumberland.

AMBRA, Sax. amber, Lat. amphora.] A vessel among the Saxons; it contained a measure of salt, butter, meal, beer, &c. Leg. Inc., West. Sax.

AMBROSSII BURGUS. Amesbury, in Wilts.

AMBRY, the place where the arms, plate, vessels, and every thing which belonged to housekeeping were kept; and probably the ambry at Westminster is so called, because formerly set apart for that use: or rather the aumonery, from the Lat. eleemosynery, an house adjoining to an abbey, in which the charities were laid up for the poor.

AMENABLE, Fr. amener.] To bring or lead unto; or amaniable, from the Fr. main, a hand.] Signifies tractable, that may be led or governed: and in our books it is commonly applied to a woman that is governable by her husband. Cowel Interp. It also, in the modern sense, signifies to be responsible, or subject to answer, &c. in a court of justice.

AMENDMENT, emendatio.] The correction of an error committed in any process, which may be amended after judgment; and the party is driven to his writ of error; though where the fault appears to be in the clerk who writ the record, it may be amended. Terms

de Ley, 39.

At common law there was little room for amendments, which appears by the several statutes of amendments and jeofails, and like-wise by the constitution of the courts; for, says Britton, the judges are to record the parols [or pleas] deduced before them in judgment; also, says he, Ed. 1. granted to the justices to record the pleas pleaded before them; but they are not to erase their records, nor amend them, nor record against their inrollment, nor any way suffer their records to be a warrant to justify their own misdoings, nor erase their words nor amend them, nor record againsti their nrollment. This ordinance of Ed. 1. was so rigidly observed, that when justice Hengham, in his reign, moved with compassion for the circumstances of a poor man who was fined 13s. 4d. erased the record, and made it 6s. 8d. he was fined 800 marks, with which, it is said, a clock house at Westminster was built, and furnished with a clock; but as to the clock, it has been denied by authors of credit, clocks not being in use till a century afterwards. Notwithstanding what is mentioned above, there were some cases that were amendable at common law.

Original writs are not amendable at common law, for if the writ be not good, the party may have another; judicial writs may and have

been often amended. 8 Rep. 157.

Whatever at common law might be amended in civil cases, was at common law amendable in criminal cases, and so it is at this day; resolved by Holt, Ch. J. Powell, and Powis, J. 1 Salk. 51. pl. 14. Although none of the statutes relating to amendments extend to appeals in criminal cases (3 Salk. 38.), yet the attorney-general may at any time amend a revenue information. 3 Anst. 714; and see 4 Term Rep. 457. And amendments upon information are made on application to a judge at his chambers. 4 Term Rep. 458.

Though misawarding of process on the roll might be amended at common law the same term, because it was the act of the court; yet if any clerk at common law issued out an erroneous process on a right award of the court, that was never amended in any case at the

common law. 1 Salk. 51. pl. 14.

Anciently all pleas were ore tenus at the bar; and then if any error was espied in them, it was presently amended. Since that custom is changed, the motion to amend, because all in paper, succeeded in the room of it; and it is a motion that the court cannot refuse; but they may refuse it if the party desiring it refuse to pay costs, or the amendment desired should amount to a new plea. 10 Mod. 88.

Mistakes are now effectually helped by the statutes of amendment and jeofails; the lat-

if there be any error in giving the judgment, any slip in the form of his proceeding, and acknowledges such error (jeo faile, or j'ai faille), he is at liberty by those statutes to amend it, which amendment is seldom actually made, but the benefit of the act is attained by the court overlooking the exception. 2 Stra. 1011. These statutes are in the whole twelve in number, and are here recapitulated chronologically, by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot since be maintained, but for some material mistake assigned. 3 Comm. 407. which see, and Buller's Ni. Pri. (Ed. 1793) 320. And for a more extended view of the cases in which amendments may or may not be made, see Com. Dig. tit. Amendment.

By stat. 14 Ed. 3. 6. no process shall be annulled or discontinued, by the misprision of the clerk in mistaking in writing one syllable or one letter too much or too little, but it shall

The judges afterwards construed this statute so favourably, that they extended it to a word; but they were not so well agreed, whether they could make these amendments, as well after as before judgment; they thought their authority was determined by the judgment; therefore by stat. 9 H. 5. c. 4. it is declared that the judges shall have the same power, as well after as before judgment, as long as the record in process is before them. Gilb. H. C. B. 110.

This statute is confirmed by stat. 4 H. 6. c. 3. with an exception, that it shall not extend to process on outlawry, or to records or processes in Wales. But according to 2 Sand. 40. this last exception, and the like exception in 8 H. 6. c. 15. seem to be annulled by the statute 27 H. 8. c. 26. by which it is enacted, that the laws of England shall be used, practised, and exe-

cuted in Wales.

Though the foregoing statutes gave the judges a greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but process, which they did not construe in a large signification, so as to comprehend the whole proceedings in real and personal actions, and criminal and common pleas, but confined it to the mesne process and jury process; 8 Co. 157. And therefore, to enlarge the authority of the courts, the stat. 8 H. 6. c. 12. gives power to amend what they shall think in their discretion to be the misprision of their clerks, in any record, process, and plea, warrant of attorney, writ, or pannel, or return. Gilb. H. C. B. 110.

There are only two statutes of amendments: viz. 14 Ed. 3. stat. 1. c. 6. and 8 H. 6. c. 12 & 15; the rest are reckoned to be statutes of jeofails, and not of amendments; per Powell, J. 1 Salk. 51. pl. 14. Mich. 3 A. B. R. in the case of The Queen v. Tutchin.-And ibid. he he held that the 8 H. 6. was only to enlarge the subject matter of 14 Ed. 3. and that 14 Ed. 3. extends only to process out of the roll, ter so called, because when a pleader perceived | viz. writs that issue out of the record, and not to proceedings in the roll itself: but that the 14 Ed. 3. extends not to the king, because of these words (challenge of the party), and that the stat. 8 H. 6. has always been construed in limitation of the act of Ed. 3.; and the exception in the statute of H. 6. was only ex abundanti cautela; and all judges and sages of the law in all ages have taken it not to extend to the crown; and the cases on the other side are not to be relied upon.

bringing into court of any bond, bill, or deed, or of alleging or bringing in letters testamentary, or of administration; or for the omission of vi et armis, or contra pacem, mistaking the Christian name or surname of either party, or the sum of money, day, month, or year, &c. in any declaration or pleading, being rightly named in any record, &c. preceding; nor for want of the averment of hoc paratus est verificare, or for not alleging prout

By stat. 8 H. 6. c. 15. "The king's justices, before whom any misprision shall be found, be it in any records and processes depending before them, as well by way of error as otherwise, or in the returns of the same, by sheriffs, coroners, bailiffs of franchises, or any other, by misprision of the clerks of any of the said courts, or of the sheriffs, coroners, their clerks, or other officers, clerks, or other ministers whatsoever, in writing one letter or one syllable too much or too little, shall have power to amend the same."

As these statutes only extended to what the justices should interpret the misprision of their clerks, and other officers, it was found by experience, that many just causes were overthrown for want of form, and other failings, not aided by this statute, though they were good in substance, and therefore the statutes of jeofail were made. Gilb. H. C. B.

By stat. 32 H. 8. c. 30. it is enacted, "That if the jury have once passed upon the issue, though afterwards there be found a jeofaile in the proceedings, yet judgment shall be given according to the verdict." The stat. 18 Eliz. c. 14. ordains, "That after verdict given in any court of record, there shall be no stay of judgment, or reversal, for want of form in a writ, count, plaint, &c., or for want of any writ original or judicial; or by reason of insufficient returns of sheriffs, &c." By stat. 21 Jac. 1. c. 13. " If a verdict shall be given in any court of record, the judgment shall not be stayed or reversed for variance in form between the original writ or bill and the declaration, &c., or for want of averment of the party's being living, so as the person is proved to be in life; or for that the venire facias is in part misawarded; for misnomer of jurors, if proved to be the persons returned; want of returns of writs, so as a pannel of jurors be returned and annexed to the writs; or for that the return-officer's name is not set to the return, if proof can be made that the writ was returned by such officer, &c."

The stat. 16 and 17 Car. 2. c. 8. (called by Twisden, J. an? omnipotent act, 1 Vent. 100; and made perpetual by stat. 22 and 23 Car. 2. c. 4.) enacts, "That judgment shall not be stayed or reversed after verdict in the courts of record at Westminster, &c. for default in form; or for that there are not pledges to prosecute upon the return of the original writ, or because the name of the sheriff is not returned upon it, for default of alleging and

or of alleging or bringing in letters testamentary, or of administration; or for the omission of vi et armis, or contra pacem, mistaking the Christian name or surname of either party, or the sum of money, day, month, or year, &c. in any declaration or pleading, being rightly named in any record, &c. preceding; nor for want of the averment of hoc paratus est verificare, or for not alleging prout patet per recordum, for want of profert of deeds (stat. 4 and 5 A.), see Willes's Rep. 125. n. (d.) for that there is no right venire, if the cause was tried by a jury of the proper country. or place; nor shall any judgment after verdict, by confession, cognovit actionem, &c. be reversed for want of misericordia or capiatur, or by reason that either of them are entered, the one for the other, &c.; but all such defects, not being against the right of the matter of the suit, or whereby the issue or trial are altered, shall be amended by the judges; though not in suits of appeal, of felony, indictments, and informations, on penal statutes, which are excepted out of the act.

By stat. 4 and 5 A. c. 16. all the statutes of jeofails shall extend to judgments entered by confession, nil dicit or non sum informatus in any court of record, and no such judgment shall be reversed, nor any judgment or writ of inquiry of damages thereon shall be stayed for any defect which would have been aided by those statutes, if a verdict had been given, so as there be an original writ filed, &c .- By stat. 9 A. c. 20. § 7. this act, and all other statutes of jeofails are extended to writs of mandamus and informations in the nature of a quo warranto; the statutes of amendment and jeofails not being construed to extend to criminal proceedings, or on penal statutes in general. Bull. N. P. 325: 2 Mod. 144. But a mandamus may not be amended after return. 4 Term Rep. 689. The stat. 5 G. 1. c. 13. ordains, that, after verdict given, judgment shall not be stayed or reversed for defect in form or substance in any bill or writ, or for variance therein from the declaration, or any other proceedings. 25 G. 3. c. 80. § 17: Imp. K. B. 173. (1.)

By a recent statute (9 G. 4. c. 15.) any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, Wales, and Ireland (if such courts or judges shall see fit so to do) shall and may cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court on payment of such costs (if any) to the other party as such judge or court shall think reasonable, and

thereupon the trial shall proceed as if no such | it is aided after verdict by statute, but when variance had appeared: and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended.

By the late act 1 W. 4. c. 70. § 27. the court of Common Pleas shall have the like power and authority to amend the records of fines and recoveries passed in any of the Welsh courts abolished by that act, as if the same had been levied, suffered, or had, in the court of Common Pleas.

By the foregoing statutes (from 14 E. 3. c. 6. to 8 H. 6. c. 15.) the faults and mistakes of clerks are in many cases amendable: the misprision of a clerk in matter of fact is amendable; though not in matter of law. Palm. 258. If there be a mistake in the legal form of the writ, it is not amendable: there is a diversity between the negligence and ignorance of the clerk that makes out writs; for his negligence (as if he have the copy of a bond, and do not pursue it) this shall be amended; but his ignorance in the legal course of original writs is not amendable. 8 Rep. 159. A party's name was mistaken in an original writ; and it appearing to the court that the cursitor's instructions were right, the writ was amended in court; and they amended all the proceedings after. 2 Vent. 152: Cro. Car. 74. If a thing which the plaintiff ought to have entered himself, being a matter of substance, be totally omitted, this shall not be amended; but otherwise it is, if omitted only in part and misentered. Danv. Ab. 346. By the common law a writ of error, returned and filed, could not be amended; because it would alter the record: but now by stat. 5 G. 1. the writs of error, wherein there shall be any variance from the original record, or other defect, may be amended, by the court where returnable. See tit. Error.

In an assumpsit, the defendant pleads Not Guilty, thereupon issue is joined, and found for the plaintiff, he shall have judgment, though it is an improper issue in this action; for as there is a deceit alleged, Not Guilty is an answer thereto, and it is but an issue misjoined, which is aided by stat. Cro. Eliz. 407. If in debt upon a single bill, the defendant pleads payment, without an acquittance, and issue is joined and found for the plaintiff, though the payment without acquittance is no plea to a single bill, he shall have judgment, because the issue was joined upon an affirmative and a negative and a verdict for the plain-Mich. 37 and 38 Eliz.: 5 Rep. 43. An ill plea and issue may be aided by the statute of jeofails, after a verdict: and if an issue joined be uncertain and confused, a verdict will help it. Cro. Car. 316: Hob. 113. The statutes likewise help when there is no original; and where there is no bill upon the file, shall be amended by the imparlance roll which

there is an original, which is ill, that is not aided. Cro. Jac. 185. 480: Cro. Car. 282. The statute of jeofails, 16 and 17 Car. 2. helps a mistrial in a proper county, but not where the county is mistaken. 1 Mod. 24.

When the award of a writ of inquiry on the roll is good, the writ shall be amended by the roll. Carth. 70. The court cannot amend to make a new writ; or to alter a good writ, and adapt it to another purpose, &c. only when the writ is bad and vicious on the face Mod. Cas. 263, 316.

With respect to declarations a declaration grounded on an original writ may not be amended, if the writ be erroneous: though if it be on a bill of Middlesex or a latitat, it is amendable. 1 Lill. Ab. 67. But see tit. Original for the new act abolishing proceedings by original and bill of Middlesex.

A plaintiff may amend his declarations in matter of form after a general issue pleaded, before entry thereof, without payment of costs; if he amend in substance, he is to pay costs, or give imparlance; and if he amend after a special plea, though he would give imparlance, he must pay costs. 1 Lill. 58: 1 Wils. 78: Imp. K. B. 181. A declaration in ejectment laid the demise before the time; this was not amendable, for it would alter the issue, and make a new title in the plaintiff. 1 Salk. 48. The plaintiff declared on the statute of Winton for a robbery done to himself, when it should have been of his servants; he had leave to amend. 3 Lev. 347. If a defendant pleads a plea to the right, or in abatement, the plaintiff may amend his declaration, but not where he demurs, for his fault may be the cause of the demurrer. 1 Salk. 50. A demurrer may be amended after the parties have joined in demurrer if it be only in paper. Style, 48. Where a plea shall be amended, when in paper, or on record, &c. see the statute 4 Geo. 2. c. 26.

As to the amendments of records, &c. an issue entered upon record, with leave of the court, may be amended; but not in a material thing, or in that which will deface the record. 1 Lill. Abr. 61. A record may be amended by the court in a small matter, after issue joined, so as the plea be not altered. Danv. Abr. 338. See the stat. 8 H. 6. cc. 12. 15. ante. If on a writ of error a record is amended in another court in affirmance of the judgment, it must be amended in the court where judgment was given. Hardr. 505. Where the record of nisi prius does not agree with the original record, it may be amended after verdict, provided it do not change the issue: but a record shall not be amended to attaint the jury, or prejudice the authority of the judge. A general or special verdict may be amended by the notes of the clerk of assize in civil causes; but not in criminal actions. 1 Salk. 47. The issue roll

is precedent; but a roll may not be amended judge at nisi prius. See Tidd, chap. 29. (9th after verdict, when there is nothing to amend it by; though surplusage may be rejected, and so make it good. Cro. Car. 92: 1 Sid.

In an action on the statute of usury, a verdict was given for the plaintiff, and taken on one of the counts, in the declaration.-The other counts being found for defendant .- Motion in arrest of judgment.—The principal cause was, the christian name of one of the persons mentioned in that count (rightly named in that count before) was mistaken in the issue roll, which had been carried in, whereby the count was rendered absurd, and bad. The court gave leave to file a right bill (the proceedings being by bill), and afterwards amended the issue roll, by the bill.—The nisi prius roll was right.—Gardner, qui tam, v. Brown, B. R. Trin. T. 15 G. 3. This was done as an amendment at common law.

A mistake of the clerk in entering a judgment; as where it was that the defendant recovered, instead of the plaintiff, &c. was ordered to be amended. Cro. Jac. 631: Hutt. A judgment may be amended by the paper book signed by the master. 1 Salk. 50. At common law, the judges may amend their judgments of the same term; and by statute of another term. 8 Rep. 156: 14 E. 3. If judgments are not well entered, on payment of costs they will be ordered to be so: when judgments are entered 'tis said the defects therein being the act of the court, and not the misprision of the clerk, are not amendable. Golsb. 104. Mistakes in returns of writs, fines and recoveries, made by mutual assent of parties, may be amended. 5 Rep. 45. Judgment shall not be staid after verdict, for that an original wants form, or varies from the record in point of form, which are amendable. 5 Rep. 45. After verdict given in any court of record where shall be no stay of judgment for want of form in any writ, or insufficient returns of sheriffs, variance in form between the original writ and declaration, &c. stat. 32 H. 8: 18 Eliz.: vide 5 G. 1. c. 13. The postea may be amended by the judge's notes. 1 Wils. 33: 2 Stra. 1197. S. C. As to amendments in informations by the attorney-general see 4 Term. Rep. 457, 8.

Amendments are usually made in affirm. ance of judgments; and seldom or never to destroy them: and where amendments were at common law, the party was to pay a fine for leave to amend. 3 Salk. 29.

All amendments are within the discretion of the court, and are allowed in furtherance of justice under the particular circumstances of each case. 7 Term. Rep. 699. Amendments are commonly made by summons and order at the judge's chambers, or they may now be made by the judges in their circuits, under the 1 G. 4. c. 55. § 5., previous to which statute it seems that when the amendment proposed was material, it could not be made by a

A bill of Middlesex, filed of record as of 24 G. 3. when it ought to have been of the 25th, may be amended agreeable to the truth. Green v. Remet, 1 Term Rep. 782. There is a distinction between amending those mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk. As in the case of execution, if the clerk enter judgment de bonis propriis, instead of de bonis testatoris, and error is brought, the court of K. B. will order the entry to be amended, even if the record is sent back from the Exchequer chamber. Ibid. Per Buller, J.

After argument on demurrer, and before the court has given judgment, leave is sometimes given to amend. Stra. 954: Tidd. 710.

Pleas and replications may also be amended in the same manner. Lord Raym. 1441.

After verdict found on some issues, and demurrer argued as to others, application made to withdraw the demurrer, and plead, court refused. 1 Burr. 316.

The court will not allow plea to be amended after demurrer when the plaintiff has lost

a trial. Rep. in Temp. Hard. 171.

Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. Contanche v. La Reuz, 1

If the award of the writ of enquiry on the roll be right, the teste of the writ, if wrong, shall be amended by it. Johnson v. Toulmin, 4 East, 173. See as to amendment, Tidd's

A recent statute extending the power of judges to make amendments at trials at nisi

prius will be found under Variance.

AMERCIAMENT, amerciamentum (from the Fr. merci), signifies the pecuniary punishment of an offender against the king or other lord in his court, that is found to be in misericordia, i. e. to have offended, and to stand at the mercy of the king or lord. The author of Terms de Ley saith, that amerciament is properly a penalty assessed by the peers or equals of the party amerced, for the offence done; for which he putteth himself at the mercy of the Terms de Ley, 40. And by the statute of Magna Charta, c. 14. a freeman is not to be amerced for a small fault, but proportionable to the offence, and that by his peers. 9 H. 3. c. 4. amerciaments are a more merciful penalty than a fine; for which if they are too grievous, a release may be sued by an ancient writ founded on Magna Charta, called moderata misericordia. See New Nat. Brev. 167: F. N. B. 76. The difference between amerciaments and fine is this; fines are said to be punishments certain, and grow expressly from some statute: but amerciaments are such as

are arbitrarily imposed. Kitch. 78. Also fines And see the statute 5 Eliz. c. 9. against perare imposed and assessed by the court: amerciaments by the country; and no court can impose a fine, but a court of record: other courts can only amerce, 8 Rep. 39. 41.

A court-lect can amerce for public nuisances only. 1 Saund. 135. For a fine and all amerciaments in a court-leet, a distress is incident of common right; but for amerciament in a court baron, distress may not be taken but by prescription. 11 Rep 45. When an amerciament is agreed on, the lord may have an action of debt, or distrain for it, and impound the distress, or sell it at his pleasure; but he cannot imprison for it. 8 Rep. 41. 45. Vide the case of the Duke of Bedford v. Alcock, B. R. 1 Wils. 248. See tit. Leet.

There is also amercement in pleas in the courts of record, when a defendant delays to tender the thing demanded by the king's writs, on the first day. Co. Lit. 116. all personal actions without force, as in debt, detinue, &c. if the plaintiff be non-suited, barred, or his writ abate for matter of form, he shall be amerced; but if on judicial process, founded on a judgment and record, the plaintiff be non-suited, barred, &c. he shall not be amerced. 1 Nels. Abr. 206. And an infant, if non-suited, is not to be amerced: Jenk. Cent. 258. The capias pro fine is taken away by 5 W. & M. c. 12.

The amerciament of the sheriff, or other officer of the king, for misconduct, is called amerciament royal. Terms de Ley. Amerciaments are likewise in several other cases. See

tit. Fines for offences.

AMERICA. See Importation: Plantations.

AMESSE. See Amictus.

AMI. Vide Amy.

AMICIA. See Almutium.

AMICTUS. The uppermost of the six garments worn by priests, tied round the neck, and covering the breast and heart-Amictus, alba, cingulum, stola, manipulus et planeta .-These were the six garments of priests.

AMICUS CURIÆ. If a judge is doubt-ful or mistaken in matter of law, a standerby may inform the court, as amicus curiæ. 2 Co. Inst. 178. In some cases, a thing is to be made appear by suggestion on the roll by motion; sometimes by pleading; and sometimes as amicus curiæ. 2 Keb. 548. Any one as amicus curiæ may move to quash a vicious indictment: for if there were a trial and verdict, judgment must be arrested. Com-herb, A counsel urged, that he might, as amicus curiæ, inform the court of an error in proceedings, to prevent giving false judgment; but was denied, unless the party was present.

2 Show. Rep. 297.
AMITTERE LEGEM TERRÆ, or LI-BERAM LEGEM. To lose and be deprived of the liberty of swearing in any court: as to become infamous, renders a person incapable of being an evidence. Vide Ganvil, lib. 2.

jury. . So a man that is outlawed, &c. is said to lose his law, i. e. put out of the protection of the law, at least so far as relates to the suing in any of his majesty's courts of justice, though he may be sued.

AMMOBRAGIUM. A service suggested

by Spelman to be the same as Chevage; which

AMNESTY, amnestia, oblivio.] An act of pardon or oblivion, such as was granted at the restoration by king Charles II.

AMNITUM INSULÆ. Isles upon the

West coast of Britain. Blount.
AMORTIZATION, amortizatio, Fr. amortissement.] An alienation of lands or tenements in mortmain, viz., to any corporation or fraternity, and their successors, &c. And the right of amortization is a privilege or licence of taking in mortmain. In the statute de libertatibus perquirendis, anno 27 Ed. 1. st. 2. the word amortisement is used.

AMORTISE, Fr. amortir. To alien lands

in mortmain.

AMOVEAS manus. See Oustre le Main. AMPLIATION, ampliatio.] An enlargement; in law a referring of judgment, till the cause is farther examined.

AMY, amicus.] In law prochein amy is the next friend to be trusted for an infant. And infants are to sue by prochein amy (i. e. next friend) or guardian, and defend by guardian. Alien amy is a foreigner here subject to some prince in friendship with us.

AN, JOUR and WASTE. See Year, Day

ANCESTOR, antecessor or predecessor.] One that has gone before in a family: but the law makes a difference between what we commonly call an ancestor and a predecessor; the one being applied to a natural person and his ancestors, and the other to a body politic and their predecessors. Co. Lit. 78. b.

ANCESTREL. What relates to or hath been done by one's ancestors; as homage an-

cestrel, &c.

ANCHOR. Is a measure of brandy, &c. containing ten gallons. Lex. Mercat.

ANCHORAGE, ancoragium.] A duty taken of ships for the use of the haven where they cast anchor. M. S. Arth. Trevor. Arm. The ground in ports and havens belonging to the king, no person can let any anchor fall thereon, without paying therefor to the king's

ANCIENTS. Gentlemen of the inns of court. In Gray's Inn the society consists of benchers, ancients, barristers, and students under the bar; and here the ancients are of the oldest barristers. In the Middle Temple such as have gone through, or are past their readings, are termed ancients: the inns of Chancery consist of ancients and students or clerks; and from the ancients one is yearly chosen the principal or treasurer.

ANCIENT DEMESNE, or domain; vetus

all the manors belonging to the crown in the days of St. Edward and William, called the Conqueror, were held. The number and names of all manors, after a survey made of them, were written in the book of Domesday; and those which by that book appear to have at that time belonged to the crown and are contained under the title terra regis, are called ancient demesne. Kitch. 98. The lands which were in the possession of Edward the Confessor, and were given away by him, are not at this day ancient demesne, nor any others, except those writ down in the book of Domesday; and therefore, whether such lands are ancient demesne or not, is to be tried only by that book. 1 Salk. 57: 4 Inst. 269; Hob. 188: 1 Brownl. 43: F. N. B. 16 D.

But if the question is, whether lands be parcel of a manor which is ancient demesne, this shall be tried by a jury. For 'parcel or not parcel' is matter of fact. 9 Rep. case of the Abbot of Strata Marcella, Salk. 56. 774:

and see 2 Burr. 1046.

The qualities and privileges of ancient demesne are very different from, and some of them are hardly reconcileable with, the notion of its being a species of copyhold. Scriven (on Copyholds, 656) states that there are three sorts of tenants in ancient demesne; one, those who hold their lands freely by the grant of the king; a second who hold of a manor which is ancient demesne, but not at the will of the lord, and whose estates pass by surrender or deed and admittance, and who are denominated customary freeholders; and a third, who hold of a manor which is ancient demesne by copy of court roll at the will of the lord, and are denominated copyholders of base tenure; which latter cannot maintain a writ of right close, or monstraverunt, but are to sue by plaint in the lord's court.

In the cases generally this fact is overlooked, though it is very important, as making even the highest privileges and the freest qualities not unreasonable with reference to some tenants in ancient demesne, to whom

probably they ought to be confined.

Whatever be the kind of ancient demesne which a manor is pleaded to be, the truth of such plea is always tried by Domesday Book, which has therefore been called Liber Judicatorius. This book contains a survey of all manors throughout England, except those in the four northern counties and in part of Lancashire. It has been lately reprinted with great fidelity and correctness by order of government, as well as a valuable supplement, called the Boldon Book, which contains a similar survey of the palatinate of Durham, made by order of Bishop Pudsey, nephew to King Stephen, in the year 1183.

Fitzherbert tells us, that tenants in ancient demesne had their tenures from ploughing the

patrimonium domini.] Is a tenure whereby, account they had liberties granted them. F. N. B. 14. 228. And there were two sorts of these tenures and tenants; one that held their lands freely by charter; the other by copy of court roll, according to the custom of the manor. Brit. c. 66. The tenants holding by charter cannot be impleaded out of their manor; for if they are, they may abate the writ by pleading their tenure: they are free from toll, for all things bought and sold concerning their substance and husbandry. And they may not be impanelled upon an inquest. F. N. B. 14. If tenants in ancient demesne are returned on juries, they may have a writ de non ponendis in assisis, &c. and attachment against the sheriff. 1 Rep. 105. And if they are disturbed by taking duties of toll, or by being distrained to do unaccustomed services, &c. they may have writs of monstraverunt, to be discharged. See F. N. B. 14: New Nat. Bar. 32. 35: 4 Inst. 269. These tenants are free as to their persons; and their privileges are supposed to commence by act of parliament; for they cannot be created by grant at this day. 1 Salk. 57.

Lands in ancient demesne are extendible upon a statute merchant, staple, or elegit. 4 Inst. 270. No lands ought to be accounted ancient demesne but such as are held in socage: and whether it be ancient demesne or not, shall be tried by the book of Domesday. A lessee for years cannot plead in ancient demesne: nor can a lord in action against him plead ancient demesne, for the land is frank-free in his hands. Danv. Abr. 660.

In real actions, ejectment, replevin, &c. ancient demesne is a good plea; but not in actions merely personal. Danv. 658. If in ancient demesne a writ of right close be brought, and prosecuted in nature of a formedon; a fine levied there by the custom, is a bar: and if this judgment be reversed in C. B. that court shall only adjudge that the plaintiff be restored to his action in the court of ancient demesne; unless there is some other cause, which takes away its jurisdiction. Jenk. Cent. 87: Dyer, 373. See the statutes 9 H. 4. c. 5. and 8. H. 6. c. 26. to prevent depriving lords in ancient demesne of their jurisdiction by collusion.

A fine in the king's courts will change ancient demesne to frank-fee at common law; so if the lord enfeoffs another of the tenancy; or if the land comes to the king, &c. 4 Inst. 270. See Fine. But if the lord be not a party, he may have a writ of disceit, and avoid the fine or recovery; for lands in ancient demesne were not originally within the jurisdiction of the courts of Westminster; but the tenants thereof enjoy this amongst other privileges, not to be called from the business of the plough by any foreign litigation. 1 Roll. Abr. 327. If the lord be party, then the lands become frank-fee, and are withking's lands, and other works towards the in the jurisdiction of the courts of Westmaintenance of the king's freehold, on which minster; for the privilege of ancient demesne

being established for the benefit of lord and luti sucurrebant. And the word sucurrendum, tenant, they may destroy it at pleasure.

Roll. Abr. 324: 1 Salk. 57.

With respect to pleading, it is to be observed, that in all actions wherein, if the demandant recover, the lands would be frank-fee, ancient demesne is a good plea. 1 Roll. Abr.

Therefore in all actions real, or where the realty may come in question, ancient demesne is a good plea; as assise, writ of ward of land, writ of account against a bailiff of a manor, writ of account against a guardian, &c. See 4 Inst. 270: 1 Roll, Abr. 322, 323.

In replevin ancient demesne is a good plea. because by intendment the freehold will come in question. Godb. 64: 1 Bulst. 108.

In an ejectione firmæ ancient demesne is a good plea; for by common intendment the right and title of the lands will come in question; and if in this action it should not be a good plea, the ancient privileges of those tenants would be lost, inasmuch as most titles at this day are tried by ejectment. Hob. 47: 1 Bulst. 108: Hetl. 177: Cro. Eliz. 826.

But in all actions merely personal, as debt upon a lease, trespass quare clausum fregit, Sc. ancient demesne is no plea. Hob. 47: 5 Cro. 105. For farther matter see Kyd's

Com. Dig. tit. Ancient Demesne.

ANCIENTY, Fr. Anciente, Lat. Antiquitas.] Eldership or seniority. This word is used in the stat. of Ireland, 14 H. 3.

ANDENA. A swath in mowing: it likewise signifies as much ground as a man can stride over at once.

ANDERIDA. Newenden, in Kent.

ANDREAPOTIS. St. Andrews, in Scotland.

ANELACIUS. A short knife or dagger.

Mat. Paris, 277.

ANFELDTYHDE, or, according to Somner, Anfealtible, a simple accusation: for the Saxons had two sorts of accusations, viz. simplex and triplex: that was called single, when the oath of the criminal and two more were sufficient to discharge him; but his own oath, and the oaths of five more were required to free him a triplici accusatione. Blount. See Leg. Adelstani, c. 19. apud Brompton.

ANGARIA, Fr. Angaire; interpreted Personal Service.] A troublesome vexatious duty or service which tenants were obliged to pay their lords; and they performed it in their own persons. Impressing of ships. Blount. See also Spelman and Cowel; the former of whom gives some fanciful derivations under this word, and v. Perangaria. It seems that it may be easily and rationally derived from Angor, Lat.

ANGELICA VESTIS. A monkish garment which laymen put on a little before their deaths, that they might have the benefit of the prayers of the monks. It was from them called angelicus, because they were called angeli, who by their prayers anime sain our old books, is understood of one who had put on the habit, and was near death. Monasticon, 1 tom. p. 632.

ANGEL. An ancient English coin, value

ANGILD, Angildum.] The bare single valuation or compensation of a criminal; from the Sax. An, one, and gild, payment, mulct, or fine. Twigild was the double mulct or fine; and trigild the treble, according to the rated ability of the person. Laws of Ina, c.

ANGIDLLARIANUM MONASTERI-UM. The city of Ely.

ANGLING. See Fish.

ANHLOTE. A single tribute or tax. The words anhlote and anscot are mentioned in the laws of William the Conqueror; and their sense is, that every one should pay according to the custom of the country his part and share, as scot and lot, &c. Leg. W. 1.c.

ANIENS, Fr.] Void, being of no force.

F. N. B. 214.

ANIENT, Aniente, Fr.] Made void.

ANIMALS, of a base nature, such as dogs, &c. (see that tit.) or feræ naturæ, as deer, hares, &c. fish (except in a tank) are not the subject of larceny. 3 Nist. 309, 310. By 9 G. 4. c. 31. § 15. the crimen innomina-

bile committed either with mankind or with

any animal, is punishable with death.

ANN or ANNAT, is half a year's stipend, over and above what is owing for the incumbency, due to a minister's relict, child, or nearest of kin after his decease. Scotch Dict.

ANNALES. Yearlings, or young cattle

from one to two years old.

ANNATS, Annates.] This word has the same meaning with first fruits, stat. 25 H. 8. c. 20. The reason of the name is, because the rate of the first fruits paid for spiritual livings is after the value of one year's profit.

ANNEALING OF TILE, stat. 17 Ed. 4. c. 4. From the Saxon Onclan, Accendere, signifies the burning or hardening of tile.

ANNEXATION, is employed to express the act of uniting lands to the crown, and declaring them unalicnable. It is employed also to express the appropriating of church lands to the crown, and the unions of lands, lying at a distance from the kirk to which they belong, to a kirk to which they are more contiguous. Scotch Dict.
ANNIENTED, from the Fr. Aneantir.]

Abrogated, frustrated, or brought to nothing.

Lit. sect. 741.

ANNIVERSARY DAYS, Dies Anniversarii.] Solemn days appointed to be celebrated yearly in commemoration of the death or martyrdom of saints; or the days whereon, at the return of every year, men were wont to pray for the souls of their deceased friends, according to the custom of the Roman Catholies, mentioned in the statute of 1 Ed. 6. c. 14.

Vol. I.—11

This was in use among our ancient Saxons, as may be seen in Lib. Rames. sect. 134. The anniversary, or yearly return of the day of the death of any person, which the religious registered in their oblitual or martyrology, and annually observed in gratitude to their founders and benefactors, was by our fore-fathers called a year-day and a mind-day, i. e. a memorial day.

ANNI NUBILES. See tit. Age.

ANNO DOMINI. The computation of time from the incarnation of our Saviour; which is generally inserted in the dates of all public writings, with an addition of the year of the king's reign, &c. The Romans began their æra of time from the building of Rome; the Grecians computed by Olympiads, and the Christians reckon from the birth of Jesus Christ. Legal instruments may bear date either in the year of our Lord, or in the year of the reigning sovereign.

ANNOISANCE, ANNOYANCE, or Noisance, Nuisance, thus termed in stat. 22 H. 8. c. 5. Vide titles Nuisance and Highways.

ANNUA PENSIONE. An ancient writ for providing the king's chaplain unpreferred with a pension. It was brought where the king had due to him an annual pension from an abbot or prior, for any of his chaplains whom he should nominate (being unprovided of livings), to demand the same of such abbot or prior. Terms de Ley, 43: Reg. Orig. 165. 307.

ANNUALE, ANNUALIA. A yearly stipend, anciently assigned to a priest for celebrating an anniversary, or for saying continued masses one year, for the soul of a deceased

person.

78

ANNUITY, Annuus redditus.] A yearly payment of a certain sum of money, granted to another for life, for years, or in fee, to be received of the grantor or his heirs, so that no freehold be charged therewith; whereof a man shall never have assise or other action, but a writ of annuity. Terms de Ley, 44: Reg. Orig. 158: Co. Lit. 144. b.

To make a good grant of an annuity, no particular technical mode of expression is necessary. For if a man grants an annuity to another, to be received out of his coffers, or to be received out of a bag of money, or to be received of a stranger, yet this is sufficient to charge his person, and the subsequent words shall be rejected. 1 Roll. Abr. 227.

If a man grant a rent out of land, in which he has nothing, proviso that he be not charged for this in a writ of annuity, it shall be a good annuity; for the proviso, being repugnant, is void. Co. Lit. 146. a: 2 Bulst. 149: see 6

Co. 58. b.

If a man grant a rent charge out of his land, the grantee has an election to take it as a rent; or as an annuity. Lit. sect. 219; 2 Bulst. 148: 2 Comm. 40.

The treatise called *Doctor and Student*, dial. 1. cap. 3. shows several differences between a

rent and an annuity, viz. that every rent is issuing out of land; but an annuity chargeth the person only, as the grantor and his heirs, who have assets by descent.

If no lands are bound for the payment of an annuity, a distress may not be taken for it.

Dyer, 65.

But if an annuity issue out of land (which of late it often doth), the grantee may bring a writ of annuity, and make it personal, or an assise, or distrain, &c. so as to make it real. Co. Lit. 144. And if the grantee take a distress, vet he may afterwards have a writ of annuity, and discharge the land, if he do not avow the taking, which is in nature of an action. 1 Inst. 145. But if the grantee of a rent bring an assise for it, he shall never after have writ of annuity; he having elected this to be a rent; so if the grantee of an annuity avow the taking of a distress in a court of record. Danv. Abr. 486. And if the grantee purchase part of the land out of which an annuity is issuing he shall never after have a Co. Lit. 148. writ of annuity.

Where a rent charge, issuing out of lands, granted by tenant for life, &c. determines by the act of God; as an interest was vested in the grantee, it is in his election to make it a rent-charge, and so charge the lands therewith, or a personal thing to charge the person of the grantor in annuity. 2 Rep. 36. A. seised of lands in fee, he and B. grant an annuity or rent-charge to another; this prima facie, is the grant of A. and confirmation of But the grantee may have a writ of annuity against both. If two men grant an annuity of 201. per ann., although the persons be several, if the deed of grant be not for them severally, yet the grantee shall have but one annuity against them. Co. Lit. 144.

When a man recovers in a writ of annuity he shall not have a new writ of annuity for the arrears due after the recovery, but a scire facias upon the judgment, the judgment being always executory. 2 Rep. 37. No writ of annuity lieth for arrearages only when an annuity is determined, but for the annuity and arrearages. Co. Lit. 285. Though, if a rentcharge be granted out of a lease for years, it hath been adjudged that the grantee may bring annuity when the lease is ended. Moor, cap. 450. When an annuity is granted to one for life, during the term he shall have a writ of annuity; and when that is determined, then his executors may have action of debt: for the realty is resolved into the personalty. 4 Rep. 49: New Nat. Br. 287. An action of debt doth not lie for the arrears of the annuity, if the grantee have a freehold in it, as long as the freehold estate endures, for it is a real interest. Webb v. Jiggs, 4 Maule & S. 113: Kelly v. Clubbe, 3 Bro. & Bing. 130.

If the annuitant of an annuity payable half-yearly, since the last term of payment, die before the half year is completed, nothing is due for the time he lives. 3 Atk. 260. So

if a grant be made to A. for life, to be paid at , set forth in a table in the act; otherwise every the feast of Easter, or within twenty days after, and he die after Easter within twenty days, it has been said his executor shall not have it, for the last day was the time of payment. Dal. 1.

Upon a rent created by way of reservation, no writ of annuity lies. Danv. 483. Writ of annuity may not be had against the grantor's heir, unless the grant be for him and his heirs; and there must be assets to bind the heir, by grant of annuity by his ancestor, when he is named. Co. Lit. 144: 1 Roll. Ab. 226. But it is otherwise in case of the grant of a rent out of land, or a grant of a rent whereof the grantor is seised, for this charges the land, but an annuity charges the person only. Br. Charge, pl. 54.

An annuity granted by a bishop, with confirmation of dean and chapter, shall bind the successor of the bishop. New. Nat. Br. 340. If the king grant an annuity, it must be expressed by whose hands the grantee shall receive it, as the king's bailiff, &c., or the grant will be void; for the king may not be sued, and no person is bound to pay it, if not expressed in the patent. New Nat. Br. 341. If, where an annuity is granted pro decimis, the grantor is disturbed of his tithes, the annuity ceaseth; and so it is where any annuity is

granted to a person pro consilio, and the

grantee refuseth to give counsel; for where

the cause and consideration of the grant

amount to a condition, and the one ceases, the

other shall determine. Co. Lit. 204. There are now very few, if any, grants of annuities, without a covenant for payment, expressed or implied; and therefore, where a distress cannot be made, or is not approved of, the grantee may bring an action of covenant, and recover the arrears in damages, with costs of suit. And that action is now usually brought, real actions and writs of an-

nuity being much out of use.

Annuities for Life. To guard against the fraudulent and oppressive practices of usurious money-lenders, exercised on young heirs and other necessitous persons entitled to property in expectancy, the legislature found it necessary to interpose by the act 17 G. 3. c. 26. repealed by 53 G. 3. c. 141. containing more specific regulations for the same pur-

By this latter act a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall be granted for one or more life or lives, or for term of years, or greater estate determinable on lives, shall, within thirty days of the execution [exclusive of the day of execution; 5 Term Rep. 283.] be enrolled in Chancery; such memorial to contain the date of the deed, the names of all the parties, and of all the witnesses; and to set forth the annual sum to be paid, the name of the person for whose life the annuity

such deed and assurance shall be void. § 2, 3.

In every annuity-deed, &c., where the person to whom the annuity shall be granted or made payable, shall not be entitled thereto beneficially, the name of the party who is actually to take the annuity beneficially shall be described, in the same manner as is required in the enrollment. § 4.

Copies of the deeds or instruments for securing such annuities shall be given to the parties applying for the same; and on refusal may be obtained by an order of a judge of King's Bench or Common Pleas. § 5.

If any part of the consideration shall be returned to the party advancing the same, or if notes given as part of the consideration shall not be duly paid, or if the consideration is expressed to be paid in money, if any part shall be paid in goods, or if the consideration, or any part of it, be retained, under pretence of answering future payments, or under any other pretence; in any of the said cases the annuitant may apply to the court in which any action is brought, or judgment entered, by motion, to stay proceedings, and the court may order the assurance to be cancelled; and any judgment obtained to be vacated. § 6.

A book of enrollments shall be kept in Chancery by a clerk, whose fee for entering each enrollment is 20s., and 1s. for each certificate and search.

All contracts for the purchase of any annuity or rent-charge with any infant under 21 years of age shall be UTTERLY VOID; notwithstanding any attempt to confirm the same on the infant's coming of age. And all persons soliciting infants to grant annuities, or advancing money to them on condition of their granting annuities when of age, or engaging them by oath or promise not to plead infancy, shall be judged guilty of a misdemeanor. And solicitors or brokers demanding gratuities for procuring money (beyond ten shillings per cent.) shall also be judged guilty of misdemeanors; and all persons so guilty shall be liable to fine, imprisonment, and corporal punishment. § 8, 9.

This act does not extend to Scotland or Ireland, nor to any annuity given by will or marriage settlement, or for the advancement of a child; nor to any annuity secured on lands of equal annual value, over and above any other annuity secured thereon (2 Barn. & Adol. 315.), whereof the grantor is seised in fee-simple or fee-tail in possession, or which he is by law enabled to charge, or secured by actual transfer in the funds, the dividends being of equal value with the annuity; nor to any voluntary annuity without pecuniary consideration, nor to annuities granted by corporations, or under act of parliament. § 10.

The following determinations have been made in the courts on the act 17 G. 3. c. 26.

A deed, not registered according to the diis granted, the consideration, &c., in the form rections of the above act, is absolutely void, and not merely voidable. 2 Term Rep. 603. See also 4 Term Rep. 463. 494. 500. 694. 790. 824: and § 2 of 53 G. 3. c. 141. But see 6 B. & C. 652.

Notes given as part of the consideration (which if actually given bona fide are to be understood as money) must be circumstantially set out in the memorial, that the court may see whether a full consideration was given or not. 3 Term Rep. 218: 2 Mod. 402: 2 East, 137. The redemption of a former annuity, at a higher price than it was purchased at, is a good consideration. 5 Term Rep. 283.

If the security be set aside for want of complying with the formalities of the act, the consideration, if fair and legal, may be recovered back by the grantee in an action of assumpsit, against the person actually receiving such consideration-money, but not against a surety. 1 Term Rep. 732: 2 Term Rep. 366: 6 East, 241. But where the grantee of the annuity receives it regularly till his death, his executor cannot recover back the considerationmoney, on the ground that no memorial was chrolled. Davis v. Bryan, 6 Barn. & C. 651. The 4th sect. 17 G. 3. c. 26. which exactly corresponds with the 6th sect. (supra) of the 53 G. 3. c. 141. is held not imperative on the court, the words being, "it may be lawful for the court to order the deeds to be cancelled:" and the court has a discretionary power to examine whether unfair advantage has been taken of the grantor or not. See 1 Barn. & A. 61: 4 Barn. & A. 281: 6 Taunt. 8: Taunt. 596: Bac. Ab. Annuity. D. 3. (7th ed.)

Where the grantee of an annuity, set aside for a defective registry, brings an action for money had and received, to recover back the consideration-money paid for it, the grantor may, under a plea of set-off, set-off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. Hicks v. Hicks, 3 East, 16.

Where a rule nisi is obtained in B. R. for setting aside an annuity, the several objections thereto intended to be insisted on by counsel at the time of making such rule absolute, must be stated in the said rule nisi. Reg. Gen. T.

42 G. 3.

For farther matter relative to annuities in general, as well as those for life, see Com. Dig. tit. Annuity: Bac. Ab. Annuity. (D.) (Ed. by Gwillim and Dodd.) See stat. 33 G. 3. c. 14. as to the Royal Exchange Assurance Annuity Company; 39 G. 3. c. 83. as to Globe Insurance Company.

ANNUITIES PUBLIC. See tit. National Debt.

ANNUITIES OF TIENDS (or Tithes), are ten shillings out of the boll of teind wheat, eight shillings out of the boll of beer, six shillings out of the boll of rye, oats, and pease, allowed to the king yearly out of the teinds not paid to bishops, or set apart for other pious uses. Scotch Dict.

ANNUS DELIBERANDI, is the year allowed by the law of Scotland to the heir to deliberate whether he will enter and represent his ancestor. The entry of an heir has very scrious effects, and therefore he should have time to consider of the consequences; it is for this purpose the year is allowed to him. The annus deliberandi commences on the death of the ancestor, unless in the case of a posthumous heir, when the year runs from his birth. Scotch Dict.

ANSEL, or Ansul. See Aunsel weight. ANSWER. See tit. Chancery, Equity.

ANSWER. See th. Chameery, Equity.

ANTEJURAMENTUM, and Prajuramentum. By our ancestors called juramentum calumnia; in which both the accuser and the accused were to make this oath before any trial or purgation, viz. the accuser was to swear that he would prosecute the criminal; and the accused was to make oath on the very day that he was to undergo the ordeal, that he was innocent of the crime of which he was charged. Leg. Athelstan, apud Lambard, 23. If the accuser failed to take this oath, the criminal was discharged; and if the accused did not take his, he was intended to be guilty, and not admitted to purge himself. Leg. Hen. 1. c. 66.

ANTIENT DEMESNE. See Ancient

Demesne.

ANTISTITIUM. A word used for mon-

astery in our old histories. Blount.

ANTITHETARIUS, signifies where a man endeavours to discharge himself of the fact of which he is accused, by recriminating and charging the accuser with the same fact. This word is mentioned in the title of a chapter in the laws of Canutus, cap. 47.

ANTIVESTÆUM. The Land's End. ANTONA. The river Avon, in Warwick-

shire

APATISATIO. An agreement or compact made with another. Upton, lib. 2. c. 12.
APIACUM. Pap Castle, in Cumberland.

APIACUM. Pap Castle, in Cumberland. APORIARE. To bring to poverty. Walsingham in R. 2. In another sense, to shun

APOSTARE. To violate: apostere leges, and apostature leges, wilfully to break or transgress, to apostatise from the laws. See Leg.

Edw. Confessoris, c. 35.

APOSTATA CAPIENDO. A writ that formerly lay against one who, having entered and professed some order of religion, broke out again, and wandered up and down the country, contrary to the rules of his order; it was directed to the sheriff for the apprehension of the offender, and delivery of him again to his abbot or prior. Reg. Orig. 71. 267.

APOTHECARIES, are exempted from serving offices. See tit. Constable, Churchwarden. Their medicines are to be scarched and examined by the physicians chosen by the College of Physicians, and if faulty, shall be burnt, &c. 32 H. 8. c. 40: 1 M. st. 2. c. 9. See also statutes 10 A. c. 14: 10 G. 1. c. 20.

And apothecaries to the army are to make up | son to whom the succession will probably their chests of medicines at Apothecaries' Hall, there to be openly viewed, &c., under the penalty of 40l. See Physicians.

By stat. 55 G. 3. c. 194. the practice of apothecaries throughout England and Wales is regulated; and the powers of the Apothecaries' Company of London (incorporated by Jac. 1.) are extended and enlarged for the control of the regular practitioner, and for the preventing the intrusion of ignorant or mischievous pretenders, by a system of examina-tion and certificate by the company, and by officers appointed by them for that purpose; and a penalty of 201. is imposed on persons practising without having obtained such certificate. But this act does not affect the trade of chemists or druggists in buying, preparing, compounding, dispensing, and vending any drugs, medicines, or medicinal compounds.

Under this act a service of three years before its passing as house-apothecary to a public infirmary is sufficient to qualify the party to act as an apothecary. 1 Moore, 102: S. C.

Taunt. 401.

But to come within the exception in § 20. of the act, the party claiming it must show that he was practising as an apothecary on the 1st of August, 1816. 5 B. & A. 949. If an apprentice to an apothecary live in a house of his master's, at a distance from his master's residence, and attend patients there for his master, this is a practising as an apothecary within the 55 G. 3. c. 194. § 20. though his master occasionally comes to the place, and is consulted by the apprentice as to the patients. Apothecaries' Company v. Greenwood, 2 B. & Adol. 708.

APPARATOR, or APPARITOR. A messenger that serves the process of the spiritual court. His duty is to cite the offenders to appear; to arrest them; and to execute the sentence or decree of the judges, &c. See stat.

21 H. 8. c. 5.

If a monition be awarded to an apparitor, to summon a man, and he, upon the return of the monition, avers that he had summoned him, when in truth he had not, and the defendant be thereupon excommunicated; an action on the case at common law will lie against the apparitor for the falsehood committed by flicted on him by the ecclesiastical court for such breach of trust. Ayl. Parerg. 70: 2 Bulst. 264.

APPARATOR COMITATUS. An officer formerly called by this name: for which the sheriffs of Buckinghamshire had a considerable yearly allowance; and in the reign of queen Elizabeth there was an order of court for making that allowance; but the custom and reason of it are now altered. Sher. Acco. 104.

APPARENT HEIR. In common language is applied to the eldest son as the per-

open. But legally speaking, an apparent heir is the person to whom the succession has actually opened, and who remains apparent heir until his regular entry in the lands by service or by infettment on a precept of clare constat. Scotch Dict.

APPARLEMENT, from the Fr. Pareillement, i. c. in like manner.) A resemblance or likelihood; as apparlement of war. Stat.

APPARURA. Furniture and implements. Carrutarum apparura is plough tackle, or all the implements belonging to a plough. Blount.

APPEAL, is used in two senses.

1. It signifies the removal of a cause from an inferior court or judge to a superior. From the French verb neuter, APPELLER, of the same signification. As relative to this sense see

the proper titles in this Dictionary.

The term is particularly applied to the act of bringing a decision of the courts of Scotland or Ireland under a review of the House of Lords of the United Kingdom. This is done by presenting a petition of appeal, which states the ground of action and the judgment complained of, and prays that it may be re-

It may be well also in this place to observe the difference between an appeal from a court of equity, and a writ of error from a court of law. First, the former may be brought upon any interlocutory matter; the latter upon nothing but only a definitive judgment. Secondly, that on writs of error the House of Lords pronounces the judgment; on appeals it gives direction to the court below to rectify its own decree. 3 Comm. 55. See tit. Writ

of Error, Audita Querela, &c.

2. When spoken of as a criminal prosecution, it denoted an accusation by a private subject against another for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. And in this sense it is derived from the French verb active, APPELLER, to call upon, sumom, or challenge one. 4 Comm. 312. Or the accusation of a felon at common law by one of his accomplices, which accomplice was then called an approver. (Sec tit. Accessary.) Co. Lit. 287. See also Bract. lib. 3: Brit. c. 22. 25: Staundf. lib. 2. c. 6.

CRIMINAL APPEALS were either capital or not capital. But of the latter sort appeals de pace, de plagis, de imprisonamento, and of mayhem, have long become obsolete, being turned into actions of trespass long since. Leach's Hawk. P. C. ii. 235. Capital appeals were either of Treason or Fclony; and may be subdivided into—1. Appeals of Death, or, as they are otherwise called, Appeals of Murder. 2. Appeals of Larceny or Robbery. 3. Appeals of Rape. 4. Appeals of Arson, which last have long been obsolete. 1 Inst. 288, a: and sec 2 Hawk. P. C. c. 23.

public crimes, probably had its original in those times when a private pecuniary satisfaction, or weregild, was constantly paid to the party injured, or his relations, to expiate enormous offences. As, therefore, during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that when these offences, by degrees, grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation. 4 Comm. 313, 314.

It was also anciently permitted (as above hinted) for one subject to appeal another of high treason, either in the courts of common law (Brit. c. 22.), or in parliament; or for treasons committed beyond the seas, in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battle awarded in the court of chivalry on such appeal of treason [by Donald Lord Rae against David Ramsey. Rushw. vol. 2. part 2. p. 112.] But the cognizance of appeals for treason in the common law courts was virtually abolished by stat. 5 E. 3. c. 9. and 25 E. 3. [stat. 5. c. 4.] (1 Hale, P. C. 349. 359.) and in parliament expressly by stat. 1 H. 4. c. 14. See 4 Comm. 314.

All these criminal appeals are now put an end to by stat. 59 G. 3. c. 46. The proceedings therefore upon them are become matters of mere curiosity; and can scarcely be quoted even as analogous to any other criminal pro-ceedings. See Kendall's Argument on Trial by Battel, and for abolishing appeals, for an excellent summary of the more antiquated law on this subject. This statute was passed in consequence of the case of Ashford v. Thornton, 1 Barn. & A. 405.

APPEAL TO THE SESSIONS, from the convictions or orders of justices of the peace, is allowed by numerous statutes where the defendant is dissatisfied with their adjudica-

tion. See tit. Sessions.

APPEAL, High Court of, for Prizes. By 53 G. 3. c. 151. forging or uttering the name of the registrar of this court, or the court of admiralty, or his deputy, or any document made by them, is felony. This act is not repealed by the general forgery act, 1 W. 4. c. 66. See tit. Forgery.

APPEAL TO ROME. At the reformation in the reign of H. 8. the kingdom entirely renounced the authority of the see of Rome: and therefore by the several statutes 24 H. 8. c. 12. and 25 H. 8. c. 19. and 21. to appeal to Rome from any of the king's courts, (which though illegal before, had at times been connived at;) to sue to Rome for any license or dispensation; or to obey any process from thence, are made liable to the pains of pramunire; and by stat. 5 Eliz. c. 1. to de-

This private process for the punishment of fend the pope's jurisdiction in this realm is a præmunire for the first offence, and high treason for the second. See tit. Papists.

Where an appeal in an ecclesiastical cause is made before the bishop, or his commissary, it may be removed to the archbisop; and if before an archdeacon, to the court of arches, and from the arches to the archbishop; and when the cause concerns the king, appeal may be brought in fifteen days from any of the said courts to the prelates in convocation. Stat. 24 H. 8. c. 12.—And the stat. 25 H. 8. c. 19. gives appeals from the archbishop's courts to the king in Chancery, who thereupon appoints commissioners finally to determine the cause; and this is called the court of delegates: there is also a court of commissioners of review; which commission the king may grant as supreme head, to review the definitive sentence given on appeal in the court of delegates.

APPEARANCE, (before the late act, 2 W. 4. c. 39. see post) signified the defendant's filing common or special bail, when he is served with copy of, or arrested on any process out of the courts at Westminster: and there could be no appearance in the court of B. R. but by special or common bail. are four ways for defendants to appear to actions; in person, or by attorney, by persons of full age; and by guardians, or next friends,

by infants. Show. 165.

By the common law, the plaintiff or defendant, demandant or tenant, could not appear by attorney without the king's special warrant by writ or letters patent, but ought to follow his suit in his own proper person; by reason whereof there were but few suits. Co. Lit. 128: 2 Inst. 249. But it is now the common course for the plaintiff or defendant, in all manner of actions where there may be an attorney, to appear by attorney, and put in his warrant without any writ from the king for that purpose. And therefore, generally, in all actions real, personal, and mixt, the demandant or plaintiff, tenant or defendant, may appear by attorney. F. N. B. 26.

But in every case, where the party stands in contempt, the court will not admit him to appear by attorney, but oblige him to appear in person. As if he comes in by a cepi corpus upon an exigent. F. N. B. Or if he be

outlawed. 2 Cro. 462. 616.

But by stat. 4 and 5 W. & M. c. 18. persons outlawed in any case, except for treason or felony, may appear by attorney to reverse the same without bail; except where special bail shall be ordered by the court.

In all cases, where process issues forth to take the party's body, if a common appearance only, and not special bail, is required, there every such party may appear in court in his proper person, and file common bail. 1 Lill. Ab. 85: Hill. 22 Car. B. R.

In a capital criminal case the party must always appear in person, and cannot plead by

attorney: also in criminal offences, where an | act of parliament requires that the party should appear in person; and likewise in appeal, or on attachment. 2 Hawk. P. C. c. 22.

On an indictment, information, or action, for any crime whatsoever under the degree of capital, the defendant may, by the favour of the court, appear by attorney; and this he may do as well before plea pleaded, as in the proceeding after, till conviction. 1 Lev. 146: Keilw. 165: Dyer, 346: Cro. Jac. 462.

If husband and wife are sued, the husband is to make attorney for her. 2 Saund. 213:

See Barnes, 412.

If an idiot doth sue or defend, he cannot appear by guardian, prochein ami, or attorney, but must appear in proper person; but otherwise of him who becomes non compos mentis; for he shall appear by guardian if within age, or by attorney, if of full age. Co. Lit. 135. b: 2 Inst. 390: 4 Co. 124.

A corporation aggregate of many persons cannot appear in person, but by attorney, and such appearance is good. 10 Rep. 32. in the

case of Sutton's Hospital.

If a man is bound to appear in court on the first day of the term, it shall be intended the first day in common understanding, viz. the first day in full term. 1 Lill. 83: 2 Leon. 4.

Attorneys subscribing warrants to appear, are liable to attachment, upon non-appearance. And where an attorney promises to appear for his client, the court will compel him to appear and put in common bail, in such time as is usual by the course of the court; and that although the attorney say he hath no warrant for appearance: nor shall repealing a warrant of attorney to delay proceedings, excuse the attorney for his not appearing, who may be compelled by the court. See Impey's Pract. K. B. 189. cites R. M. 1654. The defendant's attorney is to file his warrant the same term he appears, and the plaintiff the term he declares, under penalties by stat. 4 and 5 A. c.

An attorney is not compellable to appear for any one, unless he takes his fee, or back the warrant; after which the court will com-

pel him to appear. 1 Salk. 87.

If an attorney appears, and judgment is entered against his client, the court will not set aside the judgment, though the attorney had no warrant, if the attorney be able and responsible; for the judgment is regular, and the plaintiff is not to suffer when in no default; but if the attorney be not responsible or suspicious, the judgment will be set aside; for otherwise the defendant has no remedy, and any one may be undone by that means. 1 Salk. 86.

Attachment denied by the court against an attorney, who appeared for the plaintiff without a warrant; but said an action on the case lies. Comb. 2.

It should also be remembered, that by the state 45 G. 3. c. 124. § 3. a common appearpearance may be entered by the plaintiffs, in actions against members of the House of Commons, if the defendant do not appear at the return of the summons, or within eight days after such return. Tidd, 120, 21. And by the annual marine and mutiny acts. (7 and 8 G. 4. c.4 .§ 130. c. 5. § 71.) a common appearance may be entered by the plaintiff, in actions against volunteer soldiers, or marines. Also, by statutes 43 G. 3. c. 46. § 2: and 7 and 8 G. 4. c. 71. § 2. the plaintiff is authorized to enter a common appearance, or file common bail for the defendant, after money has been deposited in the sheriff's hands (Tidd, 228), or paid into court (Tidd, 244), on those statutes, in case the defendant shall not duly put in, and perfect bail in action. And by the statutes 51 G. 3. c. 124. § 2; and 7 and 8 G. 4. c. 71. § 5. if the defendant, on being personally served with the summons or attachment by original, do not appear at the return of such writ, or of the distringas, as the case may be, or within eight days after the return thereof, the plaintiff, upon affidavit being made and filed in the proper court, of the personal service of such summons or attachment, or of the due execution of such distringas, &c. may enter a common appearance for the defendant, and proceed thereon, as if he had himself entered his appearance. Tidd, 114. 243. (9th ed.) A defendant who has been served with process by original, shall enter an appearance within four days of the appearance day, if the action is brought in London or Middlesex, or within eight days of the appearance day in other cases; otherwise the plaintiff may enter an appearance for him, according to the statute; and any attorney who undertakes to appear shall enter an appearance accordingly. Rule of H. T. 1832.

An appearance entered by plaintiff for defendant in a wrong name may be amended after declaration. 3 Wils. 49.

An appearance by defendant cures all errors and defects in process. Barnes, 163. 167: 3 Wils. 141: Lutw. 954: Jenk. Cent. 57.

In what cases common appearance will be ordered see Impey's Pract. K. B. 1919. and

this Dict. tit. Arrest, &c.

On two nihils returned upon a scire & alias scire facias, they amount to a scire feci, and the plaintiff giving rule, the defendant is to appear, or judgment shall be had against him by default, and where a defendant doth not plead after appearance, judgment may be had against him. Style, 208.

A wife may appear without her husband. 1 Wils. 264. A man may appear before the return of a capias ad respondendum. Id. 39.

For the appearance is to the suit.

The act for uniformity of process, 2 W. 4. c. 39. has altered the mode of appearing in actions.

When the defendant has been personally

within eight days inclusive after such service, cause an appearance to be entered for him, in the court out of which the writ issued; or in default of his so doing, the plaintiff may, by the terms of the writ, cause an appearance to be entered for him, and proceed thereon to judgment and execution. For this purpose an affidavit of the service of the writ should, it seems, be made, though it is not expressly required by the statute. "And the mode of appearance to every such writ shall be by delivering a memorandum in writing according to the form contained in the schedule of the act, and marked No. 2; such memorandum to be delivered to such officer or person, as the court out of which the process issued shall direct, and to be dated on the day of delivery thereof." For entering an appearance a fee of one shilling is allowed, by rule of court, for every defendant, unless an appearance shall be entered for more than one defendant, by the same attorney; and in that case a fee of fourpence for every additional defendant.

For the time and mode of appearance by the defendant, or his attorney, before the stat. 2 W. 4. c. 39. on a special original writ, in the King's Bench on Common Pleas, see Tidd's Prac. 9th ed. 110. 238; on stat. 7 and 8 G. 4. c. 71. ib. 113, 114; in actions against peers, ib. 119; members of the House of Commons, ib. 120; or on common process against the person, by stat. 12 G. 1. c. 29. ib. 240; and by the plaintiff, or his attorney, on same stat., ib. 241, 242; on stat. 43 G. 3. c. 46. § 2. ib. 228. 243, 244; on stat. 45 G. 3. c. 124. ib. 120, 121. 243; on stat 51 G. 3. c. 124. ib. 113, 114, 243; on stat. 7 and 8 G. 4. c. 71. § 2 ib. 228. 243, 244; on same stat. § 5. ib. 113, 114. 243: and on the annual mutiny and marine acts, ib. 243. It is not stated in the stat. 2 W. 4. c. 39. with what officer the appearance is to be entered; but it seems to have been previously entered with the filacer, in actions by original writ, in the King's Bench or Common Pleas; Tidd's Pract. 9th cd. 110; or against peers, ib. 119; with the clerk of the common bails, by bill against members of the House of Commons, ib. 120; or on common process, against the person, in the King's Bench, ib. 240: and in the Exchequer, on the appearance book, in the office of pleas, ib. 120.

As to appearance by guardian and next

friend, vide Infants, &c.

APPEARAND HEIR, is any person who has a right to succeed in a heritable subject, but is not actually entered; though in the more strict acceptation of the word, it is understood only of descendants. Scotch Dict.

APPELLANT. The party by whom an appeal is made. The other party is termed

Respondent.

APPENDANT, appendens.] Is a thing of inheritance, belonging to another inheritance

served with the writ of summons, he should, I that is more worthy. As an advowson, common court, &c. may be appendant to a manor; common of fishing appendant to a freehold; land appendant to an office; a seat in a church to a house, &c.; but land is not appendant to land, both being corporeal, and one thing corporeal may not be appendant to another that is corporeal; but an incorporeal thing may be appendant to it. Co. Lit. 121: 4 Rep. 86: Danv. Ab. 500. A forest may be appendant to an honour; and waifs and estrays to a leet. Co. Lit. 367. And incorporeal things, advowsons, ways, courts, commons, and the like, are properly parcel of and appendant or corporeal things; as houses, land, manors, &c. Plowd. 170: 4 Rep. 38. If one disseise me of common appendant belonging to my manor, and during the disseisin I sell the manor; by this the common is extinct for ever. 4 Ed. 3. 21: 11 Rep. 47. Common of estovers cannot be appendant to land; but to a house to be spent there. Co. Lit. 120. By the grant of a messuage the orchard and garden will pass as

Appendants are ever by prescription, and this makes a distinction between appendants and appurtenances, for appurtenances may be created in some cases at this day; as if a man at this day grant to a man and his heirs, common in such a moor for his beasts; levant or couching upon his manor; or if he grant to another common of estovers, or turbury in fee simple, to be burnt or spent within his manor; by these grants these commons are appurtenant to the manor, and shall pass by the grant thereof; in the civil law it is called adjunctum.

Co. Lit. 121. b.

A way may be quasi appendant to a house, &c., and as such pass by the grant thereof. Cro. Jac. 190.

What things may be appendant. Vide Plow. Com. 103. b. 104. b. 170. Sec also tit.

Appurtenances.

APPENDITA. The appendages or pertinences of an estate. Hence our pentices or pent-houses are called appenditia domus, &c.

APPENNAGE, or apennage, Fr.] Is derived from appendendo; or the German word apanage, signifying a portion. It is used for a child's part or portion; and is properly the portion of the king's younger children in France. Spelm. Gloss.

APPENSURA. The payment of money at the scale or by weight. Hist. Elien. edit.

Gale, 1. 2. c. 19.

APPLES. A duty is granted on all apples imported into Great Britain. By what measure apples are to be sold, see 1 A. st. 1. c. 15.

APPODIARE. A word used in old historians, which signifies to lean on, or prop up any thing, &c. Walsingham, ann. 1271: Mat. Paris. Chron. Aulæ Regiæ, ann. 1321.

APPOINTMENTS, under Power. See tit.

Power.

To pledge or pawn. New-APPONERE. brigensis, lib. 1. c. 2.

APPORTIONMENT, apportionamentum.] [all just allowances, or a proportionable part Is a dividing of a rent, &c. into parts, according as the land out of which it issues is divided among two or more. If a stranger recovers part of the land, a lessee shall pay, having regard to that recovered and what remains in his hands. Where the lessor recovers part of the land, or enters for a forfeiture into part thereof, the rent shall be apportioned. Co. Lit. 148. If a man leases three acres, rendering rent, and afterwards grants away one acre, the rent shall be apportioned. Co. Lit. 144. Lessee for years leases for years, rendering rent, and after devises this rent to three persons, this rent may be apportioned. Danv. Abr. 505. If a lessee for life or years under rent surrenders part of the land, the rent shall be apportioned; but where the grantee of a rent-charge purchases part of the land, there all is extinct at law. Moor, 231. But he shall have relief in equity. Fon-blanque's Treatise of Equity, i. 379. A rent-charge, issuing out of land, may not be ap-portioned; nor shall things entire, as if one holds land by service to pay yearly to the lord, at such a feast, a horse, &c. Co. Lit. 149. But if part of the land, out of which a rent-charge issues, descends to the grantee of the rent, this shall be apportioned.

A grantee of rent releases part of the rent to the grantor, this doth not extinguish the residue, but it shall be apportioned: for here the grantee dealeth not with the land, only the rent. Co. Lit. 148. On partition of lands out of which a rent is issuing, the rent shall be apportioned. Danv. Abr. 507. And where lands held by lease, rendering rent, are extended upon elegit, one moiety of the rent shall be apportioned to the lessor. Ibid. 509. If part of lands leased is surrounded by fresh water, there shall be no apportionment of rent; but if it be surrounded with the sea, there shall be an apportionment of the rent. Dyer, 56.

The stat. 11 G. 2. c. 19. § 15. has in certain cases, altered the law as to the apportioning of rents in point of time; it being thereby enacted, "That if any tenant for life shall happen to die before, or on the day on which any rent was reserved, or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of any such tenant for life, that the executors or administrators of such tenant for life shall and may, in an action on the case. recover of and from such under-tenant or under-tenants of such lands, tenements, and hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making

Vol. I.-12

thereof respectively."

Before this statute the rent, by the death of a tenant for life, was lost: for the law would not suffer his representative to bring an action for the use and occupation, much less if there was a lease, and the remainder-man had no right, because the rent was not due in his time; nor could equity relieve against this hardship by apportioning the rent. 1 P. Wms. 392. The legislature having, however, by the above statute, interposed in favour of tenants for life, its provisions have, by an equitable construction, been extended to tenants in tail. Amb. Rep. 198: 2 Bro. C. Rep. 659: Bac. Ab. Rent. H. (7th ed.)

But though the executor of tenant for life is now entitled to an apportionment of the rent, yet the dividends of money directed to be laid out in lands, and in the mean time to be invested in government securities, and the interest and dividends to be applied as the rents and profits would in case it were laid out in land, were held not to be apportionable, though tenant for life died in the middle of the half year. 3 Atk. 502: Amb. Rep. 279: 2 Vez. 672: and the authority of the case on the will of Lord C. J. Holt, 3 Vin. Abr. 18. pl. 3. was denied. But where the money is laid out in mortgage till a purchase could be made, the interest is apportionable. Wms. 176. This distinction, however, may be referred to interest on a mortgage, being in fact due from day to day, and so not properly an apportionment: whereas the divi-dends accruing from the public funds are made payable on certain days, and therefore not apportionable; and upon the principle of this distinction the master of the rolls decreed an apportionment of maintenance-money, it being for the daily subsistence of the infant. 2 P. Wms. 501: see also Mr. Cox's note (1): 13 Ves. 135: 11 Ves. 361. And the principle extending to a separate maintenance for a feme covert, such apportionment has, in such case, been allowed at law. 2 Black. Rep. Q. Whether equity would not apportion dividends of money in the funds, directed to be applied for the maintenance of an infant or secured by the husband as a separate provision for his wife, as it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of a quarter? That equity will not in general apportion dividends, sec 3 Bro. Ch. Rep.

As to apportionment of fines paid on renewal of leases by tenant for life, see 1 Bro. Ch. Rep. 440: 2 Bro. Ch. Rep. 243. and the cases there referred to.

In what cases eviction of part of the land is a ground for apportionment, see Co. Lit. 148: Fonblanque's Treat. of Equity, 376: 2 Maule & S. 276: 2 East, 375: Bac. Ab. Rent. (M.) (7th ed.)

A man purchases part of the land where he hath common appendant, the common shall be apportioned: of common appurtenant it is otherwise, and if by the act of the party the common is extinct. 8 Rep. 79. Common appendant and appurtenant may be apportioned or alienation of part of the land to which it is appendant or appurtenant. Wood's Inst. 199. If where a person has common of pasture sans number, part of the land descends to him, this being entire and uncertain, cannot be apportioned: but if it had been common certain, it should have been apportioned. Co.

Lit. 149.

APP

The provisions of 11 G. 19. § 15. have been extended by a recent statute. See Life Estates.

APPORTUM, from the Fr. apport.] Signifies properly the revenue or profit which a thing brings in to the owner: and it was commonly used for a corody or pension. It hath also been applied to an augmentation given to an abbot out of the profits of a manor for his better support.

APPOSAL OF SHERIFFS. The charging them with money received upon their accounts in the exchequer. Stat. 22 and 23

Car. 2. c. 22.

The accounts of sheriffs are no longer audited in the Exchequer, but by the commissioners for auditing the public accounts. See

Sheriff, V.

APPRAISERS of goods are to be sworn to make true appraisement, and, valuing the goods too high, shall be obliged to take them at the price appraised. Stat. 11. Ed. 1. Stat. Acton Burnel. See Auctioneers.

APPREHENDING OFFENDERS. Persons active in so doing are, by the stat. 7 G. 4. c. 64. § 28. allowed compensation, in certain specified cases. See tit. Compensation.

APPRENDRE [Fr.] A fee or profit apprendre, is fee or profit to be taken or receiv-

ed. Stat. 2 and 3 Ed. 6. c. 8.

APPRENTICE, apprenticius, Fr. apprenti, from apprendre, to learn.] A young person bound by indentures to a tradesman or artificer, who, upon certain covenants, is to teach him his mystery or trade.

It will be proper under this head to consider,

- I. Who may be bound apprentices, and in what manner; and who are compellable to receive them.
- II. How they are to be provided for and governed during their apprenticeship, and in what manner they are to be assigned, &c.

III. What trades may not be exercised without having served an apprenticeship.

IV. For what offences they are punishable, and how.

Of apprentices acquiring settlement, see tit. Settlement.

I. It seems clearly agreed, that, by the she shall be bound to the husband; and may

age of twenty-one years, cannot bind themselves apprentices, in such a manner as to entitle their masters to an action of covenant, or other action against them for departing from their service, or other breaches of their indentures: which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices, according to the terms agreed on. 11 Co. 89. b: 2 Inst. 379. 580: 3 Leon. 63: 7 Mod. 15. And notwithstanding stat. 5 Eliz. c. 4. enacts, that although persons bound apprentices shall be within age at the time of making their indentures, they shall be bound to serve for the years in their indentures contained, as if they were at full age at the time of making them; it hath been held, that although an infant may voluntarily bind himself an apprentice, and, if he continue an apprentice for seven years, he may have the benefit to use his trade; yet neither at the common law, nor by any words of the above-mentioned statute, can a covenant or obligation of an infant, for his apprenticeship, bind him; but if he misbehave himself, the master may correct him in his service, or complain to a justice of peace to have him punished according to the statute: but no remedy lieth against an infant upon Cro. Car. 179: Cro. Jac. such covenant. 194. S. P. The father, however, cannot, at common law, bind his infant son apprentice without his assent; and, therefore, where the indenture is executed by the father only, and not by the son, it is invalid. Rex v. Arnesby, 3 Barn. & A. 548. Covenant upon an indenture of apprenticeship by the master against the father; breach, that the apprentice absented himself from the service; plea, that the son faithfully served till he came of age, and then avoided the indenture. This was held no answer to the action. 3 Barn. & A. 59; and see 1 Barn. & C. 460.

But if any one entices an apprentice from his master's service, or harbours him after notice, the master may maintain a special action on the case against the person so doing. Vide

1 Salk. 380.

By the custom of London, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of London, by indenture, with proper covenants, which covenants, by the custom of London, shall be as binding as if he were of full age. Moore, 134: 2 Bulst. 192: 2 Roll. Rep. 305: Palm. 361: 1 Mod. 271: 2 Keb. 687. But a waterman's apprentice is not, within the custom of London, to bind himself, being under twenty-one. 6 Mod. 69.

A freeman's widow may take a maid apprentice for seven years, and inrol her as a youth, if she be above fourteen years old: and if an exchange woman, that hath a husband free of London, take such apprentice, she shall be bound to the husband; and may

be made free, at the end of the apprenticeship, if she be then unmarried. Lex Londinen. 48.

By stat. 5 Eliz. c. 4. § 35. the justices may compel certain persons under age to be bound as apprentices, and on refusal may commit them, &c. And by stat. 43 Eliz. c. 2. and 18 G. 3. c. 47. churchwardens and overseers of the poor may bind out the children of the poor to be apprentices, with the consent of two justices; if boys till twenty-one, if girls till that age or marriage. And if any person refuse to accept a poor apprentice, he shall forfeit 10l. Stat. 8 and 9 W. 3. c. 30. § 5: and see 54 G. 3. c. 107: and this Dict. tit. Settlement. Also justices of peace and churchwardens, &c. may put out poor boys apprentice to the sea-service. Stat. 2 and 3 A. c. 6. and 4 A. c. 19. And by stat. 7 Jac. 1. c. 3. apprentices bound out by public charities are regulated. See tit. Chimney-sweepers.

As to the manner of their being bound: Indentures must also be inrolled in all towns corporate, under stat. 5 Eliz. c. 5. and 5 G. 2. c. 46. and in London, by the custom, in the chamberlain's office there.

In London, if the indentures be not inrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c. a scire facias shall issue to the master, to show cause why not inrolled; and if it was through the master's default, the apprentice may sue out his indentures, and be discharged: otherwise if through the fault of the apprentice, as if he would not come to present himself before the chamberlain, &c. for it cannot be inrolled, unless the apprentice be in court and acknowledge it. 2 Roll. Rep. 305: Palm. 361: 1 Mod. 271.

Indentures are likewise to be stamped, and are chargeable with several duties by act of parliament.

By stat. 8 A. c. 9. made perpetual by stat. 9 A. c. 21. a duty of 6d. in the pound under 50l. and 12d. in the pound for sums exceeding it, given with apprentices (except poor apprentices) is granted. And if the full sum agreed be not inserted, or the duty not paid, indentures shall be void, and apprentices not capable of following trades; and the masters are liable to 50l. penalty.

See Jackson v. Warwick, 7 Term Rep. 121. No action can be maintained by the plaintiff, on a note given to him by the defendant, as an apprentice fee with his son, who was to be bound to the plaintiff, if it appear that the indenture executed was void by 8 A. c. 9. for want of the insertion of such premium therein, and a proper stamp in respect of the same; although the plaintiff did in fact maintain the apprentice for some time, and until he ab-

There are several statutes allowing farther time to pay the duties and stamp indentures, through neglect, omitted, &c. And acts of indemnity of this nature are usually passed at turn money is good, though it is not averred intervals of two or three years.

The payment of the duties on apprentice fees is enforced by several acts; 18 G. 2. c. 22. and 20 G. 2. c. 45; the former of which provides, that if the apprentice shall pay the duties, on the neglect of the master, he may recover back the apprentice fce; and the latter, that if no suit is commenced, and the master shall pay double duties within two years after the end of the apprenticeship, the indentures shall be valid, or the apprentice may pay them, and in such case recover double the apprentice fee, by action, from his mas-

The stat. 5 Eliz. c. 4. and 5. directs who shall take apprentices, and directs that every cloth-worker, fuller, shearman, weaver, taylor, or shoe-maker, taking three apprentices, shall have one journeyman, and for every other apprentice above three, also one journeyman. § 33. Stat. 1 Jac. 1. c. 17. allows only two apprentices at a time to hatters and felt-makers; (except a son apprentice;) and stat. 13 and 14 Car. 2. c. 5. allows only two to Norwich weavers, who must then have also two journey-

As by the stat. of 5 Eliz. c. 4. the justices of the peace have a power of imposing an apprentice on a master, in consequence thereof an indictment lies for disobedience to their orders, either in not receiving, or receiving, and after turning off, or not providing for such apprentice; for though an act of parliament prescribes an easier way of proceeding by complaint; yet that does not exclude the remedy by indictment. 6 Mod. 163: 1 Salk.

By the stat. 5 Eliz. c. 4. so often quoted, divers rules and regulations were enacted respecting the qualifications of persons entitled to take and become apprentices, and the term of years for which they should be bound, and the mode of binding them: and all indentures, covenants, and bargains to the contrary, were declared void, and liable to a penalty of 10l. By 54 G. 3. c. 96. § 2. all these regulations are repealed, and it is declared lawful for any person to take or retain, or become an apprentice, though not according to the provisions of the said act of Elizabeth.

II. The justices of peace may discharge an apprentice not only on the default of the master, but also on his own default; for in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power. Skin. 108: 5 Mod. 139: 2 Salk. 471.

And under the said stat. 5 Eliz. c. 4. justices, or the sessions, may hear and determine disputes between masters and apprentices: and the sessions may discharge the apprentice, and vacate the indentures, or correct the apprentice.

An order of justices on the master to rethat he had any with the apprentice; for the

order being to return money, is as necessary of peace have a jurisdiction of discharging a proof of the receipt of it, as if it had been expressly alleged: and the court held, that the justices had jurisdiction to oblige the master to refund. Trin. 7 G. 2. in B. R. The King v. Amies: though an order of this nature has been quashed. Bott. (by Const.) i.

By the stat. 20 G. 2. c. 19. any two justices, upon complaint of any apprentice put out by the parish, or with whom no more than 5l. were paid, of any mis-usage, refusal of necessary provisions, cruelty, or other ill treatment by his master, may summon the master to appear before them; and upon proof of the complaint on oath, to their satisfaction (whether the master be present or not, if service of the summons be proved,) to discharge such apprentice by warrant or certificate, for which no fee shall be paid (and by stat. 33 G. 3 c. 55. may fine the master for such ill usage:) and on complaint of the master against any such apprentice, touching any misdemeanor. miscarriage, or ill behaviour, the justices may punish the offender by commitment to the house of correction, there to be corrected and kept to hard labour, not exceeding a calender month; or otherwise by discharging such offender. Either party may appeal to the sessions, and the determination there is to be final. By 31 G. 2. c. 11. this act is extended to servants in husbandry, though hired for less than a year. By 4 G. 4. c. 29. the powers of the 20 G. 2. c. 19. and of 33 G. 3. c. 55. are extended to all apprentices on whose binding not more than 25l. is paid; and sec 4 G. 4. c.

By stat. 6 G. 3. c. 25. apprentices (with whom less than 10l. premium is paid) absenting themselves during their apprenticeship, shall serve an equal time beyond their term.—In London, apprentices are all under the controul of the chamberlain, whose jurisdiction is saved in the several statutes. The stat. 32 G. 3. c. 57. makes some additional regulations as to the punishing and relieving parish apprentices.

With regard to the assigning of apprentices, it hath been held, that an apprentice is not assignable. He cannot be bound nor discharged without deed. 1 Salk. 68. pl. 7: Mich. 13 W. 3. B. R.

But though an apprentice is not assignable. yet such assignment amounts to a contract between the two masters, that the child should serve the latter. 1 Salk. 68. pl. 7: Mich. 13 W. 3. B. R. Caster v. Eccles Parish.

By the custom of the city of London, also, an apprentice may be turned over from one master to another; and if the master refuse to make the apprentice free at the end of the term, the chamberlain may make him free: in other corporations there must be a mandamus to the mayor, &c. to make him free in such case. Danv. Ab. 421: Wood's Inst. 51.

apprentices, and may bind them to other masters, that they cannot turn them over: and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed; because the justices have nothing to do about turning over an apprentice; and though he applied to them, that could not give them a jurisdiction. Comb.

It seems agreed, that, if a man be bound to instruct an apprentice in a trade for seven years, and the master dies, that the condition is dispensed with, being a thing personal; but if he be bound farther, that in the mean time he will find him in meat, drink, and clothing, and other necessaries, here the death of the master doth not dispense with the condition, but his executors shall be bound to perform it as far as they have assets. 1 Sid. 216: 1 Keb. 761. 820: 1 Lev. 177.

But if a person is bound apprentice by a justice of peace, and the master happens to die before the term expires, the justices have no power to oblige his executor, by their order, to receive such apprentice and maintain him; for by this method the executor is deprived of the liberty of pleading plene administravit, (which he may do, in case covenant be brought against him,) and must maintain the apprentice, whether he hath assets or not. Carth. 237; 1 Salk. 66: 1 Show. 405. It is said, however, that the executor or administrator may bind him to another master for the remaining part of his time.

But it is said, that in this case of the master's dying, by the custom of London the executor must put the apprentice to another master of the same trade. 1 Salk. 66. per Holt, Ch. J.

By stat. 22 G. 3. c. 57. in case of the death (§ 3.) or insolvency (§ 8.) of the master or mistress of a parish apprentice (with a premium not exceeding 5l.,) the justices shall, by indorsement on the indenture, direct the apprentice to serve another master, &c. and so toties quoties. And masters, &c. of apprentices under stat. 8 and 9 W. 3. c. 30. may with consent of two justices assign them.

Whatever an apprentice gains is for the use of his master; and whether he was legally bound or no, is not material, if he was an apprentice de facto. Salk. 68. For enticing an apprentice to embezzle goods, indictment will 1 Salk. 380. A master may be indicted for not providing for, or for turning away, an apprentice. If a master gives an apprentice licence to leave him, it cannot afterwards be recalled. Mod. Cas. 70. If an apprentice marries, without the master's privity, that will not justify his turning him away, but he must sue his covenant. 1 Vern. 492. By the custom of the city of London a freeman may turn away his apprentice for gaming. But it hath been held that though justices Ibid. 241. Though if a master turns an apprentice away on account of negligence, &c. fully use or exercise any art, mystery, or equity may decree him to refund part of the money given with him. 1 Vern. Rep. 460. As no apprentice can be made without writing; so none may be discharged by his master, but by writing under his hand, and with the allowance of a justice of peace, by statute. Dalt. 121.

The court of King's Bench will not discharge an apprentice from his indentures, if it appear upon the return to an habeas corpus that he is in execution, under the conviction of two magistrates, by virtue of the statute, for absenting himself from his master's service, although it appeared by affidavit that the party had bound himself when an infant to serve till twenty-five, but when he came of age had elected to avoid the indentures. E. R. 376.

An apprentice, who at the age of seventcen was bound by indenture (which stated him to be fourteen) for seven years, was discharged by the court of King's Bench, being brought up by habeas corpus. 5 Term. Rep. 715.

By 33 G. 3. c. 55. two justices at special sessions, on complaint on oath of any apprentice, on whose binding 10l. (now 25l. by 4 G. 4. c. 29.) was paid, of any ill usage by his master, may impose a fine of 40s. on the master. And by 4 G. 4. c. 29. power is given to two justices to consider the circumstances under which such apprentice shall be discharged, and to make an order on the master to refund all or any part of the premium paid on his binding, according to their discretion.

By 1 & 2 W. 4. c. 39. several regulations were made for preserving the health and morals of apprentices employed in cotton and woollen mills, and other manufactories, by which, among other things, the system of night-work, so destructive to every sound principle of mind and body, was abolished as to persons under twenty-one; and persons under eighteen are not to work more than twelve hours per day, and one hour and a half is to be allowed for meals, and no child under nine is to be employed, and parents and guardians are liable to penalties for falsely stating their children's ages.

III. By the common law no man may be prohibited to work in any lawful trade, or in more trades than one, at his pleasure.

So that without an act of parliament no man may be restrained, either from working in any lawful trade, or using divers mysteries or trades; therefore an act of parliament made to restrain any person therein, must be taken strictly, and not favourably, as acts made in affirmance of the common law.

It was enacted by the 5 Eliz. c. 4. § 31. "That it should not be lawful to any person or persons, other than such as then did law-

manual occupation, to set up, occupy, use or exercise any craft, mystery, or occupation, then used or occupied within the realm of England or Wales, except he should have been brought up therein seven years, at the least, as an apprentice; nor to set any person on work in such mystery, art, or occupation, being not a workman at that day, except he should have been apprentice, as is aforesaid; or else being served as an apprentice, as is aforesaid, because a journeyman, or hired by the year; upon pain that every person willingly offending, or doing the contrary, shall forfeit and lose for every default, forty shillings for every month."
By 54 G. 3. c. 96. § 1. this section of the

act of Elizabeth is repealed; with a saving for the customs and bye laws of the city of London, and of other cities, and of corporations and companies lawfully constituted. See Bac. Ab. Master, Servant, and Appren-

tice. (D.)

Previous to the passing of this act 54 G. 3. the policy of the courts of law had been in favour of the free exercising of trades, and against enforcing the penalties of the act of Elizabeth, as will appear from the following determinations.

It hath been ruled, that there are many trades within the general words and equity of this act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been adjudged, that in every indictment, &c. it must be alleged, that it was a trade at the time of making the stattute, for the words thereof are, any craft, mystery, or occupation, now used, &c. from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute. 2 Salk. 611: Palm. 528: 1 Sid. 175.

Also it seems agreed, that the act only extends to such trades as imply mystery and craft, and require skill and experience; that therefore merchants, husbandmen, gardeners, &c. are not within the statute; and on this foundation it hath been held that a hempdresser is not within the statute, as not requiring much learning or skill, and being what every husbandman doth use for his necessary occasions. 8 Co. 130: 2 Bulst. 190:

Cro. Car. 499.

It is clearly agreed, that the following the common trade of a brewer, baker, or cook, is within the statute, as unskilfulness herein may be very prejudicial to the lives and healths of his majesty's subjects; but it is, at the same time agreed that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statute. 11 Co. 54. a.: Cro. Car. 499: Hob. 183. 211: Moor 886: 8 Co. 129: Palm. 542: Lit. Rep. 251: Bridg. 141.

It hath been held, that this statute does not

restrain a man from using several trades so as he had been an apprentice to all: wherefore it indemnifies all petty chapmen in little towns and villages, because the masters kept the same mixed trades there before. Carth.

A man may exercise as many trades as he hath worked at, or served as an apprentice to, for seven years. 2 Wils. 168.

It hath been resolved, that there is no occasion for any actual binding, but that the following a trade for seven years is a sufficient qualification within the statute. 1 Salk. 67: 2 Salk. 613.

By stats. 2 and 3 P. & M. c. 11. and 5 Eliz. c. 4. aliens and denizens are restrained to use any handicraft or trade therein mentioned, unless they have served seven year's apprenticeship within the realm, under the penalty of 40s. per month. Hutt. 132. But it hath been adjudged that if an apprentice serve seven years beyond sea, he shall be excused from the penalties of the statute 5 Eliz. c. 4; and so, if he serve seven years, though he was never bound. 1 Salk. 76.

So it hath been held, that serving five years to a trade out of England, and two in England, is sufficient to satisfy the statute; but that there must be a service of a full time: and therefore, serving five years in any country where, by the law of the country, more is not required, will not qualify a man to use the trade in England. Ca. in Law and Eq. 70.

By the statute 31 Eliz. c. 5. § 7. it is enacted, "That all suits for using the trade, without having been brought up in it, shall be sued and prosecuted in the general quarter sessions of the peace, or assizes in the same county where the offence shall be committed; or otherwise inquired of, heard, and determined in the assizes, or general quarter sessions of the peace, in the same county where such offence shall be committed, or in the leet within which it shall happen."

In the construction of this statute it hath been held, that it restrains not a suit in the King's Bench or Exchequer, for such offence happening in the same county where these courts are sitting; for the negative words of the statute are not, that such suits shall not be brought in any other court, but that they shall not be brought in any other country; and the prerogative of these high courts shall not be restrained without express words. Cro. Jac. 178; Hob. 184: 1 Salk. 373.

But where the offence is in a different county, such suits in these, or any other courts out of the proper county, seem to be within the express words of the statute. *Hob.* 184. 327: Cro. Jac. 85.

Infants voluntarily binding themselves apprentice, and continuing seven years, shall have the benefit of their trades; but a bond for their service shall not bind them. Cro. Car. 179. See the several statutes enabling soldiers and mariners to exercise trades.

The court will not, at the prayer of the master, grant a habeas corpus to bring up an apprentice impressed, he being willing to enter into the king's service. Ex parte Landsdown, E. 44 G. 3.: 5 East, 38.

The captain of a ship of war detaining an apprentice who had been impressed, after notice by such apprentice, is liable in an action by the master to recover wages for the service of such apprentice. Eades v. Vandeput, M. 25 G. 3: East, 39. n.

IV. At common law, a servant or apprentice, without any regard to age, may be guilty of felony in feloniously taking away the goods of their master, though they were goods under their charge, as a shepherd, butler, &c. and may, at this day, for any such offence, be indicted, as for felony, at common law; but at common law, if a man had delivered goods to his servant to keep, or carry for him, and he carried them away animo furandi, this was considered only a breach of trust, but not felony. 1 Hale's Hist. P. C. 505. 666. See tit. Embezzlement, Servant, Chimney Sweepers.
APPROBATE and REPROBATE.

term used in the Scotch law when a person takes advantage of one part of a deed, but re-

jects the rest. Scotch Dict.

APPROPRIATION, appropriatio, from the Fr. approprier.] The annexing of an ecclesiastical benefice to the proper and perpetual use of some religious house, bishoprick, college, or spiritual person, to enjoy for ever; in the same way as impropriation is the annexing a benefice to the use of a lay person or corporation; that which is an appropriation in the hands of religious persons being usually called an impropriation in the hands of the laity. See Com. Dig. tit. Advowson. (D. E.) It is computed that there are in England 3845 appropriations and impropriations: but the distinction between these terms is merely of common and random usage. See Huggard's Reports in the Ecclesiastical Courts, i. 162.

This contrivance seems to have sprung from the policy of monastic orders. At the first establishment of parochial clergy, the titles of the parish were distributed in four parts-one for the bishop; one to maintain the fabrick of the church; a third for the poor; and the fourth for the incumbent. The sees of the bishops becoming amply endowed, their shares sunk into the others; and the monasteries inferring that a small part was enough for the officiating priests, appropriated as many benefices as they could by any means obtain, to their own use; undertaking to keep the church in repair, and to have it constantly served. But in order to complete such appropriation effectually, the king's licence and consent of the bishop must first be obtained; because they might both, some time or other, have an interest by lapse in the benefice; if it were not in the hands of a corporation, which never dies. The consent of the patron is also ne-

cessarily implied, because the appropriation profits of the lands themselves. could originally be made to none but to such spiritual corporation as is also the patron of the church; the whole being indeed nothing else but an allowance for the patron to retain the tithes and glebe in their own hands, without presenting any clerk. Plowd. 496-500.

When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued in all matters concerning the rights of the church by the name of parsons. Hob. 307.—An appropriation cannot be granted

over. Ibid.

This appropriation may be severed, and the church become disappropriate, two ways. 1st. If the patron or appropriator present a clerk, who is instituted and inducted to the parsonage; for such incumbent is to all intents and purposes complete parson; and the appropriation being once severed, can never be re-united again, unless by a repetition of the same solemnities. Co. Lit. 46: 7 Rep. 13. And when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a sine-cure; because he has no cure of souls, having a vicar under him, to whom that cure is committed; though this is not the only mode of creating sine-cures. See 2 Burn's Ec. Law, 347. Also if the corporation to which the benefice is annexed, is dissolved, the parsonage becomes disappropriate at common law. 1 Comm. 386: see the note there.

In this manner may appropriations be made at this day; and thus were most, if not all, now existing, originally made. At the dissolution of the monasteries by stat. 27 H. 8. c. 28. and 31 H. S. c. 13. the appropriations belonging to those religious houses (being more than one-third of all the parishes in England) would at common law have been disappropriated; had not a clause been inserted in those statutes to give them to the king, in the same manner as the alien priories had before been; 2 Inst. 584; and from hence have sprung all the lay impropriations or secular parsonages in the kingdom; they having been afterwards granted out from time to time by the crown. See 1 Comm. 384, &c.: 11 Rep. 11: Gibs. 719.—See also tit. Parson, Vicar.

APPROPRIARE COMMUNIAM. To inclose or appropriate any parcel of land that was before open common, and thus to discommon it.

APPROVE, approbare.] To augment a thing to the utmost; to approve land is to make the best benefit of it by increasing the rent, &c. 2 Inst. 474.

APPROVEMENT, is where a man hath common in the lord's waste, and the lord makes an inclosure of part of the waste for himself, leaving sufficient common, with egress and regress for the commoners. Reg. Jud. 8, 9. See tit. Common.

The word approvement is also used for the

Jurisd. 152. And the statute of Merton, 20 H. 3. c. 4. makes mention of land newly approved. F. N. B. 71. Approvement is also the same with improvement.

APPROVER, or PROVER, approbator.] One that, confessing felony committed by himself, appealed or accused others to be guilty of the same crime. See tit. Accessary, II. 5. He is called approver, because he must prove what he hath alleged; and that proof was anciently by battle, or the country, at the election of him appealed: and the form of this accusation may be found in Cromp. Just. 250. See also Bracton, lib. 3: Staundf. Pl. Cor. 52. If a person indicted of treason or felony, not disabled to accuse, upon his arraignment before any plea pleaded, and before competent judges, confesseth the indictment, and takes an oath to reveal all treasons and felonies that he knoweth of; and therefore prays a coroner to enter his appeal, or accusation, against those that are partners in the crime contained in the indictment; such a one is an approver. 3 Inst. 129: H. P. C. 192. Unless the crime wherewith a person is charged amount either to felony or treason, he cannot be an approver. 2 Hawk. P. C. c. 24. § 10.

When a person hath once pleaded not guilty, he cannot be an approver. 3 Inst. 129. And persons attainted of treason or felony shall not be approvers; their accusation will not then be of such credit as to put a man upon his trial. 2 Hawk. 205. Vide 5 H. 4. c. 2. as to

charters of pardon.

If an accomplice act fairly and openly, and discover the whole truth, although he is not entitled of right to a pardon, yet the usage, and practice, and lenity of the court, is to stop the prosecution against him, and he has an equitable title to a recommendation to the king's mercy; it holds out a hope that accomplices so conducting themselves and bringing others to justice, shall themselves escape punishment and be pardoned .- Per Ld. Mansfield on Mr. Rudd's case. Cowp. 336.

A person indicted for a misdemeanor may be legally convicted upon the uncorroborated evidence of an accomplice. 2 Campb. 132.

Infants under age of discretion may not be approvers: and it being in the discretion of the court to suffer one to be an approver, this method of late hath seldom been practised. See tit. Accessory, II. 5; tit. Appeal; and Leach's Hawk. P. C. ii. c. 24. See tit. Prover. APPROVERS. In old statutes, bailiffs of

lords in their franchises are called their approvers: and approvers in the marches of Wales were such as had licence de vendre et acheter beasts, &c. But by the statute 2 Ed. 3. c. 12. approvers are such as are sent into counties to increase the farms of hundreds, &c. held by sheriffs. Such persons as have the letting of the king's demesnes in small manors, are called approvers of the king

(approbatores regis), stat. 51 H. 3. st. 5. In [the old stat. 1 Ed. 3. st. 1. c. 8. sheriffs are called the king's approvers.

APPRUARE. To take to his own use or

profit. Stat. W. 2. c. 20.

APPRYSING, is when, by letters, a debitor is charged to appear before a messenger (who, in that case, represents the sheriff), to hear the lands specified in the letters apprysed by an inquest, and declared to belong to the creditor for payment of his debts.

APPURTENANCES, pertinentia, derived from the French appartenir, to belong to.] Signify things both corporcal and incorporcal, appertaining to another thing as principal; as hamlets to a chief manor; and common of pasture, piscary, &c. Also liberties and services of tenants. Brit. c. 39. If a man grant common of estovers to be burnt in his manor, these are appurtenant to the manor; for things appurtenant may be granted at this day. Co. Lit. 121. Common appurtenant may be to a house, pasture, &c. Out-houses, yards, orchards, and gardens are appurtenant to a messuage; but lands cannot properly be said to be appurtenant to a messuage. 1 Lill. Abr. 91. And one messuage cannot be appurtenant to another. Ibid. Lands cannot, in the true sense of the words cum pertinentiis, be appurtenant to the house; but the word pertinens may be taken in the sense of usually letten or occupied with the house. Plowd. 170. See Cro. El. 704. contra; but it seems now settled, that lands will not pass by the word appurtenances, but only such things which do properly belong to the house. Palm. 375: Godb. 352. S. C.: Cro. Car. 57: Hutt. 85. S. C.: Lit. Rep. 8. S. C.

Lands, a common, &c. may be appurtenant to a house; though not a way. 3 Salk. 40. Grant of a manor, without the words cum pertinentiis, it is said will pass all things belonging to the manor. Owen's Rep. 31. Where a person hath a messuage, &c. to which estovers are appurtenant, and it is blown down or burnt by the act of God; if the owner re-edify it, in the same place and manner as before, he shall have the ancient appurtenances. 4 Rep. 86. A turbary may be appurtenant to a house; so a seat in a church, &c., but not to land; for the things must agree in nature and quality. 3 Salk. 40. Vide tit. Appendant, and see Plo. Com. 103. b. 104. b. 170. Also vide Com. Dig. (1 V.)

tit. Appendant and Appurtenant.

DE AQUA FRISCA. Freshwater. AQUA PONTANUS. Bridgewater. AQUÆ CALIDA, AQUÆ SOLIS, AKE-

MAN-CESTER. Bath, in Somersetshire. AQUÆDON. Ediure, vulgo Eatoun.

AQUÆ DUCTUS, AQUÆ HAUSTUS.] servitudes: the former consists in a right of carrying a water-course through the grounds of another; the latter, of watering cattle at a river, well, or pond. Scotch Dict.

AQUÆDUNENSIS SALTUS. Waterdon. AQUÆDUNUM. Aicton.

AQUAGE, aquagium, quasi aquæ agium, i. e. aquæductus et aquægangium.] A watercourse. -- In some instances used for toll paid for water-carriage. See Ewage.

AQUÆUDENSIS PONS. Eiford.

AQUILÆDUNUM. Hoxton.

AQUITANIA, Æ. Aquitain, now containing Guienne and Gascony.

ARACE, angl. To rase or erase, from the

French arracher, evellere. Blount.

ARAHO, In araho conjurare, i. e. To make oath in the church, or some other holy place; for, according to the Ripuarian laws, all oaths were made in the church upon the relicks of saints. Spelm.

ARATÍA. Arable grounds. Cowel.

ARATRUM TERRÆ. As much land as can be tilled with one plough.—Aratura terræ is the service which the tenant is to do for his lord in ploughing his land. See Arrura. A plough gate is said to consist of eight oxgates of land, because anciently the plough was drawn with eight oxen. Scotch Dict.

ARBEIA. Ireby, in Cumberland. ARBITRATION, ARBITRATOR, and ARBITRAMENT. See tit. Award.

ARCA CYROGRAPHICA, sive cyrographorum Judæorum. This was a common chest, with three locks and keys, kept by certain Christians and Jews, wherein all the contracts, mortgages, and obligations belonging to the Jews were kept, to prevent fraud; and this by order of K. Rich. I. Hoveden's Annals, p.

ARCHBISHOP, archiepiscopus.] The chief of the clergy in this province. See title Bish-

ARCHDEACON, archidiaconus.] Is one that hath ecclesiastical dignity, and jurisdiction over the clergy and laity, next after the bishop, throughout the diocese, or in some part of it only. Archdeacons had anciently a superintendant power over all the parochial clergy in every deanery in their precincts; they being the chiefs of the deacons; though they have no original jurisdiction, but what they have got is from the bishop, either by prescription or composition; and Sir Simon Degg tells us, that it appears an archdeacon is a mere substitute to the bishop; and what authority he hath is derived from him, his chief office being to visit and inquire, and episcopo nunciare, &c. In ancient times archdeacons were employed in servile duties of collecting and distributing alms and offerings; but at length, by a personal attendance on the bishops, and a delegation to examine and report some causes, and commissions to visit the remoter parts of the dioceses, they became, as it were, overseers of the church; and, by degrees, advanced into considerable dignity and power. Lanfranc, archbishop of Canterbury, was the first prelate in England who instituted an archdeacon in his diocese,

which was about the year 1075. And an archdeacon is now allowed to be an ordinary, as he hath a part of the episcopal power lodged with him. He visits his jurisdiction once every year; and he hath a court, where he may inflict penance, suspend, or excommunicate persons, prove wills, grant administrations, and hear causes ecclesiastial, &c. subject to appeal to the bishop of the diocese, under stat. 24 H. 8. c. 12. It is one part of the office of an archdeacon to examine candidates for holy orders, and to induct clerks within his jurisdiction, upon receipt of the bishop's mandate. 2 Cro. 556: 1 Lev. 193: Wood's Inst. 30.

Archdeaconries are commonly given by bishops, who do therefore prefer to the same by collation: but if an archdeaconry be in the gift of a layman, the patron doth present to the bishop, who institutes in like manner as to another benefice; and then the dean and chapter do induct him, that is, after some ceremonies place him in a stall in the cathedral church to which he belongeth, whereby he is said to have a place in the choir. Wats. c. 15.

Archdeacons, by stat. 13 and 14 Car. 2. c. 4. are to read the Common Prayer and declare their assent thereunto, as other persons admitted to ecclesiastical benefices; and also must subscribe the same before the ordinary; but they are not obliged by stat. 13 Eliz. c. 12. to subscribe and read the thirty-nine articles; for although an archdeaconry be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, which relates only to such benefices with cure as have particular churches belong. ing to them. Wats. c. 15. And they are to take the oaths at the sessions, as other persons qualifying for offices.

The judge of the archdeacon's court (where he doth preside himself) is called the official.

Wood's Inst. 30.

Where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there, and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted; for the statute intends that no suit shall be per saltum; but if the archdeacon hath not a peculiar, then the bishop and he have a concurrent jurisdiction, and the party may commence his suit either in the archdeacon's court or the bishop's, and he hath election to choose which he pleaseth; and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. L. Raym. 123.

An archdeacon is a ministerial officer, and cannot refuse a churchwarden elected by the parish. Rex v. Martin Rice. L. Raym. 138.

Vol. I.-13

ARCHERY. A service of keeping a bow, for the use of the lord to defend his castle. Co. Lit. sect. 157.

ARCHES COURT, curia de arcubus.] The chief and most ancient consistory court belonging to the archbishop of Canterbury for the debating of spiritual causes. It is so called from the church in London, commonly called St. Mary Le Bow (de Arcubus), where it was formerly held; which Church is named Bow Church, from the steeple which is raised by pillars, built archwise, like so many bent bows. Cowel.

The judge of this court is stiled the Dean of the Arches, or Official of the Arches court; he hath extraordinary jurisdiction in all ecclesiastical causes, except what belong to the prerogative court; also all manner of appeals from bishops or their chancellors or commissaries, deans and chapters, archdeacons, &c., first or last, are directed hither: he hath ordinary jurisdiction throughout the whole province of Canterbury, in case of appeals; so that upon any appeal made, he, without any farther examination of the cause, sends out his citation to the appellee, and his inhibition to the judge from whom the appeal was made. Of this, see more 4 Inst. 337. But he cannot cite any person out of the diocese of another, unless it be on appeal, &c. Stat. 23 H. 8. c. 9.

In another sense the dean of the arches has a peculiar jurisdiction of thirteen parishes in London called a deanery (being exempt from the authority of the bishop of London), of which the parish of Bow is the principal. The persons concerned in this court are the judge, advocates, registers, proctors, &c. And the foundation of a suit in these courts is a citation for the defendant to appear; then the libel is exhibited which contains the action, to which the defendant must answer; whereupon the suit is contested, proofs are produced, and the cause determined by the judge, upon hearing the advocates on the law and fact: when follows the sentence or decree

This court, as also the court of peculiars, the admiralty court, the prerogative court, and the court of delegates (for the most part), are now held in the hall belonging to the college of civilians, commonly called Doctor's

Commons. Floy. 21.

From this court the appeal is to the king in

ARCHIVES, Archiva, from arca, a chest.] The Rolls, or any place where ancient records, charters, and evidences, belonging to the crown and kingdom are kept; also the Chancery, Exchequer-office, &c. And it hath ries.-It is used in common speech for the

Bowes.

ARENTARE. To rent out, or let at a certain rent. Consuetud. Domus de Farendon, MS. fol. 53.

ARERIESMENT. Surprise, affrightment, in the year 1776, the king of the Scots pro-To the great arcriesment and estenysement of the common law. Rot. Parl. 21 Ed. 3.

ARGADIA, and ARGATHALIA. Argyle

shire, in Scotland.

ARGENTUM ALBUM. Silver coin, or pieces of bullion that anciently passed for money. See Alba Firma.

ARGENTUM DEI. God's money; i. e. money given in earnest upon the making of any bargain; hence comes arles, earnest.

ARGIL, or ARGOIL. Clay, lime, and sometimes gravel; also the lees of wine, gathered to a certain hardness. Law Fr. Dict.

ARGUMENTO S, ingenious, mentioned by our historian Newbrigensis, Lib. 1. c. 14.

ARICONIUM. Kenchester, near Here-

DE ARIDA VILLA. Drayton, or Drey-

ARIERBAN. The edict of the ancient French and German kings, &c. commanding all their tenants to come into the army; if they refuse, then to be deprived of their estates.—See Spelm. in v. Aribannum, &c.

ARIETUM LEVATIO. An old sportive exercise, supposed to be the same with running at the quintain. See Stevens's Shak-

speare, edit. 1793. vol. vi. p. 27. 175.

ARMA DARE. To dub or make a knight. Arma capere, or suscipere, to be made a knight. Kennet's Paroch. Antiq. p. 288: Walsingham, p. 507. The word arma in these places, signifies only a sword; but sometimes a knight was made by giving him the whole armour. Ordericus Vitalis, lib. 8. de Henrico, &c.

ARMA LIBERA. A sword and a lance which were usually given to a servant when he was made free. Leg. Will. cap. 65.

ARMA MOLUTA. Sharp weapons that cut, opposed to such as are blunt, which only break or bruise. Bract. lib. 3. They are called arma emolita by Fleta, lib. 1. c. 33. par. 6.

ARMA REVERSATA. A punishment when a man was convicted of treason or felony: thus our historian Knighton, speaking of Hugh Spencer, tells us, Primo vestierunt eum uno vestimento cum armis suis reversatis. Lib. 3. p. 2546.

ARMARIA. Vide Almaria.

ARMIGER, Esquire. A title of dignity belonging to such gentlemen as bear arms: and these are either by curtesy, as sons of noblemen, eldest sons of knights, &c.; or by creation, such as the king's servants, &c. The word armiger has been also applied to the higher servants in convents. Antiq. 576. See title Esquire, and Spelman

ARMISCARA, is a sort of punishment decreed or imposed on an offender by the judge. Malmsb. lib. 2. p. 97: Walsingham, p. 430. At first it was to carry a saddle at his back, in token of subjection. Brampton says, that,

mised king Hen. 2. at York, Lanceam et sellam suam super altare Sancti Petri ad perpetuam hujus subjectionis memoriam offerre. See Spelm in v.

ARMORIAL BEARINGS. By various acts, 38 G. 3. c. 53: 39 G. 3 c. 8: 41 G. 3. (U. K.) c. 69: 43 G. 3. c. 161. the last of which only is at present in force, a duty (now under the management of commissioners of taxes) is imposed on armorial bearings, whether borne on plate or carriages, &c.

ARMOUR and ARMS, in the understanding of law are extended to any thing that a man wears for his defence, or takes into his hands, or useth in anger, to strike or cast at another. Comp. Just. 65. Arms are also what we call in Latin insignia, ensigns of honour; as to the original of which, it was to distinguish commanders in war; for the ancient defensive armour being a coat of mail, &c. which covered the persons, they could not be distinguished, and therefore a certain badge was painted on their shields, which was called arms; but not made hereditary in families till the time of king Rich. I. on his expedition to regain Jerusalem from the Turks: and, besides shields with arms, they had a silk coat drawn over their armour, and afterwards a stiff coat, on which their arms were painted all over, now the herald's coat of arms. Sid. 352.

By stat. 13 R. 2. st. 1. c. 2. the constable (Lord High Constable) shall have cognizance of contracts touching deeds of arms done out of the realm; but it seems he cannot punish for painting coats of arms, &c. See 2 Hawk. P. C. c. 4. § 5-8. and this Dict. tit. Constable.

By the common law it is an offence for persons to go or ride armed with dangerous and unusual weapons: but gentlemen may wear common armour, according to their

quality, &c. 3 Inst. 160.

By stat. 7 E. 1. st. 1. the king may prohibit force of arms, and punish offenders according to law; and herein every subject is bound to be aiding. And by stat. 2 E. 3. c. 3. enforced by stats. 7 R. 2. c. 13. and 20 R. 2. c. 1. none shall come with force and arms before the king's justices, nor ride, nor go armed, in affray of the peace, on pain to forfeit their armour, and suffer imprisonment, &c.

Under these statutes none may wear (unusual) armour publicly upon pretence of protecting his person; but a man may assemble his neighbours to protect his house without transgressing the act. 1 Hawk. P. C. 267. But no wearing of arms is within the stat. unless they are such as terrify; therefore, the weapons of fashion, as swords, &c. or privy coats of mail, may be worn. Id. ib. And one may arm to suppress riots or dangerous insurrections, Id. 268.

By the Bill of Rights, 1 W. & M. st. 2. c. 2. it is declared that "the subjects which are Protestants, may have arms for their defence

suitable to their conditions, as allowed by had the care of the soldiers' armour, and law." See stat. 33 H. S. c. 6. and tit. Game

and Constable, III. 2.

By 47 G. 3. st. 2. c. 54. and 50 G. 3. c. 109. to prevent improper persons from having arms in Ireland; all persons keeping arms shall be licensed, and when required shall deliver up their arms to be placed in the public stores. These acts are temporary. And see I Will. 4. c. 44. as to importation and exportation of arms in Ireland.

By 53 G. 3. c. 115: 55 G. 3. c. 59. regulations are made for insuring the careful manufacture of fire-arms in England, and making provision for proving the barrels thereof.

By stat. 60 G. 3. c. 1. for preventing the training of persons to the use of arms, and the practice of military evolutions and exercises, all meetings and assemblies of persons (in England, Scotland, or Ireland), for training and drilling themselves, or being trained or drilled to the use of arms, or for practising military exercise, movements, or evolutions, without authority from the crown, or the lieutenant, or two justices of the peace of the county, are prohibited as dangerous to the peace and security of the king's subjects and his government. Persons attending such meetings for the purpose of training others, are made punishable by transportation not exceeding seven years, or imprisonment no exceeding two years. All such meetings may be disposed of by any justice of peace or constable, or the parties present may be arrested and committed, or held to bail. By cap. 2. of the same session (now expired), justices of the peace in certain disturbed counties, were authorised to seize and detain arms kept for purposes dangerous to the public peace.

ARMY. See tits. King, Militia, Soldiers. ARNALDIA, Arnoldia. A disease that makes the hair fall off like the alopecia, or like a distemper in foxes. Rog. Hoveden, p.

ARNALIA, Arable grounds. This word is

mentioned in Domesday, tit. Essex.

AROMATARIUS, Latin.] A word often used for a grocer, but held not good in law

proceedings. 1 Vent. 142.

ARPEN, or Arpent. An acre or furlong of ground: and according to the old French account in Domesday-book, 100 perches make an arpent. The most ordinary acre, called l'arpent de France, is one hundred perches square; but some account it but half an acre.

ARPENTATOR. A measurer or surveyor

of land.

ARQUEBUSS, Fr. Arquebuse.] A short hand gun, a caliver, or pistol; mentioned in some of our ancient statutes. Law Fr. Dict.

ARRACK. A duty and excise is payable for arrack imported from the East Indies.

See tit. Navigation Acts.

ARRAIATIO PEDITUM, is used in Pat. 1 Ed. 2. for the arraying of foot soldiers.
ARRAIERS, Arraitores.] Such officers as

whose business it was to see them duly ac-In several reigns commissioners have been appointed for this purpose.

ARRAIGN, ARRAIGNMENT, from the Fr. arranger, to set a thing in order; hath the same signification in law: but the true derivation is from the French arraisonner, i. c. ad rationem ponere. To call a man to answer in form of law. A prisoner is arraigned, when he is indicted and brought to trial: and to arraign a writ of assize, is to cause the demandant to be called to make the plaint, in such manner as the tenant may be obliged to answer. Co. Lit. 262. But no man is properly arraigned but at the suit of the king, upon an indictment found against him, or other record wherewith he is to be charged; and this arraignment is to take care that the prisoner do appear to be tried and hold up his hand at the bar, for the certainty of the person, and plead a sufficient plea to the indictment. Co. Lit. 262, 263.

The prisoner is to hold up his hand only in treason and felony; but this is merely a ceremony: if he owns that he is the person, it is sufficient without it; and then upon his arraignment his fetters are to be taken off; and he is to be treated with all the humanity imaginable. 2 Inst. 315: 3 Inst. 35: 4 Bl. Com. 322: Hawk. P. C. c. 28. § 1. A peer need not hold up his hand. 4 St. Trials, 211.

The arraignment of a prisoner consists of three parts:-1st, calling him to the bar, and by holding up his hand, or otherwise making it appear he is the party indicted; -2ndly, reading the indictment to him distinctly in English, that he may fully understand the charge; -3rdly, demanding of him whether he be guilty or not guilty, and entering his plea; and then demanding of him how he will be tried; the common answer to which is by God and the country. 2 Hale Hist. 219.

An attainder of high treason has been reversed for the omission of an arraignment. 2 Hawk. P. C. 438. which see for farther mat-

ter as to Arraignment.

If in action of slander for calling one thief, the defendant justifies that the plaintiff stole goods, and issue is thereon taken; if it be found for the defendant in B. R. and for felony in the same county where the court sits, or before justices of assise, &c. he shall be forthwith arraigned upon this verdict of twelve men, as on an indictment. 2 Hale's Hist. P. C. 151.

The pleas upon arraignment are either the general issue, not guilty; plea in abatement, or in bar; and the prisoner may demur to the indictment; he may also confess the fact, but then the court has nothing more to do than to proceed to judgment against him.

When the person charged is called upon to plead, it is enacted by stat. 7 and 8 G. 4. c. 28. § 1. "that if any person not having the

any indictment for treason, felony, or piracy, shall plead thereto a plea of 'not guilty,' he shall by such plea, without any farther form, Shep. Ab. 299. be deemed to have put himself upon the country for trial, and the court shall in the usual manner order a jury for the trial of such person accordingly;" and by section 2 of the same statute it is enacted, "that if any person being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanour, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the court if it shall so think fit, to order the proper officer to enter a plea of 'not guilty' on behalf of such person, and the plea so entered shall have the same force and effect as if the person had so pleaded the same.

ARRAY, arraya sive arraiamentum.] An old French word, signifying the ranking or setting forth of a jury of men impanelled upon a cause. And when we say to array a panel, that is to set forth the men impanelled one by another. F. N. B. 157. To challenge the array of the panel is at once to except against all the persons arrayed or impanelled, in respect of partiality, &c. Co. Lit. 156. If the sheriff be of affinity to either of the parties; or if any one or more of the jurors are returned at the nomination of either party, or for any other partiality; the array shall be quashed. See 2 Barn. & C. 104. The word array also relates, in a particular manner, to military order, as to conduct persons armed, &c. Stat. 13 and 14 Car. 2. cap. 3.
ARRAY, MILITARY, Commission of. See

tit. Soldiers.

ARREARS or ARREARAGES, areragia, from the French arriere, retro, behind.] Money unpaid at the due time, as rent behind; the remainder due on account; or a sum of money remaining in the hand of an

ARRECTATUS. One suspected of any crime. Offic. Coronat. Spelm. Gloss.

ARRECTED; reckoned, considered. Inst. 173. b. & n.

ARRENATUS, arraigned, accused. Rot.

Parl. 21 Ed. 1.

ARRENTATION, from the Spanish arrendar ad certum redditum dimittere.] The according to the assise of the forest, under a yearly rent: saving the arrentations is saving a power to give such licenses. Ordin. Forestæ, 34 Ed. 1. st. 5.

ARREST, arrestum, from the Fr. arreter, to stop or stay.] A restraint of a man's person, obliging him to be obedient to the law: and it is defined to be the execution of the command of some court of record or officer of justice. An arrest is the beginning of imprisonment, when a man is first taken, and re-

privilege of peerage, being arraigned upon strained of his liberty, by power or colour of a lawful warrant: also it signifies the dccree of a court by which a person is arrested. 2

ARRESTS are either in civil or criminal

- An arrest in a civil cause is defined to be the apprehending or restraining one's person by process in execution of the command of some court, or officers of justice. Wood's

There are several statutes securing the liberty of the subject against unlawful arrests and suits. See Magna Charta, c. 29: 3 Ed. 1

c. 35: and see tit. Barrator.

Some persons are also privileged from arrests, viz. peers of the realm, members of parliament, peeresses by birth, (1 Inst. 131: 2 Inst. 50: 4 Bacon's Ab. 228.) peers of Scotland, (2 Stra. 990.) a peeress by marriage, (Co. Lit. 16. 6: Co. 53: Dyer, 79.) an Irish peer, (1 M. & R. 110: 7 B. & C. 388.) a Scotch peer who votes at the election of peers, (8 Bing. 55:) members of convocation actually attending thereon, (st. 8 H. 6. c. 1.) bishops, ambassadors, or the domestic servant of an ambassador, really and bona fide in that capacity, (st. 7 Ann. c. 12: 3 Wils. 32: 2 Str. 797: 2 Ld. Raym. 1524: 4 Burr. 2016, 17: 3 Burr. 1676.) the king's servants, (1 Raym. 152: 8 Mod. 12.) marshal, warden of the fleet, (1 Vent. 65.) clerks, attorneys, and all other persons attending the courts of justice, (4
Inst. 72: 2 Inst. 551: 12 Mod. 163: 11 E. R. 439: 1 H. Bl. c. 636: 1 Mau. & Sel. Rep. 638.) clergymen performing divine service, and not merely staying in the church with a fraudulent design; stats. 50 E. 3. c. 5:1 R. 2. c. 16. repealed by stat. 9 G. 4. c. 31; but by which act, § 23. it is declared to be a misdemeanour to arrest any clergymen upon civil process, during his performance of, or going to, or returning from the performance of divine service; suitors, (Bro. Privil. 57.) witnesses subpenned, and other persons necessarily attending any court of record upon business, (Sir T. Raym. 101: 1 Vent. 11: Rules in Chan. 217: 3 Inst. 141.) A bankrupt coming to surrender, or within forty-two days after his surrender, (st. 5 G. 2. c. 30. § 5. and see Cowp. 156. but not an extent at the suit of the crown, 2 Bl. Rep. 1142.) witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, (1 Atk. 54.) but not creditors coming to prove their debts, (4 Term. Rep. 377.) heirs, executors, or administrators, R. M. 1654. except on personal contracts by themselves, (1 T. Rep. 716.) or in cases of devastavit, (1 Salk. 98.) sailor or volunteer soldier, (unless the debt is twenty pounds,) Stat. 1 G. 2. c. 14. § 15: 31 G. 3. c. 13. § 65. See Barnes, 114: 1 Str. 2. 7: 1 Black. Rep. 29, 30.—Officers of courts are allowed these privileges only where they sue or are sued in their own right; not if as executors or administrators, nor in joint actions. Hob. 177: after his arrest, unless the prisoner refuses to Dyer, 24. p. 150: 2 Sid. 157. Latch. 199: go to some safe house (except his own) of his own choosing. Nor shall any officer take for 19. p. 289. that no arrests can be made in the king's presence, &c.

But this privilege does not extend to Irish or other foreign peers, (2 Inst. 48: 3 Inst. 70.) or to peeresses by marriage, if they afterwards intermarry with commoners. Co. Lit. 16: 2 Inst. 50: 7 Co. 15, 16.

And though the servants of peers necessarily employed about their persons and estates, could not formerly be arrested; (2 Str. 1065: 1 Wils. 278.) yet this privilege seems to have been taken away by the stat. 10 G. 3. c.

A person who has been appointed his majesty's coachman, and who is liable to be called upon to act in that quality, is not liable to be arrested, although he publicly carries on trade, and the debt was contracted in the course of such business. 2 Taunt. 167.

Members of corporations aggregate and hundredors, not being liable to a capias, cannot be arrested in their corporate capacity, or on the statutes of hue and cry, &c. Bro. tit. Corp. 43: 3 Keb. 126, 7. Corporations must be made to appear by distringas. Finch, 353: 3 Salk. 46; and see 2 W. 4. c. 29.

In an action against husband and wife, the husband alone is liable to be arrested; and shall not be discharged until he have put in bail for himself and wife; 1 Vent. 49; 1 Mod. 8; and if she is arrested, she shall be discharged on common bail. 1 Term. Rep.

486: 1 Salk. 115. See tit. Bail.

A clerk of the court ought not to be arrested for any thing which is not criminal, because he is supposed to be always present in court to answer the plaintiff. 1 Lill. 94. Arrests are not to be made within the liberty of the king's palace: nor may the king's servants be arrested in any place without notice first given to the lord chamberlain, that he remove them, or make them pay their debts. Vide tit. Ambassador.

There is this difference between arrests in civil and criminal cases; that none shall be arrested for debt, trespass, &c. or other cause of action, but by virtue of a precept or commandment out of some court: but for treason, felony, or breach of the peace, any man may arrest without warrant or precept.

Terms de Ley, 54.

The abuses of gaolers and sheriffs' officers towards their prisoners are well restrained and guarded against by stat. 32 G. 2. c. 28; the chief provisions of which are, that an officer shall not carry his prisoner to any tavern, &c. without his consent, nor charge him for any liquor, but such as he shall freely call for, nor demand for caption or attendance any other than his legal fee, nor exact any gratuity-money, nor carry his

own choosing. Nor shall any officer take for the diet, lodging, or expenses of his prisoner more than shall be allowed by an order of sessions. Bailiffs to show a copy of the act to prisoners, and to permit perusal thereof; and the prisoner to send for his own victuals, bedding, &c.

Sheriffs and their officers to take no reward for doing their office but according to law. Stat. 3 E. 1. c. 26: 1 H. 4. c. 11: Co. Lit. 368: 23 H. 6. c. 9: Plowd. 465.

The fees now allowed by the master for arrests on mesne process in town are 10s. 6d. on capias, bill latitat, &c. and 1 guinea if by original, and also in the country I guinea and 1s. per mile. Impey's Sheriff, 122. See 2

W. 4. c. 39. § 4.

The stat. 8 Eliz. c. 2. § 4. enacts that if any person procure another to be arrested in the Marshalsea, or in any court within London, &c. at the suit of any person, where there is no such person known, or without the plaintiff's consent, every person who shall procure such arrest, &c. and shall be accused by indictment, presentment, or by the testimony of witnesses, or other due proof, shall suffer six months' imprisonment without bail or mainprize, and pay to the party arrested treble costs, and forfeit 10l. for every such offence, to be recovered by action of debt, &c.

By stat. 29 Car. 2. c. 7. no writ, process, warrant, &c. (except in cases of treason, felony, or for breach of the peace) shall be served on a Sunday; on pain that the person serving them shall be liable to the suit of the party grieved, and answer damages, as if the same had been done without writ; an action of false imprisonment lies for arrest on a Sunday, and the arrest is void. 1 Salk. 78. A defendant was arrested on a Sunday by a writ out of the Marshalsea; and the court of B. R. being moved to discharge him, it was denied: and he was directed to bring action of false imprisonment. 5 Mod. Rep. 95. The defendant being taken upon a Sunday, without any warrant, and locked up all that day; on Monday morning a writ was got against him, by which he was arrested; it was ruled that he might have an action of false imprisonment, and that an attachment should go against those who took him on the Sunday. Mod. Cas. 96. Attachments have been often granted against bailiffs for making arrests on Sunday: but affidavit is usually made, that the party might be taken upon another day. 1 Mod. 56. A person may be retaken on a Sunday, where arrested the day before, &c. Mod. Cas. 231. And a man may be taken on a Sunday on an escape warrant; or on fresh pursuit when taken the day before; 2 Ld. Raym. 1028: 2 Salk. 626; when he goes at large out of the rules of the King's Bench or Fleet prison, &c. Stat. 5 Ann. c. 9. Also prisoner to gaol within twenty-four hours bail may take the principal on a Sunday, and

ARREST. 98

him. 1 Atk. 239: 6 Mod. 251. A party cannot be arrested on a Sunday on an attachment for non-performance of an award, it being only in the nature of a civil execution. 1 T. Rep. 266. denies 1 Atk. 581.

By 9 G. 4. c. 31. § 23. the arresting any clergyman upon any civil process, while performing, or going to, or returning from performance of divine service, is declared a mis-

demeanor.

By stat. 11 and 12 W. 3. c. 9. no person is to be held to bail in Wales on process out of the courts at Westminster for less than 20l.

By 43 G. 3. c. 46. for the more effectual prevention of frivolous and vexatious arrests, &c. no person shall be arrested (in England or Ireland) except where the case of action originally required bail: § 1. The defendant on an arrest may deposit the amount of the debt with the sheriff, and 10l. to answer the costs; which deposit shall be paid into court, and on the defendant's perfecting bail repaid him; or if bail is not put in shall be paid over to the plaintiff: § 2. The plaintiff shall not be entitled to costs, if he does not recover the amount of the sum for which defendant was held to bail, &c.: § 3.—Nor to costs on action on the judgment unless by order of the court: \S 4. The defendant may justify bail on mesne process in vacation: \S 6. See also 7 and 8 G. 4. c. 71. § 2-4.

By 37 G. 3. c. 45. (for the restraining of payments in cash by the Bank of England, and amended by 43 G. 3. c. 18. and continued by several subsequent acts to 5th July, 1818,) no person to be held to special bail, unless affidavit required to be made by 12 G. 1. c. 29. also add that there had been no offer to pay in Bank notes, or partly in notes and partly in cash, otherwise proceedings to be had as if no affidavit had been made to hold to special bail. But by the 59 G. 3. c. 49. § 1. the restrictions on cash payments ceased on the 1st May, 1823, so that it is no longer necessary to negative a tender in Bank notes.

No person shall be held to special bail or arrested upon any process issuing out of any court (in England) when the cause of action shall not have originally amounted to 201. exclusive of costs, 7 and 8 G. 4. c. 71. § 1; and

so in Ireland by stat. 10 G. 4.c. 35.

It is not necessary that the creditor should himself swear to the debt; it suffices for another person to swear positively that defendant is indebted to plaintiff, without showing that the deponent is the agent of, or connected with, the plaintiff. King v. Turner, 1 Chit. 58: Brown v. Davis, 1 Chit. 161: S. P. Pieters v. Luytjies, 1 B. & P. 1: Lee v. Selwood, 9 Price, 322.

In trover the defendant might be held to bail of course. 2 Str. 1122: Cowp. 529. For this is more an action of property than a tort. 1 Wils. 23. But now by a rule 48 G. 3. (9 East, 325.) no person can be held to bail in

confine him till Monday, and then render | trover or detinue without an order of the chief justice or a judge: and by the rule H. T. 2 W. 4. in all the courts after non pros. nonsuit or discontinuance, the defendant shall not be arrested a second time without the order of a judge.

In an action of debt on a judgment, whether after verdict or by default, defendant cannot be arrested if he was previously held to bail in the original action. Say 160.

Bail cannot be had in an action on the second judgment, where bail has been given on the first. 2 Str. 782.

In what cases special bail shall be required, see tit. Bail.

Formerly one great obstruction to public justice, civil as well as criminal, was the number of privileged places, such as the Mint, Savoy, &c. under pretence of their being ancient palaces; but the sanctuaries for iniquity are now abolished, and the opposing any process therein is made highly penal by stat. 8 and 9 W. 3. c. 27. § 15: 9 G. 1. c. 28. § 1: and 11 G. 1. c. 22: by which persons opposing the execution of process, or abusing the officer, if he receives any bodily hurt, are declared guilty of felony. By stat. 1 G. 4. c. 116. these acts are repealed, and the offences enumerated in the statutes are now consequently to be judged of in the same manner as similar offences committed in any other part of the kingdom. See tit. Privileged Places.

When a person is apprehended for debt, &c. he is said to be arrested; and writs express arrest by two several words, capias and attachias, to take and catch hold of a man; for an officer must actually lay hold of a person besides saying he arrests him, or it will be no lawful arrest. 1 Lill. Ab. 96. If a bailiff be kept off from making an arrest, he shall have an action of assault: and where the person arrested makes resistance, or assaults the bailiff, he may justify beating of him. If a bailiff touches a man, which is an arrest, and he makes his escape, it is a rescous, and attachment may be had against him. 1 Salk. 79. If a bailiff lays hold of one by the hand (whom he had a warrant to arrest), as he holds it out at the window, this is such a taking of him, that the bailiff may justify the breaking open of the house to carry him away. 1 Vent. 306.

When a person has committed treason or felony, &c. doors may be broken open to arrest the offender; but not in civil cases, except it be in pursuit of one arrested; or where a house is recovered by real action, or in ejectment, to deliver possession to the person recovering. Plowd. 5 Rep. 91. See Bac. Ab. Sheriff. (N.) (7th ed.) Action of trespass, &c. lies for breaking open a house to make arrest in a civil action. Mod. Cas. 105. But if it appears a bailiff found an outer door, &c. open, he may open the inner door to make

an arrest. Comb. 327.

In the case of Lee v. General Gansel, the

court of King's Bench determined, that the writ, or order of his courts, according to law; chamber door of a lodger is not to be considered as his outer door; but that the street door being open, the officers had a right to force open the chamber door, the defendant being in the room, and refusing to open it. Cowp.

Also it is enacted by 3 and 4 Jac. 1. par. 35. that upon any lawful writ, warrant, or process awarded to any sheriff or other officer, for the taking of any popish recusant, standing excommunicated for such recusancy, it shall be lawful, if need be, to break any house. 2 Hawk. P. C. c. 14. § 10.

But it hath been resolved, that where justices of the peace are, by virtue of a statute, authorised to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors. 2 Hawk. P. C. c. 14. § 11.

An arrest in the night, as well as the day is lawful. 9 Rep. 66. And every one is bound by the common law to assist not only the sheriff in the execution of writs, and making arrests, &c., but also his bailiff that hath his warrant to do it. 2 Inst. 193. A bailiff upon an arrest ought to show at whose suit, out of what court the writ issues, and for what cause, &c. when the party arrested submits himself to the arrest: a bailiff, sworn and known, need not show his warrant, though the party demands it; nor is any other special bailiff bound to show his warrant unless it be demanded. 9 Rep. 68, 69: Cro. Jac. 485.

If an action is entered in one of the compters of London, a city serjeant may arrest the party without the sheriff's warrant. 1 Lill. Ab. 94. And by the custom of London, a debtor may be arrested before the money is due, to make him find sureties; but not by the common law. 1 Nels. Ab. 258.

If a wrong person is arrested; or one for felony, where no felony is done, &c., it will be false imprisonment.

By Glynn, Ch. J. Mich. 1658. If one be arrested by the sheriff of a county within a liberty, without a non omittas, yet the arrest is good; for the sheriff is sheriff of the whole county, but the bailiff of the liberty may have his action against the sheriff, for entering of his liberty. But upon a quo minus, a sheriff may enter any liberty and execute it impune. Pract. Leg. 72.

A person superseded for want of being charged in execution within two terms after judgment, cannot be again arrested and taken in execution upon the same judgment. Line v. Lowe .- Aliter if superseded for want of proceeding in time before judgment. R. 330.

With regard to arrests in criminal cases it hath already been observed, that for treason, felony, or breach of the peace, any person may arrest without warrant or precept. But the king cannot command any one by word of mouth to be arrested: for he must do it by

nor may the king arrest any man for suspicion of treason, or felony, as his subjects may; because, if he doth wrong, the party cannot have an action against him. 2 Inst. 186.

Arrests by private persons are in some cases commanded. Persons present at the committing of a felony must use their endeavours to apprehend the offender, under penalty of fine and imprisonment. 3 Inst. 117: 4 Inst. 177.

And for this cause, by the common law, if any homicide be committed, or dangerous wound given, whether with or without malice, or even by misadventure or self-defence, in any town, or in the lanes or fields thereof, in the day-time, and the offender escape, the town shall be amerced, and if out of a town, the hundred shall be amerced. 3 Inst. 53.

And since the statute of Winchester, c. 5. which ordains that walled towns shall be kept shut from sun-setting to sun-rising; if the fact happen in any such town by night or by day, and the offender escape, the town shall be amerced. 3 Inst. 53.

And as private persons are bound to apprehend all those who shall be guilty of any of the crimes above mentioned in their view, so also are they, with the utmost diligence, to pursue and endeavour to take all those who shall be guilty thereof, out of their view, upon a hue and cry levied against them. 3 Inst.

A private person may justify breaking and entering the house of another, and assaulting and imprisoning him in order to prevent him from committing murder on his wife. 2 Bos. & Pull. 260. and the note of the learned re-

Every private person is bound to assist an

officer requiring him to apprehend a felon.

As to the arresting of offenders by private persons of their own authority, permitted by law for the prevention of treason or felony only intended to be done; any one may lay hold of a person, whom he sees upon the point of committing treason, or felony, or doing an act which would manifestly endanger the life of another, and detain him, till it may be reasonably presumed he has changed his purpose. 2 Hawk. P. C. c. 12. § 19.

There is this distinction between a constable and a private person, that a constable may arrest a party on reasonable suspicion that a felony has been committed; but a private party, to justify the arrest, must show that a felony has actually been committed. Doug. 359: 3 Camp. 421: 6 Barn. & C. 638: Bac. Ab. Trespass. (D.) (Ed. by Gwillim and Dodd.) It was lately decided that a watchman may legally apprehend a person found walking in the street at night with a bundle in his hand when there was reasonable ground to suspect felony, though there was no proof of one having been committed. 3 Taunt. 1. 3: Bac. Ab. ubi supra.

As to arrests for inferior offences, no pri-

100 ARREST.

vate person can arrest another for a bare breach of the peace after it is over; but it is held, that a private man may arrest a night-walker, or a common cheat going about with false dice, and actually caught playing with them, in order to have him before a justice of peace; and the arrest of any other offenders, by private persons, for offences in like manner scandalous, and prejudicial to the public, seems justifiable. 2 Hawk. P. C. c. 12. § 20.

With regard to arrests by public officers, they may be made either with or without

process.

Arrests without process may be made by watchmen, constables, bailiffs of towns, or justices of peace. For the power of watchmen, see Stat. Winchester, c. 4. It has been holden, that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself. 2 Hawk. P. C. c. 13. § 6: see 3 Tuunt. 1. 3: 2 Burr. R. 164: 54 G. 3. c. 57. § 18.

As to arrests by Constables, see tit. Consta-

ble, III. 1, 2.

It is the better opinion at this day, that any constable, or even a private person to whom a warrant shall be directed from a justice of peace, to arrest a particular person for felony, or any other misdemeanor within his jurisdiction, may lawfully execute it, whether the person mentioned in it be, in truth, guilty or innocent; and whether he were before indicted of the same offence or not; and whether any felony were, in truth, committed or not: for however the justice himself may be punishable for granting such a warrant, without sufficient grounds, it is reasonable that he alone be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding. 2 Hawk. P.C. c. 13. § 11: 6 Barn. & C. 638. acc.

The doctrine of general warrants (i. c. to apprehend all the authors and publishers of libels, or generally all persons suspected of any particular crime, without mentioning the name of the person accused) seems exploded as illegal. See Leach's Hawk. P. C. ii. c. 13. § 10; and the note there as to Wilkes's case. But it is to be observed, that the term general warrant used by Hawkins in that place, does not seem to mean a warrant, without the name of the party being specified, but one which does not contain the specific charge against the party. See the case of Money v. Leach, and also 4 Comm. 65. 291.

The great point gained by these determinations was the rescuing persons from the malice or ignorance of the *inferior* ministers of

justice.

With regard to arrests by bailiffs of towns, their power is founded on the above-mentioned statute of Winchester, c. 4. And as to arrests by justices of peace, arrests by their

command are either by word of mouth or by

A justice of peace may, by word of mouth, authorise any one to arrest another, who shall be guilty of an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. 2 Hawk. P. C. c. 13. § 14: Dalt. c. 117.

And a justice of peace may lawfully grant a warrant for apprehending or arresting persons charged with treason, felony, premunire, or any other offence against the peace; and generally, wherever a statute gives one or more justices of peace a jurisdiction over any offence, any one justice of peace may, by his warrant, cause such offenders to be arrested and brought before him. 2 Hawk. P. C. c.

13. § 15.

But it is said, that anciently, no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor; cognizable only by a sessions of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it. Yet the long, constant, universal, and uncontrolled practice of justices of peace seems to have altered the law in this particular, and to have given them an authority, in relation to such arrests, not now to be disputed. Ibid. § 16.

A justice of peace may justify the granting a warrant for the arrest of any person upon strong grounds of suspicion of felony, or misdemeanor; but he seems to be punishable, as well at the suit of the king, as of the party grieved, if he grant any such warrant groundlessly or maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty. *Ibid.*

1 8 18

Every warrant ought to be under the hand and scal of the justice of peace, and specify the day it was made out: if it be for the peace or good behaviour, it is advisable to set forth the special cause upon which it is granted; but if it be for treason or felony, or other offences of an enormous nature, it is said that it is not necessary to set forth the special cause; and it seems to be rather discretionary than necessary to set it forth in any case. Ibid. § 21—25.

The warrant may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for, though the justice may authorise any one to be his officer, whom he pleases to make such, yet it is most advisable to direct to the constable of the precinct wherein it is to be executed; for that no other constable, and a fortiori no private person, is compellable to serve it. Ibid.

A bailiff or constable, if they be sworn, and commonly known to be officers, and act

within their own precincts, need not show | discharged; Dougl. 716: 1 Burr. 334; and their warrant to the party, notwithstanding he demand the sight of it; but that these and all other persons whatsoever, making an arrest, ought to acquaint the party with the substance of their warrant; and all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must show their warrants, if demanded. Ibid. § 28.

And therefore, stat. 27 G. 2. c. 20. provides, that in all cases where a justice is empowered, by statute, to issue a warrant of distress for levying a penalty, the officer executing such warrant, if required, shall show the same to the defendant, and suffer a copy to

The sheriff, having such a warrant directed to him, may authorise others to execute it; but every other person, to whom it is directed, must personally execute it; yet, it seems, that any one may lawfully assist him.

After presentment or indictment found in felony, &c. the first process is a capias, to arrest and imprison the offender; and if the offender cannot be taken, an exigent is awarded in order to outlawry. H. P. C. 209. For farther matter, see tit. Debtors; and see Bac. Ab. Trespass. (D.) (7th ed.)

A bill to abolish the law of arrest for debt, except in cases of fraud, has been introduced into the House of Commons by the Attorney-General, Sir John Campbell, but its fate or the measures that may grow therefrom have not been yet ascertained. Oct. 1835.

ARREST OF JUDGMENT. To move in arrest of judgment, is to show cause why judgment should be stayed, notwithstanding verdict given. Judgment may be arrested for good cause in criminal cases, as well as civil, if the indictment be insufficient, &c. 3 Inst.

Arrests of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested but for that which appears on the face of the record itself. Ld. Raym. 232. Motions in arrest of judgment may be made at any time before judgment signed. Dougl. 747: Str. 845. Sunday is no day; 4 Burr. 21. 30; nor a dies non. It is a rule to show cause, and therefore needs no notice to be given, nor yet an affidavit to ground it on, as it arises out of the record; and after judgment upon demurrer, there can be no such motion made, as the court will not suffer any one to tell them that the judgment they gave on mature deliberation is wrong. It is otherwise indeed in the case of judgment by default, for that is not given in so solemn a manner; or if the fault arises on the writ of inquiry or verdict, for then the party could not allege it before. Str.

It may be made after motion for a new trial Vol. I .- 14

if arrested, each party pays his own costs.

Cowp. 407.

After verdict a man may allege any thing in the record, in arrest of judgment, which may be assigned for error after judgment. Roll. Ab. 716. And judgment after verdict shall not be arrested for an objection that would have been good on demurrer. 3 Burr. 1725. Far farther matter, see tit. Amendment, Judgment; and for causes of arrest of judgment, see 3 Comm. 393. 395. tit. Judgment.

ARREST OF ENQUEST is to plead in arrest of taking the request, upon the former issue, and to show cause why an enquest should not be

taken. Bro. tit. Repleader.

arrestandiś bonis ne dissipen. TUR. A writ which lay for a man whose cattle or goods are taken by another, who, during the contest, doth or is like to make them away, not being of ability to render satisfaction. Reg. Orig. 126.
ARRESTANDO IPSUM QUI PECU-

NIAM RECEPIT, &c. is a writ that lay for apprehending a person who hath taken the king's prest-money to serve in wars, and hides himself when he should go. Reg. Orig. 24.

ARRESTMENT, is the command of a judge, discharging any person, in whose hands the debitor's moveables are, to pay or deliver up the same, till the creditor, who hath procured the arrestment to be laid on, be satisfied, either by caution or payment, according to the respective grounds of arrestment. Scotch Dict .- It is process in the nature of an attachment, whereby the person, in whose hands any part of the personal estate of the debtor is lodged, is enjoined (i. e. prohibited) from delivering or paying the same, till the creditor so arresting is paid, or the debtor gives security to answer the demand.

Arrestment jurisdictionis fundandæ causa. This arrestment is used to bring a foreigner under the jurisdiction of the courts of Scotland. A foreigner, it is held, owes no obedience to the decisions of those courts; and therefore, unless either the person or the effects of the foreigner be within the jurisdiction of that court, the judgment of the court could receive no effect: it is therefore customary to grant a warrant for attaching the person of the foreigner, or for arresting his goods to the effect of founding a jurisdiction, and these can be removed only by finding caution (judicio sisti,) that the foreigner shall appear at all diets of court. Scotch Dict.

ARRESTO FACTO SUPER BONIS MERCATORUM ALIENIGENORUM. A writ that lay for a denizen against the goods of aliens found within this kingdom, in recompence of goods taken from him in a foreign country, after denial of restitution. Reg. Orig. 129. This the ancient civilians called clarigatio; but by the moderns it is termed reprisalia.

ARRETTED, agrectatus quasi, ad rectum

See Thirlage.

a judge, and charged with a crime. Strand! Hank, P. C. i. c. 39, § 3. and in note. Pl. Co. 45. And it is sometimes used for imputed or laid unto; as no folly may be arretted to one under age. Littleton, cap. Remitter. Chaucer used the verb arretteth, that is, lays blame, as it is interpreted. Bracton says, ad rectum habere mulefactorem, i. e. to have the malefactor forthcoming, so as he may be charged and put to his trial. Bract. lib. 3. tract. 4. c. 10. And in another place, rectatus de marte hominis, charged with the death

ARRHÆ, earnest, evidence of a completed bargain. In the Scotch law dead-earnest is when the earnest is given by the purchaser over and above the price; where for instance it bears so small a proportion to the price that it is not presumed to be counted on, it is deemed dead-earnest, but where it is of greater consequence it may be understood to go into the price. Scotch Dict.

ARRIAGE and CARRIAGE were indefinite services formerly demandable from tenants; but by act 20 G. 2. c. 50. § 21, 22. all indefinite services are prohibited, and none can now be demanded but such as are enumerated in the lease, or in writing apart. Mill-services continue on the former footing.

ARROWS. By an ancient statute, all heads for arrows shall be well brazed, and hardened at the point with steel, on pain of forfeiture and imprisonment: and to be marked with the mark of the maker. Stat. 7 H. 4. c. 7.

ARRURA. In the black book of Hereford, De Operationibus Arruræ, signifies days' work of ploughing; for anciently customary tenants were bound to plough certain days for their Una arrura, one day's work at the plough: and in Wiltshire, earing is a day's ploughing. Paroch. Antiq. p. 41. See Aratrum terræ.

ARSENALS. Dock-yards, magazines, and other public stores in this realm, or in islands, countries, ports, or places thereto belonging, wilfully setting fire to, or destroying, is punishable with death, by 12 G. 3. c. 24.

ARSON, from ardeo, to burn. The legal definition of arson, as it stands at common law, is the maliciously and voluntarily burning the house of another. East, P. C. 1015: Leach. 260. House-burning was felony at common law. 3 Inst. 66. It must be maliciously, voluntarily, and an actual burning: not putting fire only into a house, or any part of it, without burning; but if part of the house is burnt, or if the fire doth burn, and then goeth out of itself, it is felony; 2 Inst. 188: H. P. C. 85; and it must be the house of another; for if a man burns his own house only, though with intention to burn others, it was not at common law felony, but a great misdemeanor, punishable with fine, pillory,

vocatus.] Is where a man is convened before by burning the public workhouse. Leach's

The law upon this subject is now clearly defined by stat. 7 and 8 G. 4. § 30. which incorporates the provisions of former statutes relating to this subject, and consolidates them into two simple enactments contained in the 2nd and 17th sections. The 2nd section constitutes it a capital offence unlawfully and maliciously to set fire to any church or chapel, or to any chapel for the religious worship of dissenters duly registered, or to any house, stable, coach-house, outhouse, warchouse, office, shop, malt-house, mill, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture or any branch thereof, whether the same, or any of them respectively, shall then be in the poss ssion of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person. The 17th section renders it also a capital offence, "unlawfully and maliciously to set fire to any stack of corn, grain, pulse, straw, hay, or wood." And the latter part of the same section subjects any person who shall unlawfully and maliciously set, fire to any crops of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppiee, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever growing, to transportation for seven years, or to imprisonment for any term not exceeding two years, according to the discretion of the court before whom the of-

If a wife set fire to her husband's house for the purpose of burning it down, this is not an offence within this stat. 7 and 8 G. 4. c. 30. § 2. There must be an intent to injure or defraud some third person not identified with herself. R. v. Marsh, 1 Ry. & Moo. C. C.

If a house is fired by negligence or mischance it cannot amount to arson. 3 Inst. 67. H. P. C. 85. Where one burns the house of another, if it be not wilful and malicious, it is not felony, but only trespass; therefore if A. shoot unlawfully with a gun at the cattle or poultry of B., and by means thereof set another's house on fire, this is not arson; for though the act he was doing was unlawful, yet he had no intent to burn the house. 1 Hale's Hist. P. C. 569.

By stat. 6. A. c. 31. § 3. if any servant, through negligence or carelessness, shall fire any dwelling-house or outhouse, be convicted by the oath of one witness before two justices of the peace, shall forseit 100l. to the churchwardens of the parish in which it shall happen, to be distributed amongst the sufferers by such fire; and in default of payment the offender to be committed to hard labour for eighteen months. See Burning, Malicious Injuries.

ARSURA. The trial of money by fire, &c. But a pauper may be guilty of the offence after it was coined. In Domesday we read, reddit 50l. ad. arsuram, which is meant of lawful and approved money, whose allay was

tried by fire.

ART AND PART, is a term used in Scotland and the north of England, when one charged with a crime, in committing the same, was both a contriver of, and acted his

part in it.

ARTHEL. A British word, and more truly written arddelw, or, according to the south Welsh, ardhel, signifying to avouch: as if a man were taken with stolen goods in his hand, he was to be allowed a lawful arthel (or vouchee) to clear him of the felony; it was part of the law of Howel Dha; according to whose laws every tenant, holding of any other than of the prince or lord of the fcc, paid a fine pro defensione regia, which was called arian ardhel. The privilege of arthel occasioning a delay and exemption of criminals from justice, provision was made against it by stat. 28 H. S. c. 6. Blount. See Rob Roy,

ARTICLES OF THE PEACE may be exhibited in the King's Bench, court of over and terminer, and sessions of the peace, when any one has just cause to fear that some one will burn his house, do him some corporal hurt, or that he will procure a third person to do him some corporal hart, and upon these articles (containing the facts) being sworn to by the complainant, sureties of the peace are taken on the part of the party complained against. See Bac. Ab. tit. Surety of the peace. (B. D.) And the court may require bail for such a length of time as they shall think necessary for the preservation of the peace, and r are not confined to a twelvemonth. 1 Term Rep. 696.

ARTICLES, LORDS OF. These were a committee of the Scotch parliament, which, in the mode of their election, and by the hature of their powers, were calculated to increase the influence of the crown, and to confer on his majesty a power equivalent to that of a negative before debate. At the Revolution this system appeared inconsistent with the freedom of parliament, and was declared a grievance by the Convention of Estates; 1689. c. 18; and was accordingly suppressed

by the act 1690. c. 3. Scotch Dict.

ARTICLES OF ROUP. The conditions under which property is exposed to sale Ly

auction. Scotch Dict.

ARTICULATE ADJUDICATION. This is used where term in Scotch law. there are more debts than one due to the adjudging creditor, in which case it is usual to accumulate each debt by itself, so that in case of an error in ascertaining or calculating one of the debts, the error may not reach any other debt. Scotch Dict.

ARTICULI CLERI, Articles of the Clergy, are statutes containing certain articles relating to the church and clergy, and causes

ccclesiastical. 9 Ed. 2. stat. 1.

ARTICULUS. An article or complaint exhibited by way of libel in a court Christian. Sometimes the religious bound themselves to obey the ordinary, without such formal process. Paroch. Antiq. p. 344.

ARTIFICERS. See tit. Manufactures and

Manufacturers.

A stranger, artificer, in London, &c. shall not keep above two strangers servants; but he may have as many English servants and apprentices as he can get. Stat. 21 H. 8. c. The acts 5 G. 1. c. 27; 23 G. 2. c. 13; 14 G. 3. c. 71; and 21 G. 3. c. 87. against seducing manufacturers and artificers to foreign parts, are repealed by 5 G. 4. c. 97. and 6 G. 4. c. 105.

ARTILLERY-COMPANY of London. See tit. Soldiers.

ARUNDINETUM. A ground or place where reeds grow. 1 Inst. 4. And it is mentioned in the book of Domesday.

ARUNDINIS VADUM. Redbridge in

Hampshire.

ARUNTINA VALLIS. Arundel, in Sus-

ARVIL-SUPPER. A feast or entertainment made at funerals in the north part of England: arvil bread is the bread delivered to the poor at funeral solemnities. And arvil, arval, arfal, are used for the burial or funeral rights.
ARVONICA. Carnaryonshire.

ASCESTERIUM. Archisterian, arcisterium, acisterium, alcysterium, architrium, from the Greek.] A monastery. It often occurs in old histories. Du Cange.

ASPORTATION. See Robbery, Felony,

Trespass.

ASSACH, or Assath, was a custom of purgation used of old in Wales, by which the party accused did clear himself by the oaths of 300 men. It is mentioned in ancient MSS. and prevailed till the time of H. 5. by which it is prohibited and punished. 1 H. 5. c. 6. Spelm. and see stat. 27 H. S. c. 7.

ASSART, Assartum, from the Fr. Assartir, to make plain.] Assartum est quod redactum est ad culturam. Fleta, lib. 4. c. 21. And the word assartum is by Spelman derived from exertum, to pull up by the roots: for sometimes it is wrote essart. Others derive it from exaratum or exartum, which signifies to plough or cut up. Manwood, in his Forest Laws, says it is an offence committed in the forest, by pulling up the woods by the roots, that are thickets and coverts for the deer, and making the ground plain as arable land: this is esteemed the greatest trespass that can be done in the forest to vert or venison, as it contains in it waste and more; for whereas waste of the forest is but the felling down the coverts which may grow up again, assart is a plucking them up by the roots, and utterly destroying them, so that they can never afterwards spring up again. See the Red Book

in the Exchequer. But this is no offence, if | him, he may justify it. Bac. Ab. ubi supra. done with licence; and a man may by writ of ad quod damnum, sue out a licence to assart ground in the forest, and make it several for tillage. Reg. Orig. 257. Hence are lands called assurted: and formerly assurt rents were paid to the crown for forest lands assarted. Sec stat. 22 Car. 2. c. 6. Assartments seem to be used in the same sense in Rot. Parl. Of assarts you may read more in Cromp. Juris. p. 203. And Charta de Foresta, anno 9 H. 3. c. 4. Manwood, part. 1. p. 171.

ASSASSINATION, is the murdering of a person for hire; and so detestable is the crime, that the Scotch law, following the rule of the Canon law, punishes with death even the at-

tempt to assassinate. Scotch Dict.

ASSAULT, Assaltus, from the Fr. Assayler.] An attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon. But no words whatsoever, be they ever so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary. 1 Hawk. P. C. c. 62. § 1. See also Lamb. Eiren, lib. 1. c. 3: 22 Lib. Ass.

Assault does not always necessarily imply a hitting, or blow; because in trespass for assault and battery, a man may be found guilty of the assault, and excused of the battery. 1 Hawk. P. C. 263. But every battery includes an assault; therefore if the assault be ill laid, and the battery good, it is sufficient.

104

If a person in anger lift up or stretch forth his arm, and offer to strike another; or menace any one with any staff or weapon, it is trespass and assault in law: and if a man threaten to beat another person, or lie in wait to do it, if the other is hindered in his business, and receive loss thereby, action lies for the injury. Lamb. lib. 1: 22 Ass. pl. 60.

Any injury whatsoever, be it never so small, being actually done to the person of a man in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently, jostling him, are batteries in the eye of the law. 1 Hawk. P. C. 263, 264.—From the Fr.

Battre, to beat or strike.

In many cases a man may justify an assault; thus to lay hands gently upon another, not in anger, is no foundation of an action of trespass and assault: the defendant may justify molliter manus imposuit in defence of his person or goods; or of his wife, father, mother, or master; or for the maintenance of justice. Bract. 9 Ed. 4: 35 H. 6. c. 51. See Bac. Ab. Assault and Battery, (7th ed.)

A servant &c. may justify an assault in defence of a master, &c., but not e contra. Ld.

If an officer having a warrant against one who will not suffer himself to be arrested,

So if a parent, in a reasonable manner, chastually in his service at that time, or a schoolmaster his scholar, or a gaoler his prisoner, or even a husband his wife (for reasonable and preservances, or if one confine a fri nd who is mad, and bind and beat him, &c. in such manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another; or if a man gently I beat one (without wounding him, or throwing at him a dangeaous weapon) who wrongfully endeavours with violence to dispossess me of my lands or goods, or the goods of and who will not desist upon my laying my hand gently on him, and disturbing him; or if a man beat, wound, or main one who makes parent, child, or master; or if a man fight with or beat one who attempts to kill any stranger; if the beating was actually necessary to obtain the good end proposed, or rendered necessary in self-defence; in all these sault and battery. See 1 Hawk. P. C. 259. and the several authorities there cited. Bac. Ab. Assault and Battery. (7th ed.)

And on an indictment the party may plead not guilty, and give the special matter in evidence; but in an action he must plead it specially. 6 Mod. 172. Supposing it matter of justification .- If of excuse, it is said, it may be given in evidence on the general issue. Bull.

N. P. 17.

Also in cases of assault, for the assault of the wife, child, or servant, the husband, father, and master may have action of trespass per quod servitium amisit. In case of a wife, husband and wife should join in the action for the personal abuse of the wife (the husband not having sustained any damage.) If the husband has been damnified, as by tearing her clothes, &c. or loss of her assistance, &c. in his domestic concerns, for that peculiar injury to himself he alone must sue.

As to parent and child, muster and servant, unless injury accrues to the parent or master,

the child or servant may sue.

For an assault, the wrong-doer is subject both to an action at the suit of the party, w. crein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 Hawk. 263.

If both are depending at one time, unless in very particular cases, the attorney-general will, on application, grant a nolle prosequi, if the party will not discontinue his

But after an acquittal of the defendant upon an indictment for a felonious assault upon the beat or wound him in the attempt to take plaintiff by striking him, the plaintiff may

maintain trespass to recover damages for the | nation of weights and measures by clerks of civil injury, if he be not shown to have colluded in procuring such acquittal. 12 E. R. 409.

Another court will not compel the party to elect between his indictment and his action, if pending at the same time, and it is discre-tionary in the attorney-general to enter a

nolle prosequi. 1 Bos. & Pull. 191. Stat. 8 & 9 W. 3. c. 11. enacts, that where there are several defendants to any action of assault, &c. and one or more acquitted, the person so acquitted shall recover costs of suit; unless the judge certify that there was a reasonable cause for making such a person a defendant or defendants to such action.

Assaulting or threatening a counsellor at law, or attorney, employed in a cause against a man; or a juror giving verdict against him; his adversary for suing him, &c. is punishable, on an indictment, by fine and imprisonment, for the contempt. 1 Hawk. 58. By 55 G. 3. c. 88. provisions are made to ensure the more effectual redress for assaults in Ireland; where the damages are laid under five guineas, proceedings may be by civil bill at the quarter sessions, who may give costs; and where the defendant cannot pay them they may be levied off the barony.

By stat. 58 G. 3. c. 30. in actions for as. sault, brought in inferior courts (in England or Wales) holding pleas to the amount of 40s. if damages are given under 40s. the plaintiff shall recover only as much costs as damages, and without increase; and so in inferior courts, not having jurisdiction to 40s., if the damages

are under 30s.

By stat. 9 G. 4. c. 31. § 24—29. for England, and 10 G. 4. c. 34. § 28-38. for Ireland, several assaults are made punishable: viz., assaults on magistrates or others in their endeavours to save shipwrecked property, are punishable by transportation or imprisonment: assaults with intent to commit felony, or on peace officers and revenue officers, or on any persons, to prevent the apprehension of offend. ers, or in pursuance of any conspiracy to raise wages, punishable by imprisonment, &c.; assaults on shipwrecked seamen, or for obstructing the buying, selling, or passage of corn, by imprisonment for three months, with hard labour, on conviction before two justices. Persons committing any common assault or battery, punishable before two magistrates by fine, not executing 51. By 7 G. 4. c. 64. § 23. the court is authorised to order the payment of the expenses of the prosecutor, &c. against persons indicted for an assault with intent to commit felony, and on peace officers, and assaults committed in pursuance of a conspiracy to raise the rate of wages. See tit. Murder, as to such assaults by shooting, &c. as endanger life. See also tit. Contempt, Robbery, Striking.

ASSAY of weights and measures (from the Fr. essay, i. e. a proof or trial), is the exami-

markets, &c. Reg. Orig. 279.
ASSAYER OF THE KING, Assayator regis.] An officer of the king's mint, for the trial of silver; he is indifferently appointed between the master of the mint and the merchants that bring silver thither for exchange. See tit. Gold and Silver, and Money.

ASSAYERS, of plate made by goldsmiths,

&c. See title Goldsmiths.

ASSAYSIARE. To associate, to take as fellow judges; a word used in old charters. Cart. Abbat. Glast. MS. § 57.

ASSECURARE, Adsecurare.] To make secure by pledges, or any solemn interposition of faith. In the charter of peace between H. 2. and his sons, this word is mentioned. Hoveden, anno 1174.

ASSEDATION. Possession by a tack or

lease, &c. Scotch Dict.

ASSEMBLY GENERAL. The General Assembly of the church of Scotland is the highest ecclesiastical court: it is composed of a representation of the ministers and elders of the church: and the proportion is regulated by the act 5th Assembly, 1694. Scotch Dict. ASSEMBLY UNLAWFUL. See tit. Riot. ASSENT, or consent. To a legacy of

goods, the ussent of the executor is necessary.

See tits. Executor and Legacy.

Assent of Dean and Chapter in making leases of church lands. Vide Leases. Of the major part of corporations, in making bye-laws. Vide Bye-Laws. Of assents to agreements. Sec tit. Agreement .- See also other

ASSESSORS. Those that assess public taxes. There are assessments of parish duties, for raising money for the poor, repairing of highways, &c. made and levied by rate on the inhabitants; as well as assessments of public

taxes, &c.

Assessors to judges in certain inferior courts are persons possessed of knowledge in the law, appointed to advise and direct the decision of the judge.

ASSETS, Fr. Assez. i. e. Satis.] Goods enough to discharge that burden which is east upon the executor or heir, in satisfying the debts and legacies of the testator or ancestor.

Assets are real, or personal; where a man hath lands in fee-simple, and dies seised thereof, the lands which come to his heir are assets real; and where he dies possessed of any personal estate, the goods which come to the executors are assets personal.

Assets are also divided into assets per descents, and assets inter maines. Assets by descent, is where a person is bound in an obligation, and dies seised of lands which descend to the heir; the land shall be assets, and the heir shall be charged as far as the land to him descended will extend.

Assets inter maines, is when a man indebt-

to pay his debts and legacies; or where some nees, see tit. Covenant, Condition. commodity or profit ariseth to them in right of the testator, which are called assets in their

hands. Terms de Ley, 56. 77.

As to assets by descent, by stat. 29 Car. 2. c. 3. § 10. lands of cestuy que trust shall be assets by descent; and by the same stat. § 12. estates per autre vie shall be assets in the hands of the heir, if it come to him by reason of a special occupancy; and where there is no special occupant, they shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. See tit. Real Estate, Executors.

ASSIDERE, or Assedure. To tax equally; to assess: Mat. Paris, anno 1232. Sometimes it hath been used to assign an annual rent, to be paid out of a particular farm, &c.

To ASSIGN, assignare.] Hath various significations; one general, as to set over a right to another, or appoint a deputy, &c.; another special, to set forth or point at, as to assign error, assign false judgment, waste, &c. And in assigning of error, it must be shown where the error is committed; in false judgment, wherein the judgment is unjust; in waste, wherein especially the waste is done. F. N. B. 19. 112: Reg. Orig. 72. Also justices are said to be assigned to take assises. Stat. 11 H. 6. c. 2.

ASSIGNATION, is when simply any thing is ceded, yielded, and assigned to another; of which intimation must be made.

Scotch Dict.

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ASSIGNS or ASSIGNEES, assignatus, Lat.] Those who are assigned, deputed or appointed by the act of the party, or the operation of law, to do any act, or enjoy any benefit on their own accounts and risks-an assignee being one that possesses a thing in his own right; but a deputy, he that acts in right of another. Perkins. Assignee by deed is when a lessee of a term, &c. sells and assigns the same to another, that other is his assignee by deed; assignee in law is he whom the law so makes, without any appointment of the person; as an executor is assignee in law to the testator. Dyer, 6. But if there be assignee in deed, assignee in law is not allowed: if one covenant to do a thing to J. S. or his assigns by a day, and before that day he dies; if before the day he name any assignce, the thing must be done to his assignee named; otherwise to his executor or administrator, who is assignee in law. 27 H. 8.2.

He is called assignee, who hath the whole

estate of the assignor: and an assignee, though not named in a condition, may pay the money to save the land; but he shall not receive any money, unless he be named. Co. Lit. 215. Assignees may take advantage of forfeitures on conditions, when they are incident to the reversion, as for rent, &c. 1 And.

ed makes executors, and leaves them sufficient | 82. What covenants affect or benefit assig-

Under the word assigns shall be included the assignee of an assignee in perpetuum, the heir of an assignce, or the assignce of an heir. Co. Lit. 384. b: Plowd. 173: 5 Co. 16, 17. b. So the assignce of an assignce's executor. 2 Show. 57. And a devisee. 2 Show. 39: Godb. 161. But if an obligation be, to pay such persons as he shall name by his will or writing; there must be an express nomination, and his executor shall not take as assignee. Mo. 855. An administrator is an assignee. Moor, 44. See tit. Covenant.

ASSIGNMENT, Assignatio.] The setting over or transferring the interest a man hath

Herein shall be considered principally what things are assignable.-As to what covenants, &c. affect or benefit assignees, see tit. Condi-

Assignments may be made of lands in fee, for life, or years; of an annuity, rent-charge, judgment, statute, &c.; but as to lands, they are usually of leases and estates for years, &c. And by the statute of frauds, stat. 29 Car. 2. c. 3. no estate of freehold, or term for years, shall be assigned but by deed in writing signed by the parties: except by operation of law: and a parol assignment of a parol lease from year to year is therefore void. 1 Camp. 318. A possibility, right of entry, title for condition broken, a trust, or thing in action, cannot be granted or assigned over. Co. Lit. 214.

But though a bond being a chose in action cannot be assigned over so as to enable the assignee to sue in his own name, yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. Co. Lit. 232. And in the assignment of bonds, &c. is always contained a power of attorney to receive and sue in the assignor's name.

Also in equity a bond is assignable for a valuable consideration paid, and the assignce alone becomes entitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again. 2 Vern. 595. And a release from the obligee, after notice of the assignment, cannot be pleaded at law. 1 Bos. & Pull. 447: Bac. Ab. Obligation. (A.) (7th ed.) The assignor who has become a beneath many suc the debtor for the benefit of the assignee. 4 Term Rep. 690.

As to bare rights and possibilities, see Com.

Dig. tit. Assignment, (C.)

Though a possibility or contingent interest be not grantable at law, yet (whether in real or personal estate) it is transmissible and deviseable. Cro. Jac. 509: 1 P. W. 566: Forrester, 117: 8 Vin. Ab. 112. pl. 38: 2 Atk. 616: 1 Vez. 236: Pollexfen, 44: 3 Term Rep. 88: 2 Burr. 1131: 1 Bro. Rep. 181: Fearne's Con. Rem. 444.—The cases in the

books (1 C. R. 18: 1 Ch. Cas. 8: Poller, 31. | his lease to another, he cannot reserve a right 44: 1 P. W. 572: 3 P. W. 132: 2 Freem. in the assignment; for he hath no interest in 250: 9 Mod. 101: 2 P. W. 608.) abundantly the thing by reason of which the rent reing personal estates, are assignable in equity; but it may be material to observe, that in the case of assignments of such interests, equity requires the assignee to show that he gave a valuable consideration for the interest assigned; and therefore will not interpose to assist volunteers. But courts of equity will establish assignments of contingent interests against executors, administrators, or heirs at law, even where such assignments are made, not for consideration of money, but in consideration of love and affection, and advancement of children. 1 Vez. 409. See Fon-blanque's Treatise of Equity, i. 203.

An assignee must take the security assigned, subject to the same equity that it was in the hands of the obligee; as if on a marriage treaty the intended husband enters into a marriage-brokage bond, which is afterwards assigned to creditors, yet it still remains liable to the the same equity, and is not to be carried into execution against the obligor. 2

Vern. 428.

Where there is a bond for the performance of the covenants in a lease, if the lessee assigns the lease, he may likewise assign the bond; but this must be before any of the covenants are broken; but if any of the covenants are broken, and the lessee afterwards assigns the lease and bond, and the assignee puts the bond in suit, for those breaches, it is maintenance. Godb. 81. And now the assignce could not sue for breaches committed before the assignment.

Statute 7 Jac. 1. c. 15. enacts, that a debtor to the king shall not assign any debts to him, but such as did originally grow due to the debtor; afterwards there was a debtor to the husband in 2000l. by a statute; the husband made his wife executrix, and died; she married again one G. D., who was indebted to the king, and then the husband and wife assigned this statute to the king, in satisfaction of the debt due to him; adjudged, that the assignment was good, for though the second husband had the statute in right of his wife, and, by consequence, the debt was not originally due to him; yet, because he might release the statute, it is the same thing as if it had been originally taken in his name. 2 Cro. 324.

An office of trust is not grantable or assignable to another; and therefore it was adjudged, that the office of a filazer, which was an office of trust, could not be assigned; nor could it be extended upon a statute. Dyer, 7. See tit. Office, and Bac. Ab. (7th ed.) tit. Offices.

A bare power is not assignable, but where it is coupled with an interest it may be assign-

ed. 2 Jon. 206: 2 Mod. 317.

Arreurs of rent, &c. is a chose in action, and not assignable. See Skin. 6.

prove, that interests in contingency, respect served should be paid; and where there is no reversion there can be no distress: but debt may lie upon it, as on a contract. 1 Lill. Ab. 99. See Bac. Ah. tit. Rent. (7th ed.) Where the executor of a lessee assigns the term, debt will not lie against him for rent incurred after the assignment; because there is neither privity of contract nor estate between the lessor and executor: but if the lessee himself assigns his lease, the privity of contract remains between him and the lessor, although the privity of estate is gone by the assignment, and he shall be chargeable during his life; but after his death the privity of contract is likewise determined. 3 Rep. 14. 24. Although a lessee make an assignment over of his term, yet debt lies against him by the lessor or his heir; (not having accepted rent from the assignee;) but where a lessee assigns his term, and the lessor his reversion, the privity is determined, and debt doth not lie for the reversioner against the first lessee. Moor, 472. Vide Barker v. Dormer, 1 Sho. 191.

A man made a lease, provided that the lessee or his assigns should not alien the premises without license of the lessor, &c. who after gave license to the lessee to alien; by this the lessee or his assigns may alien in infinitum. Dumpor's case, 4 Rep. 119.

Adjudged, that some things in respect of their nature are not assignable, or to be granted over; as for instance, if the donee in tail holdeth of the donor by fealty, he cannot assign it over to another, because fealty is incident to, and inseparable from, the reversion; so if the founder of a college grant his foundation, though it be to the king, the grant is void, because it is inseparable from his blood. 11 Rep. 66. b. in Magdalen College's case.

Several things are assignable by acts of parliament, which are not assignable in their own nature; as promissory notes by stat. 3 and 4 A. c. 9; bail-bonds by the sheriff, by 4 and 5 A. c. 16; a bankrupt's effects by the several statutes of bankruptcy; bills of exchange by the custom of merchants.

A lease was made for years of lands, excepting the woods; the lessor grants the trees to the lessee, and he assigns the land over to another; the trees do not pass by this assign-

ment to the assignee. Goldsb. 188.

Where tenant for years assigns his estate, no consideration is necessary; for the tenant being subject to payment of rent, &c. is sufficient to vest an estate in the assignces: in other cases some consideration must be paid. 1 Mod. 263. The words required in assignments are, grant, assign, and set over; which may amount to a grant, feoffment, lease, release, confirmation, &c. 1 Inst. 301. In these deeds the assignor is to covenant to save harmless from former grants, &c. That he If lessee for years assigns all his term in is owner of the land, and hath power to asand to make farther assurance; and the assignce covenants to pay the rent, and perform said C. D. harmless, of and from any costs, the covenants, &c.

A bond may be assigned, but the assignee must sue upon it in the obligee's name, not in his own; for being a chose in action, it is not assignable by the English law. But the assignee of a Scotch bond may maintain indebitatus assumpsit against the obligor in his own name; James v. Dunlop, 8 Term. Rep. 595; there being an express promise by the obligor to pay the assignee; and so also may the as-Term Rep. 82.

Form of an Assignment of a Bond.

To all to whom these presents shall come greeting: Whereas A. B. of, &c. in and by one bond or obligation, bearing date, &c. became bound to C. D. of, &c. in the penal sum of, &c. conditioned for the payment of, &c. and interest at a day long since passed, as by the said bond and condition thereof may appear: And whereas there now remains due to the said C. D. for principal and interest on the said bond, the sum of, &c. Now know ye, That the said C. D. for and in consideration of the said sum of, &c. of lawful British money to him in hand paid by E. F. of, &c. the receipt whereof the said C. D. doth hereby acknowledge; he the said C. D. hath assigned and set over, and by these presents doth assign and set over, unto the said E. F. the said recited bond or obligation, and the money thereupon due and owing, and all his right and interest of, in, and to the same. And the said C. D. for the consideration aforesaid, hath made, constituted, and appointed, and by these presents doth make, constitute, and appoint, the said E. F. his executors and administrators, his true and lawful attorney and attorneys irrevocable, for him and in his name, and ministrators, but for the sole and proper use and benefit of the said E. F. his executors, administrators, and assigns, to ask, require, demand, and receive of the said A. B. his heirs, executors, and administrators, the money due on the said bond; and on non-payment thereof, he the said A. B. his heirs, executors and administrators, to sue for and recover the same: and on payment thereof to deliver up and cancel the said bond, and give sufficient releases and discharges therefor, and one or more attorney or attorneys under him to constitute; and whatsoever the said E. F. or his attorney or attorneys, shall lawfully do in the premises, the said C. D. doth hereby allow and affirm. And the said C. D. doth covenant with the said E. F. that he the said C. D. hath not received, nor will receive, the said money due on the said bond, or any part thereof; neither shall or will release or discharge the same, or any part thereof; but will and the clerk of assise, to take assises, and do

sign; that the assignce shall quictly enjoy, own and allow of all lawful proceedings for recovery thereof; he the said E. F. saving the that may happen to him thereby. In witness, &c.

> ASSISA CADERE. This old phrase signifies to be non-suited; as when there is such a plain and legal insufficiency in a suit, that the complainant can proceed no farther on it. Fleta, lib. 4. c. 15: Bracton, lib. 2. c. 7.

> ASSISA CONTINUANDA. An old obsolete writ directed to the justices of assise for the end, aution of a cause, when certain records alleged cannot be produced in time by the party that has occasion to use them. Reg.

ASSISA PROROGANDA. An old obsolete writ directed to the justices assigned to reason of the party's being employed in the king's business. Reg. Orig. 208.

ASSISA PANIS AND CEREVISSÆ (or cervisie.) The old stat. 51 H. 3. for setting

the price of bread and ale is so entitled.

ANSISA, Fr. Assis.] According to our ancient books is defined to be an assembly of knights, and other substantial men, with the justice, in a certain place, and in a certain time appointed. Custum. Normand. c. 24. This word is properly derived from the Latin verb assideo, to sit together; and is also taken from the court, place, or time, when and where the writs and processes of assise are handled or taken. And in this signification assise is general; as when the justices go their several circuits with commission to take all assises; or special, where a special commission is granted to certain persons (formerly oftentimes done) for taking an assise upon one or two disseisins only. Bract. lib. 3.

Concerning the general assise, all the counties of England are divided into six circuits, and those of Wales into two; and two judges are assigned by the king's commission to every English circuit, who hold their assises twice a year in every county (except Middlesex, where the king's court of record do sit), and now the counties on the home circuit have a third assise about Christmas, for trial of criminals only. These judges have five several commissions.

1. Of over and terminer, directed to them and many other gentlemen of the county, by which they are empowered to try treasons, felonies, &c.; and this is the largest commission

2. Of gaol delivery, directed to the judges and the clerk of assise associate, which gives them power to try every prisoner in the gaol committed for any offence whatsoever, but none but prisoners in the gaol; so that one way or other they rid the gaol of all the pri-

3. Of assise, directed to themselves only,

right upon writs of assise brought before them (U. K.) c. 88. providing for judges' lodgings by such as are wrongfully thrust out of their on assises in Ireland; and 3 G. 4. c. 10. prolands and possessions; which writs were heretofore frequent, but now men's possessions are sooner recovered by ejectments, &c.

4. Of nisi prius, directed to the judges and clerk of assise and others, by which civil causes grown to issue in the courts above are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the

court above, the judges there give judgment.
These causes by the course of the courts are usually appointed to be tried at Westminster in some Easter or Michaelmas Term, by a jury returned from the county wherein the cause of action arises; but with this proviso, nisi prius, unless before the day prefixed, the judges of assise come into the county in question.—This they are sure to do in the preceding vacation.

5. A commission of the peace, in every county of the circuits; and all justices of the peace of the county are bound to be present at the assises; and sheriffs are also to give their attendance on the judges, or they shall be fined. Bacon's Elem. 15, 16, &c. 3 Comm.

60, 269,

There is a commission of the peace, oyer and terminer and gaol delivery of Newgate, held eight times in a year, for the city of London and county of Middlesex, at Justice Hall in the Old Bailey, where the lord mayor is the chief judge. And as the court of King's Bench is the highest court of ordinary justice in criminal cases within the realm, and paramount to the authority of justices of gaol de-livery and commissioners of oyer and termi-ner, it was found requisite by stat. 25 G. 3. c. 18. that the session of over and terminer and gaol delivery of the gaol of Newgate, for the county of Middlesex, should not be discontinued on account of the commencement of the term and the sitting of the court of King's Bench at Westminster; and farther by 33 G. 3. c. 48. it is provided that when any session of the peace, and over and terminer, holden before justices of the peace for Middlesex, shall have been begun before the essoign day of any term, the session may be continued until the business is concluded, notwithstanding the happening of such essoign day on the sitting of the court of K. B. in Middlesex.

In Wales there are but two circuits, North and South Wales. By 1 W. 4. c. 70. § 19. assises shall be held in the county of Chester, and the several counties and towns of Wales, by virtue of commissions of assise, &c. in like manner as in England, and one of the judges appointed to hold assises in the principality of Wales shall hold the assises at the usual places in South Wales, and the other judge at the usual places in North Wales.

See 19 G. 3. c. 74. § 70. as to judges' lodgings on assises in Great Britain, made per-

viding that when the commissions under which the judges sit on the circuit shall not be opened and read, at the place specified, on the day named therein, the same may be opened and read on the following day; or if such following day shall be Sunday or other day of public rest, then on the succeeding day. By § 2. the cause of the delay of opening and reading the commissions shall be certified to the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal. The stat. 49 G. 3. c. 91. enables the barons of the exchequer, and all other justices of assise within England, to act under any commissions of nisi prius, in any county, notwithstanding their being born or inhabiting in any such county. By 19 G. 3. c. 74. § 70. when the assises for a county are held in any county of a city and at the same time with the assises for such city, the judges' lodgings shall be held to be situate both within such city and within the county at large, for the purposes of the business of the assises.

The constitution of the justices of assise was begun by Hen. 2; though somewhat different from what they now are: and by Magna Charta justices shall be sent through every county once a year, who, with the knights of the respective shires, shall take assises of novel disseisin, &c. in their proper shires, and what cannot be determined there shall be ended by them in some other place in their circuit; and if it be too difficult for them, it shall be referred to the justices of the bench, there to be ended. 9 H. 3. c. 12.

By 1 A. st. 1. c. 8. § 5. no commission of assise, oyer and terminer, general gaol de-livery, or association-writ of sic non omnes or assistance, or commission of the peace, shall be determined by the demise of the sovereign, but shall continue six months, unless superseded, &c.

There are several statutes as to holding the assises at particular places in certain counties. See Circuits, Nisi Prius, Judges, Justices.

The term assise is likewise used for a jury, and for a writ for recovery of possession of things immoveable, whereof any one and his ancestors have been disseised. Likewise, in another sense, it signifies an ordinance or statute, as Assisa Panis et Cervisia. Reg. Orig. 279.

ASSISE OF NOVEL DISSEISIN, Assisa novæ disseisinæ.] See Disseisin: and

see Roscoe on Real Actions, 61.

An assise of novel disseisin is a remedy maxime festinum, for the recovery of lands or tenements of which the party was disseised. 2 Inst. 410. And it is called novel disseisin, because the justices in eyre went their circuits from seven years to seven years; and no assise was allowed before them which commenced before the last circuit, which petual by 39 G. 3. c. 46. See also 41 G. 3. was called an ancient assise; and that which

assise of novel disseisin. Co. Lit. 153. b.

An assise is called festinum remedium. 1. Because the tenant shall not be essoined. 2. Shall not cast a protection. 3. Shall not pray in aid of the king. 4. Shall not vouch any stranger, except he be present, and will enter presently into warranty; so of receit. 5. The parole shall not demur for the nonage of the plaintiff or defendant. 8 Co. 50: Booth, 262. It lies where tenant in fee simple, fee-tail,

or for term of life, is put out and disseised of his lands, or tenements, rents, common of sise lies for tithes, by stat. 32 H. 8. c. 7: Cro. pasture, common way, or of an office, toll, &c. Glanv. lib. 10: Reg. Orig. 197. Assise must be of an actual freehold in lands, &c. and not a freehold in law: it lieth of common of pasture, where the commoner hath a freehold in it, and the lord or other persons feed it so hard, that all the grass is eat up: but then the plaintiff must count and set forth how long the land was fed, and alleged per quod proficuum suum ibidem amisit, &c. 9 Rep. 113. One may have an assise of land and rent, or of several rents, and offices and profits in his soil, all in one writ: and if it be of a rent charge, or rent-seck, it shall be general de libero tenemento in such a place, and all the lands and tenements of the tenants charged ought to be named in the writ; but in assise for rent service it is otherwise. Dyer, 31. An assise may be brought for an office held for life: but then it must be an office of profit, not of charge only; of the toll of a mill, or market, assise lieth; though it may not be brought of suit to a mill. 8 Rep. 46, 47.

An assise was brought of the office of filazer of the court of Common Pleas, and the demandant counted de libero tenemento, and alleged seisin, by taking money for a capias, and the post was put in view where the officer

Dyer, 114. sate.

An assise lieth of the office of register of the admiralty, and the demandant laid a prescription to it, viz. quod quilibet hujusmodi persona, who should be named by the admiral, should be register of the admiralty for Dyer, 153.

It lieth of officers of woodward, park-keeper, and keeper of chases, warrener, &c.; but these are not at common law; but by the statute of Westm. 2. c. 25. because they are of profits to be taken in alieno solo: it likewise lieth of all other offices and bailiwicks in fee. 8 Rep. 47.

In an assise of a new office, it ought to be showed what profits belong to it; but is otherwise of an ancient office, because it is presumed, that the profit thereof is sufficiently

known. 8 Rep. 45. 49.

Tenants in common shall each have a several assise for his moiety, or part, because they are seised by several titles: but twenty jointtenants: shall have but one assise in all their names, because they have but one joint title: so if there are three joint tenants, and one of the writ shall abate quoad all. Dyer, 207. them releaseth all his right to one of his

was upon a disseisin since the last circuit, an companions, and then the other two are disseised of the whole, they shall have but one assise in both their names, for the two parts, because they had a joint title to it at the time of the disseisin, and he to whom the release was given shall have an assise in his own name, because of that part he is tenant in common. Co. Lit. 196.

If lessee for years, or tenant at will, be ousted, the lessor, or he in remainder, may have assise, because the freehold was in him at the time of the disseisin. Kel. 109. As-Eliz. 559. But not for annuity, pension, &c. In some cases an assise will lie where ejectment will not. Ejectment will not lie de piscaria, by reason the sheriff cannot deliver possession of it; but an assise will lie for it, as it may be viewed by the recognitors. Cro. Car. 534. Assise will sometimes lie where trespass vi et armis doth not. Vide 8 Rep. 47: 1 Nels. Abr. 276.

By Magna Charta, 9 H. 3. c. 12. assises of novel disseisin, &c. shall be taken in the proper counties, by the king's justices: and for estovers of wood, profit taken in woods, corn to be received yearly in a certain place; and for toll, tonnage, &c. and of offices in fee, an assise shall be; also for common of turbary, and of fishing, appendant to freehold, &c.

In an assise, the plaintiff must prove his title, then his seisin and disseisin: but seisin of part of a rent is sufficient to have assise of the whole; and if a man who hath title to enter, set his foot upon the land, and is ousted,

that is a sufficient seisin.

As the writ of assise restores the party to the actual seisin of his freehold, for so are the words of the writ, viz. facias tenementum illud seisiri, &c. consequently the party that brings the writ must found it upon an actual seisin, which he has been divested of; for otherwise this remedy is not commensurate to his case. See 2 Roll. Abr. 463.

Therefore, if there be lord and tenant by rent service, and the lord grants the services to another, and the tenant attorns by a penny, this being given by way of attornment is not sufficient seisin to ground an assize on; secus if the penny had been given by way of seisin of the rent. Lit. sect. 565: Co. Lit. 315: 4

Co. 9: 10 Co. 127.

The first process in this action is an original writ issued out of Chancery, directed to the sheriff, commanding him to return a jury, who are called the recognitors of the assise. An assise is to be arraigned on the day the writ is returnable, on which day the defendant is to count, and the tenant is to appear and plead instantly. Style Reg. 88.

If in an assise no tenant of the freehold be mentioned, the defendant may plead it; and where one defendant pleads, no tenant of the freehold named in the writ, if this is found,

On such a plea of the defendant, the plain-

tiff says that he hath made a feoffment to per- as a record or release, which could not have sons unknown, and he himself hath continually taken the profits: if then they are at issue upon the taking the profits, and it be found against the defendant, it shall not be inquired of the points of the assise, for the disseisin is acknowledged. 1 Danv. Abr. 584. And if the deed of the ancestor of the plaintiff be pleaded in bar, and this is denied, and found for the plaintiff, the assise shall not inquire of the points of the writ, but only of the damages. Ibid. 585.

In this suit, if the defendant fail to make good the exception which he pleads, he shall be adjudged a disscisor, without taking the assise; and shall pay the plaintiff double damages, and be imprisoned a year. Stat. 13 Ed. 1. c. 25. In assise the tenant pleads in bar, and the plaintiff makes title, but the tenant doth neither answer nor traverse the title; in this case, the assise shall be awarded at large. Cro. Eliz. 559. And if any other title is found for the plaintiff, he shall recover. Bro. Assi. 281. If a tenant pleads in abatement in an assise, he must at the same time plead over in bar; and no imparlance shall be allowed without good cause: and where there are several defendants, and any of them do not appear the first day, the assise shall be taken against them by default. Pasch. 5 W. 3.

If assise be brought against a lessee, he may not plead asisa non; for that is the form of the plea in bar for tenant of the freehold; he ought to plead the special matter, viz. his lease, the reversion in the plaintiff, and that he is possessed, and so in without wrong. Jenk. Cent. 142. An assise is to be first arraigned, and the plaintiff's counsel prays the court that the defendant may be called; where-upon he is called; and if the defendant appears, then his counsel demand over of the writ of assise, and the return of it; which is granted; and then he prays leave to imparl to a short time after, and the jury is adjourned to that day: at the day given by the court, the defendant is again called, and, upon his appearance, he pleads to the assise; and upon this an issue is joined between the parties, and the jurors are sworn to try the issue, the counsel proceeding to give them their evidence: after the trial the court gives judgment, and the plaintiff recovering is to have writ of seisin, &c. 1 Lill. Abr. 105, 106.

The jurors that are to try the assise are to view the thing in demand; by writ of assise the sheriff is commanded, Quod faciat duodecium liberos et legales homines de vicineto, &c. Videre tenementum illud, et nomina eorum imbreviari, et quod summoneat eos per bonas summonitiones, quod sint coram justitiariis, &c. parati inde facere recognitionem, &c.

By Westm. 2. c. 25. a certificate of assise is given, which is a writ for the party grieved, by a verdict or judgment given against him in an assise, when he had something to plead, but it lies not against brothers or sisters, &c.

been pleaded by his bailiff; or when the assise was taken against himself by default, to have the deed tried, and the record brought in before the justices, and the former jury summoned to appear before them at a certain day and place, for a farther examination and trial of the matter. See Booth, 215. 287: 4 Co. 4. b: 2 Inst. 26: F. N. B. 181: 3 Comm.

The plaint need not be so certain in assise as in other writs; the judgment being to recover per visum recognitorum: and if the plaint be but so certain as that the recognitors may put the demandant into possession, it is

sufficient. Dyer, 84.

To prevent frequent and vexatious disseisins, it is enacted by the statute of Merton, 20 H. 3. c. 3. that if a person disseised recover seisin of the land again, by assise of novel disseisin, and be again disseised of the same tenements by the same disseisor, he shall have a writ of re-disseisin; and, if he recover therein, the re-disseisor shall be imprisoned; and by the statute of Malberge, 52 H. 3. c. 8. shall also pay a fine to the king; to which the stat. Westm. 2. (13 E. 1.) c. 26, hath superadded double damages to the party aggrieved. In like manner, by the same statute of Merton when any lands or tenements are recovered by assise of mort d'ancestor, or other jury or any judgment of the court, if the party be afterwards disseised by the same person against whom judgment was obtained. he shall have a writ of post-disseisin against him; which subjects the post-disseisor to the same penalties as a re-disseisor. The reason of all which, as given by Sir Edward Coke (2 Inst. 83, 84.), is because such proceeding is a contempt of the king's court, and in despite of the law. 3 Comm. 188. See Reg. Orig. 208: F. N. B. 190: Co. Lit. 154: 2 Inst. Com. on stat. W. 2: New. Nat. Br. 417.

For proceedings in writ of assise of novel disseisin, see Plowd. 411, 412.

The court of Common Pleas or King's Bench may hold plea of assises of land in the county of Middlesex, by writ out of Chancery. 1 Lill. Ab. 105. And in cities and corpora-tions an assise of fresh force lies for recovery of possession of lands, within forty days after the disseisin, as the ordinary assise in the county. F. N. B. 7.

This writ as well as the four writs of assise next mentioned, have been abolished. Disseisin, Limitation of Actions, ii. 1.

ASSISE OF MORT D'ANCESTOR, Assisa mortis antecessoris.] Is a writ that lay where a man's father, mother, brother, sister, uncle, aunt, &c., died seised of lands, tenements, rents, &c., that were held in fee, and after their death a stranger abated. Reg. Orig. 223. It is good as well against the abator, as any other in possession of the land; person prosecuting and them. Co. Lit. 242. And it must be brought within the time limited by the statute of limitations [50 years, 3 Comm. 189.] or the right may be lost by ne-

gligence.

If tenant by the curtesy alien his wife's inheritance, and dieth, the heir of the wife shall have an assise of mort d'ancestor, if he have not assets by descent from the tenant by the curtesy; and the same shall be as well where the wife was not seised of land the day of her death, as where she was seised thereof. New. Nat. Br. 489. A warden of a college, &c. shall have assise of mort d'ancestor of rent where his predecessor was seised. And a man may have assise of mort d'ancestor of rents, against several persons in several counties; having, in the end of the writ, several summons against the tenants: and the process in this writ is summons against the party; and if he makes default at the day of the assise returned, then the plaintiff ought to sue out a re-summons; and if he makes default again, the assise shall be taken, &c. Bro. Assis. 88. In a mort d'ancestor, if the tenant says, the plaintiff is not next heir, and this is found against him, the points of the writ shall be inquired of: and in this case the assise may find, that though the plaintiff be the next heir, yet he is not next heir as to this land; for this is in regard of their inquiry at large. Br. Mort. d'An. 47: 1 Danv. Ab. 584. Damages shall be recovered in the assise of mort d'ancestor: but it lieth not of an estatetail, only where the ancestor was seised in demesne as of fee. Bro. Assis. If a man be barred in assise of novel disseisin, upon showa descent or other special matter, he may have mort d'ancestor, or writ of entry sur disseisin, 4 Rep. 43.

If the abatement happened on the death of one's grandfather or grandmother, then an assise of mort d'ancestor no longer lies, but a writ of ale or de avo; if, on the death of the great-grandfather or great-grandmother, then a writ of besayle or de proavo; but if it mounts one degree higher, to the tresayle, or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation other than those before mentioned, the writ is called a writ of cosinage, or de consanguineo. Finch. L. 266, 267. And the same points shall be inquired of, in all these actions ancestrel, as in an assise of mort d'ancestor, they being of the very same nature. Stat. Westm. 2. (13 E. 1.) c. 20; though they differ in this point of form, that these ancestrel writs (like all other writs of præcipe) expressly assert a title in the demandant (viz. the seisin of the ancestor at his death, and his own right of inheritance), the assise asserts nothing directly, but only prays an inquiry whether those points be so. 2 Inst. 399. There is also another ancestrel writ, denominated a nuper obiit, to establish an equal divi- were, setting foot to foot with the demand-

where there is privity of blood between the sion of the land in question, where, on the death of an ancestor, who has several heirs, or co-heiresses, one enters and holds the others out of possession. F. N. B. 197: Finch, L. 293: Leg. Orig. 226: New Nat. Br. 437, 438: Booth on Real Actions. But a man is not allowed to have any of these actions ancestrel for an abatement, consequent on the death of any collateral relation, beyond the fourth degree (Hale on F. N. B. 221.); though in the lineal ascent he may proceed ad infinitum. (Fitzh. Ab. tit. Cosinage, 15.) 3 Comm.

It was always held to be law, that where lands were devisable in a man's last will by the custom of the place, there an assise of mort d'ancestor did not lie. For, where lands were so devisable, the right of possession could never be determined by a process which inquired only of these two points-the scisin of the ancestor, and the heirship of the de-mandant. And hence it may be reasonable to conclude, that when the statute of wills, 32 H. 8. c. 1. made all socage lands devisable, an . assise of mort d'ancestor could no longer be brought of lands held in socage. See 1 Leon. 267. And that now, since the stat. 12 Car. 2. c. 24. (which converts all tenures, a few only excepted, into free and common socage), no assise of mort d'ancestor can be brought of any lands in the kingdom; but that, in case of abatements, recourse must be properly had to the writs of entry. 3 Comm. 187.

It is to be observed, morcover, that these writs are now almost obsolete, being in a great measure superseded by the action of ejectment, which answers almost all the purposes of real actions; except in some very pe-

ASSISE OF NUISANCE. See Nuisance. ASSISE OF DARREIN PRESENT. MENT. See tit. Darrein Presentment.

ASSISE DE UTRUM, or assisa juris

utrum.] See tit. Juris utrum.

ASSISE OF THE FOREST, Assisa de Foresta.] Is a statute touching orders to be observed in the king's forest. Manwood, 35. The statute of view of frank pledge, anno 18 Ed. 2. is also called the assise of the King; and the statute of bread and ale, 51 H. 3. is termed the assise of bread and ale. And these are so called, because they set down and appoint a certain measure, or order, in the things they contain. There is farther an assise of nuisance, assisa nocumenti, where a man maketh a nuisance to the freehold of another, to redress the same. And besides Littleton's division of assises, there are others mentioned by other writers, viz. assise at large, brought by an infant to inquire of a disscisin. and whether his ancestor were of full age, good memory, &c. when he made the deed pleaded, whereby he claims his right.

Assise in point of assise: assisa in modum assisæ.] Which is when the tenant, as it ant, without any thing further, pleads directly riff upon a writ of re-disseisin, as well as

to the writ no wrong, no disseisin.

Assise out of the point of assise, is when the tenant pleadeth something by exception; as a foreign release, or foreign matter, triable in a foreign county; which must be tried by a jury, before the principal cause can proceed.

Assise of right of damages, is where the tenant confesseth an ouster, and referring it to a demurrer in law, whether it were rightly done or not, is adjudged to have done wrong; whereupon the demandant shall have a writ of assise to recover damages. Bract. lib. 4: F. N. B. 105. Assises are likewise awarded by default of tenants, &c .-- Of the Grand Assise, see tit. Jury .- For further particulars relative to Assise in general, see Com. Dig. and ante, tit. Assise.

ASSISORS, assisores,] Sunt qui assisas condunt aut taxationes imponunt.-In Scotland (according to Skene) they are the same with our jurors: and their oath is this:-

We shall leil suith say,

And na suith conceal, for nathing we may, So far as we are charged upon this assise, Be [by] God himself, and be [by] our part

of paradise, And as we will answer to God, upon The dreadful day of dome.

ASSISTANCE, Writ of. See tit. Writ. ASSISUS. Rented or farmed out for such an assise, or certain assessed rent in money or provisions. Terra assisa was commonly opposed to terra dominica; this last being held in domain, and occupied by the lord, the other let out to inferior tenants. And hence comes the word to assess or allot the propor-

ASSITHMENT. A weregild or compensation, by a pecuniary mulct: from the preposition ad, and the Sax. sithe, vice: quod vice supplicii ad expiandum delictum solvitur.

tion and rates in taxes and payments by as.

ASSOCIATION, associatio.] Is a writ or patent sent by the king, either at his own motion, or at the suit of a party plaintiff, to the justices appointed to take assises, or of oyer and terminer, &c. to have others associated unto them. And this is usual where a justice of assise dies; and a writ is issued to the justices alive to admit the person associated: also where a justice is disabled, this is practised. F. N. B. 185: Reg. Orig. 201. 206. 223. The clerk of the assise is usually associate of course; in other cases, some learned serjeants at law are appointed. It hath been holden, that an association after another association allowed and admitted, doth not lie; nor are the justices then to admit other association in that writ afterwards, so long as that writ and commission stand in Bro. Assis. 386: Mich. 32 H. 6. The

upon assise of novel disseisin. Nat. Br. 416.

417. See ante, tit. Assise.

ASSOCIATION OF PARLIAMENT. In the reign of king William III. the parliament entered into a solemn association to defend his majesty's person and government against all plots and conspiracies: and all persons bearing offices, civil or military, were enjoined to subscribe the association, to stand by king William, on pain of forfeitures and penaltics, &c. Stat. 7 and 8 W. 3. c. 27, made void by stat. 1 A. st. 1. c. 25. § 2.

ASSOCIATIONS, unlawful. See Socie-

ASSOILE, absolvere.] To deliver from excommunication. Staundf. Pl. Cr. 72. stat. 1 H. 4. c. 10. mention being made of K. Ed. 3. it is added, whom God assoil.

ASSOILZIE. In the Scotch law, to ac-

quit the defendant in an action, or to find a

criminal not guilty. Scotch Dict.

ASSUMPSIT, from the Lat. Assumo.] taken for a voluntary promise, by which a man assumes or takes upon him to perform or pay any thing to another; it comprehends any verbal promise, made upon consideration, and the civilians express it diversely, according to the nature of the promise, calling it sometimes pactum, sometimes promissionem, or constitutum, &c. Terms de Ley. An action upon the case on assumpsit (or as it is also expressed, on promises), is an action the law gives the party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract either express or implied by law; and gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 Co. 92: Moor, 667.

Here it is to be considered,

I. In what cases an Assumpit is or is not the proper action.

II. What words will create an Assumpsit.

III. What consideration is sufficient.

IV. Of the proceedings.

I. In every action upon assumpsit, there ought to be a consideration, promise, and breach of promise. 1 Leon. 405. For,

The law distinguishes between a general indebitatus assumpsit and a special assumpsit; for though they come under the denominations of actions on the case, and the party is to be recompensed in damages alike in both, yet the first seems to be of a superior nature, and will lie in scarcely any case but where debt will lie; but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a special assumpsit must be brought. Bac. Ab. vol. i. 337, (7th ed.)

Action on the case on assumpsit lies, for not making a good estate of land sold, according to promise; not paying money upon king may make an association unto the she- a bargain and sale, according to agreement; not delivering goods upon promise, on demand; this is by express assumpsit: an implied assumpsit is where goods are sold, or remedy by action of debt on the bond. 1 work is done, &c. without any price agreed upon; in an action on the case by quantum meruit, or quantum valebat, the law implies a promise and satisfaction to the value.

When one becomes legally indebted to another for goods sold, the law implies a promise that he will pay this debt; and if he be not paid, indebitatus assumpsit lies. 1 Danv. Ab. 26. And indebitatus assumpsit lies for goods sold and delivered to a stranger, ad requisitionem of the defendant. Ib. 27. But on indebitatus assumpsit for goods sold, you must formerly prove a price agreed on, otherwise the action would not lie; but now the plaintiff may recover in indebitatus assumpsit either on an agreed price or a quantum me-

Where the consideration on the part of the defendant is performed and executed, and the thing to be done by the defendant is mere payment of a sum of money due immediately, or where money is paid on a contract which is rescinded, so that defendant has no right to retain it, this constitutes a debt for which the plaintiff may sue in indebitatus assumpsit. Bac. Ab. Assumpsit. (G.) (Ed. by Gwillim and Dodd.)

Indebitatus assumpsit lies to recover del credere commissions for guaranteeing sums insured upon policies. 14 E. R. 578.

If A. and B., having dealings with each other make up their accounts, and B. is found in arrear, and promises to pay the balance, an assumpsit lies against him on insimul computassent, and A. need not bring a writ of account. Cro. Jac. 69: Yelv. 70. S. P.: 1 Roll. Ab. 7. S. P .:: 1 Roll. Rep. 396: Bulst. 208: Moor, 854: 1 Stark. Ca. 185.

Assumpsit lies for the balance of an account, though the items on each side be ever so numerous. 5 W. P. T. 431: 5 Taunt. 431: 1 Marsh, 115: 2 Camp. 238.

So if A. gives money, or delivers goods to B. to merchandise therewith, and B, promises to render an account, assumpit lies on this express promise, as well as account. 1 Salk. 9.

So if a tenant, being in arrear for rent, settles an account of arrears with his landlord, and promises to pay him the sum in which he is found in arrear, an assumpsit lies on this promise. 1 Roll. Ab. 9: Bro. Acc. 81: Raym. 211: 2 Keb. 813. Vide Style, 131. 283: Cro. Jac. 602. So, on a balanced account between two partners, though including items not connected with the partnership. 2 Term Rep. 479.483.

An acknowledgement of a single item, due from defendant to plaintiff, is sufficient to sup-, port assumpsit on an account stated. 13 East,

But if the obligor in a bond, without any new consideration, as forbearance, &c. proremedy by action of debt on the bond. 1 Roll. Ab. 8: Hutt. 34: Cro. Eliz. 240.

Where the obligor in a Scotch bond promised to pay the assignee of the bond, it was held assumpsit lay. 8 Term Rep. 595.

Where a man comes to buy goods, and they agree upon a price, and a day for the payment, and the buyer takes them away, an assumpsit for the money is the proper action; for trover will not lie for the goods, because the property was changed by a lawful bar-gain, and by that bargain the buyer was to convert the goods before the money was due. Bac. Ab. Assumpsit. (B.) But if the goods are bought fraudulently, with an intention not to pay for them, trover will lie. 9 Barn. & C.

If a man and a woman, being unmarried, mutually promise to marry each other, and afterwards the man marries another woman, by which he renders himself incapable of performing his contract, an assumpsit lies, in which the woman shall recover damages. Carter, 233.

An indebitatus assumpsit lies for money by custom due for scavage; adjudged upon a special verdict, by which it was found that the sum demanded was due by custom, but that there was no express promise to pay it. Lev. 174.

If one receives my rent, under pretence of title, I may have an indebitatus assumpsit against him, for money had and received to my use. 2 Mod. 263: and see 10 Barn. & C. 234: Bac. Ab. Assumpsit. (A.) (7th ed.)

If a feme sole marries a man, who, in truth, is married to another woman, and he makes a lease of her lands, and receives the rents, she may bring an indebitatus assumpsit against him for so much money received to her use; adjudged after verdict. 1 Salk. 28.

Where action is brought upon a contract, if the plaintiff mistakes the sum agreed upon, he fails in his action; but if he brings it upon the promise in law, arising from the debt there, though he mistakes the sum, he shall recover. Alleyn, 29. And where the action is special on the contract, the variance as to the sum is not fatal, unless it is in setting out a written contract, or unless it is made material by the mode of stating it in the declaration. See Bac. Ab. Pleas and Plead. ing. (B.) Every contract made between parties implies a mutual promise for performance: and yet an action may be brought on a reciprocal promise by one against the other, although he who brings it hath not performed on his side; Dyer, 30. 75; unless the performance on the other side be a condition precedent to the defendant's performance; as to which see Bac. Ab. Pleas and Pleading. (B. 2.) When an assumpsit or promise is the ground of the action, it must be precisely set

forth. 3 Lev. 319. As to the precision and [assumpsit will lie; as also 1 Term Rep. 286: certainty requisite, see Bac. Ab. Pleas. (B.) If a promise be made without limitation of time for its performance, reasonable time shall be allowed, if there be an immediate consideration for it; and not time during life. 1 Lill. Ab. 112. On promise to deliver a thing such a day, the party is bound to do it without request. 1 Lev. 284. But if a promise be to do any thing upon request, the request is necessary to entitle the plaintiff to the action, on which it shall arise. 1 Lev. 48. Though in every indebitatus assumpsit it is alleged the defendant promised to pay on request, and that he was requested, and refused payment, yet no request is ever proved. The time for the performance of the promise being elapsed, and the promise not performed, the law presumes request, unless in a particular case where a thing is not to be done until request. See 3 Camp. 459. Every executory contract, and debt that is not upon record, or on a specialty, which may be turned into damage, imports it in an assumpsit in law, and one may have debt or action on the case upon it at his election; for when a man doth agree to pay money, or to deliver any thing, he thereby promiseth to pay or deliver it. Plowd. 128: 1 Cro. 94.

Every contract executory implies an assumpsit to pay money at the day agreed, or immediately, if no time be limited. Mo. 667.

The assumpsit in an agreement that will be binding and give action, must be complete and perfect, and duly pursued and observed: and if the party that makes the assumpsit, and he to whom it is made, agree together, and a bond is given and taken for what is promised; by this the assumpsit is discharged. Also where an assumpsit is to stand to an award, if the award made be void, it will make the assumpsit void. Yelv. 87: 2 Leon. c. 223: 1 Leon. 170. Indebitatus assumpsit lies by a prothonotary against an attorney, for fees, for work done for defendant as attorney. Holt's Rep. 20.

Indebitatus assumpsit lies for a customary fine, super mortem domini. Show. 35. Indebitatus assumpsit lies upon a personal contract for a sum in gross, as pro rebus venditis; per Holt, Ch. J. Show. 36.

Indebitatus lies for fees for being knighted. Show. 78.

Indebitatus assumpsit lies for money paid by mistake, on an account; but not for money paid knowingly on illegal consideration, as an usurious bond. Salk. 22.

The mistake must be as to facts; for if the party knows the facts he cannot recover back the money on the ground that he mistook the law. 2 East, 469: 3 Maule & S. 378: 5 Taunt. 143: Bac. Ab. Assumpsit. (A.)

Assumpsit lies in many cases where debt lies, and in many where debt doth not lie. 2 Burr. 1005. which see for many cases where

and Bac. Ab. vol. i. 337. (7th ed.)
Indebitatus assumpsit lies on a judgment of a foreign court, without declaring upon, or proving the grounds or cause of action; and if the judgment was obtained unfairly, defendant must show it. Doug. 1. 4. And so on a judgment of an Irish court. & C. 411.

But not upon a judgment by default obtained in one of the colonics against a party, who was summoned, according to the practice of the court there, in his absence, by nailing up a copy of the declaration at the court-house door; the defendant never having been present in the colony, or at any time subject to the jurisdiction of the colonial court. 9 E. R. 192. See 2 Barn. & Adol. 951.

Though assumpsit lies not for rent usually reserved on leases, yet if a man promise to pay, without a lease, so much a week as long as A. B. &c. permits him to enjoy a warehouse, &c. which is a special cause of promise, this action will lie. 2 Cro. 592. Now, by 11 G. 2. c. 19. § 14. where the demise is not by deed, the landlord may recover his rent in an action on the case for use and occupation. See Bac. Ab. Rent. (K. 7.)

Assumpsit lay against a lessee from year to year, upon his agreement to pay rent, not-withstanding his bankruptcy, and the occupation of the premises by his assignees during part of the time for which the rent accrued.

But now by the bankrupt act, 6 G. 4. c. 16. § 75. the bankrupt is not liable if the assignees accept the lease or agreement, nor if they decline it, and he deliver it up to the lessor. See Bac. Ab. tit. Bankrupt, vol. i. 620. (Ed.

by Gwillim and Dodd.)

Where a person pays money upon a mistake; or if he receives more from another in a reckoning than he ought, or more fees than should be taken, an assumpsit lies. 1 Salk. 22: Comb. 447. If a man receives money for the use of another person, assumpsit may be had against him, which supplies the place of action of account; and where money was deposited on a wager, an indebitatus lay for money received to a man's use; Show. 117; that is, if the party, before the wager is decided, give notice to rescind it, he may recover back the deposit. 8 Term Rep. 573:1 Barn. & A. 683. And after an illegal wager is decided, the parties may in assumpsit recover back the deposits from the stakeholder, if they give him notice before he has paid them over. 5 Term Rep. 405: 7 Price, 540: 8 Barn. & C. 221. See Bac. Ab. Assumpsit, vol. i. 348. 367. (7th ed.)

If where a promise is made, one part of it is against law, and another part of it lawful, this is ground sufficient for assumpsit. 4 Rep. 94.

The person to whom a promise is made,

shall have the action: and not those who are originally, and the party furnishing the goods strangers, or for whose benefit it is intended. cannot recover against the person for whose Danv. 64. Nor shall action be brought against use they were furnished, then the person proone for what another receives, nor at his request, &c. 1 Salk. 23. But if a man delivers goods, and I will pay you;" or, "look to money to A. B. to my use, I may have an assumpsit against him for this money. If a man accounts, and, upon the account, is found in arrear to a certain sum, and presently, in consideration thereof, assumes to pay the debt at a day; assumpsit lies for this after the day. Yelv. 70. And on a promise to pay a sum of money at so much a month, an assumpsit may be brought before the whole is payable; for it is grounded upon the promise, which is broken by every non-payment, and damages may be recovered. 2 Cro. 504; 1 H. B. 547: 2 Bos. & Pull. 429.

II. Some agreements, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory of witnesses. To prevent which, the statute of frauds and perjuries, 29 Car. 2. c. 3. enacts, that in the five following cases no verbal promise shall be sufficient to ground an action upon; but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged there-1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made, upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. And lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a merc verbal assumpsit is void. See 2 Comm. 448. (See ante, tit. Agreement.)

The same statute provides that no contract for sale of goods for the price of 10l. or upwards shall be good, except the buyer actually receive part of the goods sold, or give earnest; or there be some note or memorandum in writing of the bargain being made by the

parties or their agents.

A letter written by a party is a sufficient memorandum. 3 Burr. 1663. And see tit.

Agreement.

A parol promise of marriage between parties is not within the statute. Str. 34: 5 Mod. 411: Salk. 24.

·As to promises for the debt, &c. of another: If a person, for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing. 2 Term Rep. 80.

And there is no distinction between a promise to pay for goods furnished to a third person, made before they are delivered, and one after. 2 Term. Rep. 80: Coup. 227.

But if the credit was given to the promiser

me for payment." Com. Dig. tit. Action upon the case on Assumpsit. (F. 3.) Ante, tit. Agreement.

The intent of the parties by and to whom the promise or assumpsit is made, is more to be regarded than the form of words, and this intent and meaning is to be followed, not in the letter, but the substance of it: if a promise be to provide wedding clothes for a woman, this shall be taken for such clothes to be worn on the wedding or feast day, according to the dignity of the person. Poph. 182:

Yelv. 87: 3 Cro. 53.

All promises and contracts are to receive a favourable interpretation; and such construction is to be made, where any obscurity appears, as will best answer the intent of the parties; otherwise a person, by obscure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promises shall be taken most strongly against the promiser, and are not to be rejected, if they can by any means be reduced to a certainty.

that he will assign to him a certain term to pay him 10l., this is a good assumpsit, though the time of assignment and payment be not appointed; for the 10l. shall be paid in a convenient time after the assignment, which also must be done in a convenient time, and he shall not have time during his life. 1 Roll.

Ab. 14, 15.

If there be an agreement to enter into an obligation for performance of a thing of a certain value, without mentioning in what sum, it shall be according to the value. 1 Sid.

A promise made after taking the benefit of an insolvent act, to pay an old debt by instalments, will not raise a new assumpsit to pay it. 4 Taunt. 613.

III. The consideration is the ground of the assumpsit: and no action on the case lieth against a man for a promise where there is no consideration why he should make the promise. 1 Danv. 53.

A consideration altogether executed and past was anciently held not to be sufficient to maintain an assumpsit; but this doctrine is denied by the court of K. B.; 3 Burr. 1671: see also Cro. Eliz. 282. by which it appears that though the consideration were executed, it would be sufficient if laid at plaintiff's re-

If an infant promise after full age to pay a debt incurred in his infancy, this will bind him. 1 Term. Rep. 648.

If A. undertakes to do a thing without hire, as to take brandies out of one cellar, and to lay them down in another cellar, no action lies | me, or perform any work, the law implies that for the non feasance; but if he enters on the doing it, action lies for a mis-feasance, if it be through his own neglect or mismanagement, because it is a deceit; but not if by mere accident. Per Holt, 1 Salk. 26. Vide 3 Salk. 11. See Bac. Ab. tit. Bailment, vol. i. (7th

Where the doing a thing will be a good consideration, promise to do that thing will be so too. Per Holt. Ch. J. 12 Mod. 459.

Parting with my note to the defendant is a

good consideration. 7 Mod. 12, 13.

An assumpsit may be upon a general consideration; but it doth not lie where the plaintiff has an obligation to pay the money, which is a stronger lien than assumpsit; nor when the party has a recognizance for the duty, &c. Jenk. Cent. 293.

Love or friendship are not considerations to ground actions upon. 2 Leon. 30. Also idle and insignificant considerations are looked upon as none at all; for wherever a person promises without a benefit arising to the promisor, or loss to the promisee, it is looked upon as a void promise. 2 Bulst. 269. But any detriment incurred by the plaintiff at defendant's request is a good ground for a promise, for the request raises a presumption that it is beneficial to the defendant. 4 East, 463: 4 B. & C. 8.

Lastly, it is to be observed, that considerations may be void, as being against law; for if they are wicked and ill in themselves, or unlawful, by being prohibited by some act of parliament, they are void; therefore if an officer, who, by the duty of his office, is obliged to execute writs, promises, in consideration of money paid him, to serve a certain process, an assumpsit will not lie on this promise; for the receipt of the money was extortion, and the consideration is unlawful. 1 Roll. Ab. 16. So a promise to pay a woman money in consideration of past cohabitation, is void for want of consideration. 4 Barn. & C. 650. So a promise to pay extra wages to a sailor in consideration of extraordinary exertion; for he is bound to exert himself to the utmost for the ship. 2 Camp. 317. A person cannot recover in assumpsit for commission and money expended, in buying for defendant shares in an illegal company. 3 Barn. & C. 639. And as to illegal considerations, see Bac. Ab. Assumpsit. (E.) (7th ed.)

Implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute, but from natural reason and the just construction of law; which extends to all presumptive undertakings and assumpsits: which, though not actually made, yet constantly arise, upon this general intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus, if I employ a person to transact any business for

Vol. I.—16

I undertook, or assumed, to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this implied assumpsit: wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damago as they think he really merited. This is called an assumpsit upon a quantum meruit. There is also an implied assumpsit on a quantum valebat, which is very similar to the former; as where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that

Another species of implied assumpsit is, when one has had and received money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies, that the person so receiving promised and undertook to account for it to the true proprietor: And if he unjustly detain it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages equivalent to what he has detained in such violation of his promise. This is applicable to almost every case where the defendant has received money, which ex æquo et bono, he ought to refund. 2 Burr. 1012.

This species of assumpsit lies in numberless instances for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right, and which he had by law authority to receive from such third person. 2 Burr. 1008.

One great benefit which arises to suitors from the nature of this action is, that the plaintiff need not state the special circumstances, from which he concludes, that ex æquo et bono, the money received by the defendant ought to be deemed as belonging to him: he may declare generally, that the money was received to his use, and make out his case at the trial. 2 Burr. 1010.

This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no farther than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shows that the plaintiff, ex æque et bono, is not entitled to the whole of

his demand, or to any part of it.

This action will lie to recover premiums of insurance paid by the insured to the lottery-office-keeper. Comp. 790. But it will not lic to recover back winnings paid by the lottery-office-keeper or insurer of lottery tickets. 4 Burr. 1984.

It will lie against an auctioneer selling goods to which he had reason to know there was no title, which knowledge he concealed from the buyers, and this after he had paid over the proceeds of the sale. 5 Taunt. 657.

If two persons engage jointly in an illegal stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, with the privity and consent of the other, the whole sum, he may recover a moiety from the other, in an action for money paid to his use. 3 Term Rep. 418. But this is now overruled. See 2 Boss. & Pull. 371: 3 Barn. & A. 179. And where it is necessary for the plaintiff to go into the illegal transaction in order to prove his case, he cannot recover. See the cases Bac. Ab. Assumpsit. (E.) vol. i. 370, 371. (7th ed.)

In such a case of an illegal transaction, if one partner pay money for another without an express authority he cannot recover it back.

3 Term. Rep. 418.

And, generally, assumpsit for money paid, laid out, and expended will not lie when the money has been paid against the express consent of the party for whose use it is supposed to have been paid. 1 Term. Rep. 20.

See title Consideration.

IV. The plaintiff must set forth every thing essential to the gist of the action, with such certainty, that it may appear to the court that there were sufficient grounds for the action: for if any thing material be omitted, it cannot appear to the court whether the damages given by the jury were in proportion to the demand, or whether the party was at all entitled to a verdict. And therefore, in an action upon the case, the plaintiff cannot declare quod cum the defendant was indebted to the plaintiff in such a sum, and that the defendant, in consideration thereof, super se assumpsit to pay, &c. without showing the cause of the debt. 10 Co. 77. As to the certainty requisite in a declaration, see Bac. Ab. Pleas and Pleadings, B. (Ed. Gwillim and Dodd.)

If in an assumpsit the plaintiff declares, quod cum there were several reckonings and accounts between the plaintiff and defendant; and at such a day, &c. insimul computaverunt for all debts, reckonings, and demands; and the defendant, upon the said account, was found to be in arrear the sum of 201. in consideration whereof the defendant promised to

showing it was pro mercimoniis, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which in pede computi are reduced to a sum certain, and thercupon being indebted to the plaintiff, it is sufficient to ground an action. Cro. Car. 116. And the acknowledgement of a single item of debt due from defendant to plaintiff is sufficient to support an action on an account stated. 13 East, 249: 5 M. & S. 65. But the acknowledgment must be absolute and not qualified. Ry. & Moo. 239. And the amount must appear. 2 Carr. & Pull. 109. And see farther Roscoe on Evid. 235.

If in an assumpsit the plaintiff declares, that the defendant did assume and promise to pay the plaintiff so much money, and also to carry away certain wood before such a day; the defendant, as to the money, cannot plead that he paid it; and as to the carriage of wood, non assumpsit; for the promise being entire, cannot be apportioned. March, 100. The defendant in such case might now plead non assumpsit generally, and show that he paid the money, and also that he did not undertake as to the wood, if such were the fact.

On an assumpsit in law, payment, or any other matter that excuses payment, may be given in evidence, on the general issue. In an assumpsit in deed, it must be formerly pleaded. Gilb. Evid. 204, 205. But now it may be given in evidence in either case. Any matter may be given in evidence on non assumpsit which negatives the promise, and many matters which admit the promise, but show it discharged, as accord and satisfaction, release, payment, infancy; though these last matters are certainly contrary to the strict meaning of the plea. But the statute of limitations, tender, bankruptcy, must be pleaded. Set-off may be pleaded or given in evidence on non assumpsit with a notice of set-

If the plaintiff declares upon an indebitatus assumpsit, and upon a quantum meruit, and the defendant pleads, that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff 30l., and thereupon, in consideration that the defendant promised to pay the said 301, the plaintiff likewise promised to release and acquit the defendant of all demands, this is a good plea; for, by the account, the first contract is merged. 2 Mod. 43, 44.

The defendant cannot plead that he revoked his promise; as if A. is in execution at the suit of B., and J. S. desires B. to let him go at large, and that he will satisfy him; to which B. agrees; though J. S., before any thing is done in pursuance of this promise and agreement, comes to B. and tells him, pay, &c.; this is a good declaration, without that he revokes his promise, and that he will

not stand to it; yet such revocation cannot and serious denial of the attributes of God be pleaded in bar to the action. I Roll. Abr. 32. Sed quære if the revocation be before any

thing is done by B.?

In an action upon an assumpsit, if the consideration be executory: as if one promises to do something for me, in consideration of something to be done before by me, to or for him, if I will sue him for what he is to do for me, I must aver that I have done that which was first to be done by me; for till that be done I may not maintain an action upon the promise. Cro. Jac. 583, 620. See as to the cases where the plaintiff's agreement is a condition precedent to the defendant's, and where the plaintiff must consequently show a performance on his part. Bac. Ab. Pleas and Pleading. (B. 5. 2.) (7th ed.) For farther particulars see Com. Dig. tit. Action on the Case on Assumpsit, Bac. Ab. ubi supra: and see also 3 Comm. 158: and this Dictionary, tit. Agreement, Consideration.

ASSUMPTION. The day of the death of a saint so called, Quia ejus anima in cœlum

assumitur. Du Cange.

ASSURANCE of lands, is where lands or tenements are conveyed by deed: and there is an assurance of ships, goods, and merchandise, &c. Sec Insurance.

ASSYSERS (jurors.) Those who in an inquest serve a man, heir, or judge, the probation in criminal cases. Scotch Dict.

ASTER, and Homo Aster. A man that is

resident. Britton, 151.

ASTRARIUS HÆRES (from Astre, the hearth of a chimney.) Is where the ancestor by conveyance hath set his heir apparent and his family in a house in his life-time. Co. Lit. 8.

ASTRICTION TO A MILL, is that servitude by which the grain growing on certain lands (in some cases the grain brought within them) must be carried to a certain mill, to be manufactured into flour or meal, paying a multure or price for the manufacturing of the grain, higher or lower, according to the extent of the servitude. See Thirlage.

ASTRUM. A house or place of habitation, also from astre. Placit. Hilar. 18 Ed. 1.

ASYLUMS for lunatics. By 7 G. 4. c. 64. § 15. in indictments and informations, the property real and personal in county lunatic asylums may be laid to be in the inhabitants of the county, riding, or division.

ATHANATION. The island of Thanet,

in Kent.

ATHE, Adda.] A privilege of administering an oath, in some cases of right and property; from the Sax, ath, othe, juramentum. It is mentioned among the privileges granted by king Hen. 2. to the monks of Glastonbury. Cartular. Abbatt. Glaston. MS. fol. 14, 37.

ATHEISM. The disbelief of a God is ranked by Scotch writers under the head of Blasphemy, which is a crime punishable with officer shall be guilty of a corrupt practice in

(see acts 1661. c. 21. and 1695. c. 11.); or by an arbitrary punishment, more or less severe, where the offence consists in uttering oaths and imprecations. See Blasphemy.

ATHESIS FLUV. The river Tees.

ATIA. See odio and atia. A writ of enquiry whether a person be committed to prison on just cause of suspicion.

ATILIA. Utensils or country implements. Blount.

ATRIUM. A court before the house, and sometimes a church-yard.

To ATTACH, Attachiare, from the Fr. attacher.] To take or apprehend by commandment of a writ or precept. Lamb. Eiren, lib. 1. c. 16. It differs from arrest, in that he who arresteth a man carrieth him to a person of higher power to be forthwith disposed of; but he that attacheth keepeth the party attached, and presents him in court at the day assigned; as appears by the words of the writ. Another difference there is, that arrest is only upon the body of a man; whereas an attachment is oftentimes upon his goods. Kitch. 279. A capias taketh hold of immoveable things, as lands or tenements, and properly belongs to real actions; but attachment hath place rather in personal actions. Bract. lib. 4: Fleta, lib. 5. c. 24.

ATTACHIAMENTA BONORUM. distress taken upon goods or chattels, where a man is sued for personal estate or debt, by the legal attachiators or bailiffs, as security to answer in action. See tit. Process. There is likewise attachiamenta de spinis et bosco, a privilege granted to the officers of a forest, to take to their own use, thorns, brush, and wind-fall within their precincts. Kennet's

Paroch. Antiq. p. 209.

ATTACHMENT, is a process from a court of record, awarded by the justices at their discretion, on a bare suggestion, or on their own knowledge; and is properly grantable in cases of contempts, against which all courts of record, but more especially those of Westminster-hall, and above all the court of B. R. may proceed in a summary manner. Leach's Hawk. P. C. 2. c. 22. Sec 1 Wils. 300.

The most remarkable instances of contempts seem reducible to the following heads:-1. Contempts of the king's writs. 2. Contempts in the face of a court. 3. Contemptuous words or writings concerning the court. 4. Contempts of the rules or awards of the court. 5. Abuse of the process of the courts. 6. Forgeries of writs and other deceits tending to impose on the court. 2 Hawk. P. C. c. 22. § 33.

All courts of record have a kind of discretionary power over their own officers, and are to see that no abuses be committed by them, which may bring disgrace on the courts themselves; therefore if a sheriff or other death, according as it extends to any express not serving a writ: as if he refuse to do it,

unless paid an unreasonable gratuity from | not have right done him. Nat. Br. 6. 27: the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects, in order to prevent the service of any writ; the court which awarded it may punish such offences in such a manner as shall seem proper by attachment. Dyer, 218: 2 Hawk. P. C. c. 22. § 2.

But if there be no palpable corruption, nor extraordinary circumstance of wilful negligence or obstinacy, the judgment whereof is to be left to the discretion of the court, it seems not usual to proceed in this manner; but to leave the party to his ordinary remedy against the sheriff, either by action or by rule to return the writ, or by an alias and pluries, which if he have no excuse for not executing, an attachment goes of course. Hob. 62, 264, Noy. 101: F. N. B. 38: Finch, 237: 5 Mod. 314, 315. And the court will not grant an attachment against the deputy sealer of the writs for a criminal act in refusing to seal a writ on a legal holiday without an extra fee. 7 Taunt. 182. But quere whether the officer is entitled to demand such fee?

Attachment lies against attorneys for injustice, and base dealing by their clients, in delaying suits, &c. as well as for contempts to the court. 2 Hawk. c. 22. § 11. If affidavits to ground an attachment are full as to the charge; yet if the party deny such charge by as plain and positive affidavits, he shall be discharged; but if he take a false oath, he may be indicted of perjury. Mod. Cas.

in L. & E. 81.

Against sheriffs making false returns of writs, and against bailiffs for frauds in arrest, and exceeding their power, &c. attachment may be had. For contempts against the king's writs; using them in a vexatious manner; altering the teste, or filling them up after sealed, &c. attachment lies. And for contempts of an enormous kind, in not obeying writs, &c. attachment may issue against peers. 2 Hawk. c. 22. § 33. &c. and see 1 Brod. & Bing. 24: 4 Moo. 147. For persuading jurors not to appear on a trial, attachment lies against the party, for obstructing the procecdings of the court. 1 Lill. 121. The court of B. R. may award attachment against any inferior courts usurping a jurisdiction, or acting contrary to justice. Salk. 207. Though it is usual first to send out a prohibition.

Attachment lies for proceeding in an inferior court, after a habeas corpus issued, and a supersedeas to stay proceedings. 21 Car. B. R. And attachment may be granted against justices of peace, for proceeding on an indictment after a certiorari delivered to them to remove the indictment. 1 Lill. 121. But it does not lie against a corporation, the mode of compulsion being by sequestration. Cowp. 377. Attachment lies against a lord that rehim for that purpose, so that his tenant can- the four days; but in all cases, if he fully an-

Tidd. 478. (9th ed.)

An attachment is the proper remedy for disobedience of the rules of court; as of those made in ejectment, arbitrament, &c. So where a defendant in account, being adjudged to account before the auditors, refuses to do it, unless they will allow matter disallowed by the court before; or where one refuses to pay costs taxed by the master, whose taxation the law looks upon as a taxation by the court. 1 Mod. 21: 1 Salk. 71.

But an attachment is not granted for disobedience of a rule of Nisi Prius, unless it be first made a rule of court; nor for disobedience of a rule made by a judge at his chainber, unless it be entered; nor for disobedience of any rule without personal service. 1 Salk. 84: Bac. Ab. Attachment. (A.) (7th ed.)

Also an attachment is proper for abuses of the process of the court, as for suing out execution where there is no judgment; bringing an appeal for the death of one known to be alive; making use of the process of a superior court, to bring a defendant within the jurisdiction of an inferior court, and then dropping it; using such process in a vexatious, oppressive, or unjust manner, without colour of serving any other end by it. 2 Hawk. P. C. c. 22. § 33. &c. It seems also that counsellors are punishable by attachment for foul practices. 2 Hawk. P. C. c. 22. § 30. Gaolors are thus punishable for misbehaviour in their offices. Id. ib. Witnesses for nonattendance on a trial. Leach's Hawk. P. C. 2. c. 22. § 33.—Peers are liable to attachment for certain outrageous contempts, as a disobedience to a writ of habeas corpus, and generally of other writs. Id. ib. But the court of King's Bench will not grant an attachment against a peer for not paying money awarded, though the defendant consent it shall issue on condition that it should lie in the office for a certain time. 7 Term. Rep. 171. Nor against a member of parliament. 7 Term. Rep. 448: Tidd. 479. (9th ed.)

Attachments are usually granted on a rule to show cause, unless the offence complained of be of a flagrant nature, and positively sworn to, in which last case the party is ordered to attend, which he must do in person, as must every one against whom an attachment is granted; and if he shall appear to be apparently guilty, the court in discretion, on consideration of the nature of the crime, and other circumstances, will either commit him immediately, in order to answer interrogatories to be exhibited against him concerning the contempt complained of, or will suffer him to enter into recognizance to answer such interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance discharged; otherwise fuses to hold his court, after a writ issued to he must answer them, though exhibited after

swer them, he shall be discharged as to the quired; -2nd, a writ of capias, where bail is attachment, and the prosecutor shall be left to proceed against him for the perjury, if he thinks fit; but if he deny part of the contempts only, and confess other part, he shall not be discharged as to those denied, but the truth of them shall be examined, and such | Carth. Rep. 66. punishment inflicted as from the whole shall appear reasonable; and if his answer be evasive as to any material part, he shall be punished in the same manner as if he had confessed it. 2 Hawk. P. C. c. 22. § 1: 1 Salk. 84: 6 Mod. 73: 2 Jones, 178. See Interrogatories; and see Tidd's Prac. 481. (9th ed.)

Upon all these examinations, the master is to make his report, and the party is then, and not before, acquitted or adjudged in contempt; Hardw. 23; and in the latter case is either immediately sentenced or committed to the marshal; unless the court waive giving judgment (as they do sometimes from motives of lenity) and order the recognizance to be discharged; 3 Burr. 1256; or the attorney-general consent that the party may continue on the recognizance to appear under a rule of court at some future time. 2 Burr. 797.

Attachments for non-payment of costs, and for non-performance of an award, are in the nature of civil executions. 1 Term. Rep. 266; and it seems the sheriff may take bail for the party's appearance on such attach-Bac. Ab. Attachment (A.) vol. i. 389. ments. (7th ed.)

The court would not grant an attachment against the sealer of the writs for refusing to seal a writ on St. Luke's day, which is a holiday appointed by 5, 6 Ed. 6. c. 3. 7 Taunt.

Attachments out of Chancery may be had of course, upon affidavit made that the defendant was served with a subpæna, and appeared not, or upon non-performance of any order or decree; also after the return of this attachment, that the defendant non est inventus, &c.: then attachment, with proclamation issues against him, &c. West. Symb. And for contempts, when a party appears, he must upon his oath answer interrogatories exhibited against him; and if he be found guilty, he shall be fined.

On attachment the party is not obliged to answer any interrogatories tending to convict him of any other offence; Stra. 444; or which may subject him to a penalty. Hardw.

ATTACHMENT OF PRIVILEGE is where a man, by virtue of his privilege, calls another to that court whereto he himself belongs, and in respect thereof, is privileged, there to answer some action (as an attorney, &c.); or it is a power to apprehend a man in a place privileged. Book. Entr. 431. But this proceeding is virtually abolished by the act for uniformity of process, 2 W. 4. c. 39. which establishes only three species of process;

required; -3rd, a writ of detainer against prisoners.

Affachment foreign, is an attachment of the goods of foreigners, found in some liberty, to satisfy their creditors within such liberty.

Foreign Attachment under the custom of Loudon is thus: if a plaint be entered in the court of the mayor or the shcriff against A., and the process be returned nihil, and thereupon plaintiff suggest that another person within London is indebted to A., the debtor shall be warned (whence he is called the garnishee), and if he does not deny himself to be indebted to A. the debt shall be attached in his hands. Com. Dig. tit. Attachment foreign, cites 22 Ed. 4. 30.

The plaint may be exhibited in the mayor's or the sheriff's court; but the proceeding in the former is the most advantageous. Id. ib.

But a foreign attachment cannot be had when a suit is depending in any of the courts at Westminster. Cro. Eliz. 691. And nothing is attachable but for a certain and due debt; though by the custom of London, money may be attached before due, as a debt; but not levied before due. Sid. 327: 1 Nels. Ab. 252,

Foreign attachments in London, upon plaint of debt, are made after this manner; A. oweth B. 100l. and C. is indebted to A. 100l. B. enters an action against A. of 200l., and by virtue of that action a sergeant attacheth 100%. in the hands of C. as the money of A. to the use of B., which is returned upon that action. The attachment being made and returned by the sergeant, the plaintiff is immediately to see an attorney before the next court, or the defendant may then put in bail to the attachment, and nonsuit the plaintiff: four court days must pass before the plaintiff can cause C. the garnishee, in whose hands the money was attached, to show cause why B. should not condemn the 100l. attached in the hands of C. as the money of A:, the defendant in the action (though not in the attachment,) to the use of B. the plaintiff; and the garnishee C. may appear in court by his attorney, wage his law, and plead that he hath no money in his hands of the defendant's, or other special matter; but the plaintiff may hinder his waging of law by producing two sufficient citizens to swear that the garnishee had either money or goods in his hands of A. at the time of the attachment, of which affidavit is to be made before the lord mayor, and being filed, may be pleaded by way of estoppel: then the plaintiff must put in bail, that if the defendant come within a year and a day into court, and he can discharge himself of the money condemned in court, and that he owed nothing to the plaintiff at the time in the plaint mentioned, the said money shall be forthcoming, &c. If the garnishee fail to appear by his 1st, a writ of summons where no bail is re- attorney, being warned by the officer to come

into court to show cause as aforesaid, he is attach the debt before the day of payment taken by default for want of appearing, and judgment given against him for the goods and money attached in his hands, and he is without remedy either at common law or in equity; for if taken in execution, he must pay the money condemned, though he hath not one penny, or go to prison; but the garnishee appearing to show cause why the money or goods attached in his hands ought not to be condemned to the use of the plaintiff, having feed an attorney, may plead as aforesaid, that he hath no money or goods in his hards of the party's against whom the attenment is made; and it will then be tried by a jury, and judgment awarded, &c.; but after trial, bail may be put in, whereby the attachment shall be dissolved, but the garnishee &c. and his security will then be liable to what debt the plaintiff shall make out to be due, upon the action; and an attachment is never thoroughly perfected, till there is a bail, and satisfaction upon record. Privileg. Loud.

But the original defendant must be summoned and have notice; otherwise judgment against the garnishee will be erroneous; and the money paid or levied in execution, or it will not discharge the debt from the garnishee to the defendant: (though it was alleged that the custom of the city court is to give no no-3 Wils. 297: 2 Black. Rep. 834: see

1 Ld. Raym. 727.

Where a foreign attachment is pleaded to an action, the custom is to set forth that he who levied the plaint shall have execution of the debt owing by himself, and by which he was attached, if the plaintiff in the original action shall not disprove it within a year and a day; now if the plaintiff in the action below doth not set forth such conditional judgment given by the court, it is wrong, because he doth not bring his case within the custom. Vide 2 Lutw. 985: 2 Chitt. R. 438: Tidd's Ap-

pendix, c. 16. § 4. (9th ed.)

In assumpsit, &c. there was evidence given, that the debt was attached by the custom of London before the action brought, and that it was condemned there before the plea pleaded; and this evidence was given upon the general issue non assumpsit: and it being insisted for the defendant, that this should relate so as to defeat the plaintiff's action, it was adjudged that where there is an attachment and condemnation before the action brought, it may be given in evidence upon the general issue, because there is an alteration of the property: but if the attachment be only before the action brought, and the condemnation 'afterwards, the attachment may be pleaded in abatement, and the condemnation may be pleaded in bar, but shall not be given in evidence on the general issue, because by the condemnation the property is altered, but not before. 1 Salk. 280. 291.

Action of debt, &c. the defendant pleaded in bar, that there was a custom in London to

came; et per curiam such a custom may be good; but to have judgment to recover the debt before the day of payment is come, cannot be a good custom, because the debtee himself could not recover in such case, and therefore he who made the attachment shall not. This custom was pleaded, that the debtee in person, or by his attorney, may swear that the debt is due; but this cannot be good as to the attorney; it was agreed that goods might be attached by a foreign attachment, and that the value thereof ought to be found before judgment; but that this plea was ill, because the defendant did not aver it, viz. et hoc paratus est verificare. W. Jones, 406.

A sum of money was to be paid at Michaelmas, and it was attached before that day; adjudged that a foreign attachment cannot reach a debt before it is due: therefore, though the judgment on the attachment was after Micharlmas, yet the money being attached before it was due, it is for that reason void. Cro. Eliz. 184. For farther matter, see Com. Dig. tit. Attachment, Foreign Attachment.

Money due to an executor or administrator, as such, cannot be attached. It would give a simple contract creditor priority over judgments, &c. Fisher v. Lane and others, 3 Wils. 297. Nor trust-money in the hands of the

garnishee. See Doug. 380.

In an action on the case the plaintiff had judgment against the defendant, and he owing 60l. to one G. D., he entered a plaint against him in London, and attached the 60%. in the hands of the said defendant, against whom the plaintiff had recovered as aforesaid, and had execution according to the custom; afterwards the plaintiff brought a sci. fa. against the defendant, to show cause why he should not have execution upon the judgment which he had recovered, to which the defendant pleaded the execution upon the attachment; and upon demurrer to that plea it was adjudged against the defendant, because a duty which accrueth by matter of record, cannot be attached by the custom of London; for judgments obtained in the king's courts shall not be defeated or avoided by such particular customs, they being of so high a nature that they cannot be reached by attachment. 1 Leon. 29.

Debtor and creditor being both citizens of London, the debtor delivered several goods to the Exeter carrier then in London, to carry and deliver them at Exeter, and the creditor attached them in the hands of the carrier for the debt due to him from his debtor; adjudged that the action should be discharged, because the carrier is privileged in his person and goods, and not only in the goods which are his own, but in those of other men, of which he is in possession, for he is answerable for them. 1 Leon. 189.

An executor submitted to an award, and the arbitrators awarded, that the defendant should pay the executor 350l. This money is not attachable in his hands by any creditor of his testator, though it is assets in his hands when recovered; because it was not due to the testator tempore mortis, and the custom of foreign attachments extends only to such debts.

1 Vent. 111.

Money awarded under a rule of court cannot in any case be attached, 4 Term. Rep. 313. n.

Money directed to be paid by A. to B. by the master's allocatur, cannot be attached in A.'s hands by process out of the sheriffs' court against B. 4 Term. Rep. 312. The money attached must be due to the defendant in the mayor's court from a third party, and not from the plaintiff and another jointly. 4 Barn. & A. 646.

It is not necessary that the debt should arise within the jurisdiction. 5 Taunt. 232; and see 5 Taunt. 234. for a precedent of the

plea: 1 Brod. & B. 491.

A garnishee against whom a recovery was had in the mayor's court on foreign attachment, after a summons to defendant, and nihil returned, may protect himself by giving such proceedings in evidence upon assumpsit in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below, who attached the money in his hands, although by the course of proceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. 3 East, 367.

ATTACHMENT OF THE FOREST, is one of the three courts held in Forests. Manwood, 90. The lower court is called the Attachments: the middle one, the Swainmote: the highest, the Justice in Eyre's seat. The court of attachment seemeth to be so called, because the verderers of the forest have therein no other authority, but to receive the attachments of offenders against vert and venison, taken by the rest of the officers, and to enrol them, that they may be presented and punished at the next justice's seat. Manwood, 92. And this attaching is by three means: 1. By goods and chattels. 2. By the body, pledges, and mainprize. 3. By the body only. This court is to be kept every forty days. See Crompton in his Court of the Forest, and this Dict. tit. Forest.

ATTAINDER, attincta and attinctura.] The stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence by the common law, on the pronouncing the sentence of death.

He is then called attaint, attinctus, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for by an anticipation of his punishment, he is already dead in law. 3 Inst. 213. This is after judgment;

convicted and attainted; though they are frequently, through inaccuracy, confounded together; when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his Upon judgment therefore of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted. 4 Comm. 380, 381.

A man is attainted by appearance, or by process: attainder on appearance is by confession, or verdict, &c. Confession, when the prisoner upon his indictment being asked whether guilty or not guilty, answers guilty, without putting himself upon his country; (and formerly confession was allowed before the coroner in sanctuary; whereupon the offender was to abjure the realm, and this was called attainder by abjuration.) Attainder by verdict is when the prisoner at the bar pleaded not guilty, and is found guilty by the verdict of the jury of life and death. And attainder by process (otherwise termed attainder by default or outlawry,) is when the party fleeth, and is not to be found until he hath been five times publicly called or proclaimed in the country, on the last whereof he is outlawed upon his default. Staundf. Pl. Co. 44. 122. 182. Also persons may be attainted by act of parliament.

Acts of attainder of criminals have been passed in several reigns, on the discovery of plots and rebellions, from the reign of king Charles II., when an act was made for the attainder of several persons guilty of the murder of king Charles I. to this time; among which that for attainting Sir John Fenwick, for conspiring against King William, is the most remarkable; it being made to attaint and convict him of high treason on the oath of one witness, just after a law had been enacted, that no person should be tried or attainted of high treason where corruption of blood is incurred, but by the oath of two lawful witnesses, unless the party confess, stand mute, &c. Stat. 7 and 8 W. 3. c. 3. But in the case of Sir John Fenwick, there was something extraordinary; for he was indicted of treason, on the oaths of two witnesses; though but one only was produced against him on his trial. It was alleged Sir John had tampered with, and prevailed on, one of the witnesses to withdraw.

The consequences of attainder are forfeiture and corruption of blood; which latter cannot regularly be taken off but by act of parliament. Co. Lit. 391. b.

sec this Dict. tit. Forfeiture. As to Corruption of Blood, this operates upwards and neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ances-See tit. Tenure, Descent, Forfeiture.

This is one of those notions which our laws have adopted from the feudal constitutions, at the time of the Norman conquest, as appears from its being unknown in those tenures which are indisputably Saxon, or Gavelkind; wherein, though by treason, according to the ancient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descent, ensues; and on judgment of mere felony no escheat accrues to the lord. And therefore as every other oppressive mark of feudal tenures is now happily worn away in these kingdoms, it is to be hoped that the corruption of blood, with all its connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament; as it stands upon a very different footing from the forfeiture of lands for high treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting that, in certain treasons respecting the papal supremacy, stat. 5 Eliz. c. 1; and the public coin, stats. 5 Eliz. c. 11; 18 Eliz. c. 1; 8 and 9 W. 3. c. 26; 15 and 16 G. 2. c. 28; and in many of the new made felonies, created since the reign of Henry the Eighth by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind) this saving was neglected, or forgotten to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law. By the stat. of 7 A. c. 21. (the operation of which was postponed by stat. 17 G. 2. c. 39.) after the death of the sons of the late Pretender, no attainder for treason was to extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; these acts virtually abolished all corruption of blood for treason, though (unless the legislature should interpose) they still continue for many sorts of felony. It is to be regretted that it should have been deemed necessary by 39 G. 3. c. 93. to repeal these merciful enactments. See farther tit. Forfeiture, Corruption of Blood.

By 55 G. 3. c. 145. it is enacted that no attainder for felony, except in cases of high

As to forfeiture of lands, &c. by attainder, treason, petty treason, or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to downwards, so that an attainted person can the prejudice of the right or title of any person or persons, other than the offender during his natural life only: and every person to whom the right or interest of any lands or tenements, after the death of such offender, shall have appertained, if no such attainder had been, may enter into the same.

By attrinder all the personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown, without office found, and therefore attainder may be well pleaded in bar to an action, or a bill of exchange indorsed to the plaintiff after his at-

tainder. 2 B. & A. 258.

In treason for counterfeiting the coin, although, by the statutes, corruption of blood is sayed, yet the lands of the offender, are forfeited immediately to the king on attainder, it being a distinct penalty from corruption of blood: for the corruption may be saved, and the forfeiture remain, &c. And accordingly so it is provided by some statutes. 1 Salk. 85.

By stat. 7 and 8 G. 4. c. 28. § 4. for England, 9 G. 4. c. 54. for Ireland, no attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as

that charged in the indictment.

Attainders may be reversed or falsified, by a writ of error, or by plea; if by writ of error, it must be by the king's leave, &c. and when by plea, it may be by denying the treason, pleading a pardon by act of parliament, &c. 3

By a king's taking the crown upon him, all attainders of his person are ipso facto purged, without any reversal. 1 Inst. 26: Finch. L. 82: Wood. 17. This was the declaration of parliament, made in favour of Henry the Seventh. See 1 Comm. 248.

The stat. 8 W. 3. c. 5. requires Sir George Barclay, Major-General Holmes, and other persons, to surrender themselves to the lord chief justice, or secretaries of state; or to be attainted. By the 13 W. 3. c. 3. the pretended Prince of Wales is under attainder of treason, &c. And by 1 G. 1. c. 16. the Duke of Ormond and others are attainted. And besides these acts of attainder, bills for inflicting pains and penalties are sometimes passed; as that against the bishop of Rochester. Stat. 9 G. 1. c. 17. See tit. Corruption of Blood.

ATTAINT, attincta.] A writ that has to inquire whether a jury of twelve men gave a false verdict, that so the judgment following thereupon might be reversed. This proceeding is now repealed by the stat. 6 G. 4. c. 50. δ δ 0. (see tit. Jury) which enacts "that it shall not be lawful for the king, or any one on his behalf, or for any party or parties in any case whatsoever, to commence or prosecute any writ of attaint against any jury or jurors for

the verdict by them given, or against the par- sign him a guardian. 1 Lill. Abr. 138. ty or parties who shall have judgment upon such verdict: and that no inquest shall be taken to inquire of the concealment of other inquest: but that all such attaints and inquests shall cease, become void, and be utterly abolished, any law, statute, or usage to the contrary, notwithstanding. [The old law on this subject may be found on reference to the former editions of this Dictionary.] It is provided by § 61. of the same act that every person who shall be guilty of the offence of embracery, and every juror who shall comply or corruptly counsel thereto, shall and may be proceeded against by indictment or information, and be punished by fine and imprison-ment, in like manner as every such person and juror might have heretofore been. ATTENDANT, attendens.] Signifies one

that owes a duty or service to another, or in some sort depends on him. Where a wife is endowed of lands by a guardian, &c., she shall be attendant on the guardian, and on the heir at his full age. Terms de Ley.

ATTERMINING, from the Fr. atterminer.] The granting a time or term for payment of a debt. Ordinatio de libertatibus perquirendis, ann. 27 Ed. 1. And see stat. West. 2. c.

ATTILE, Attilium, attilamentum.] The rigging or furniture of a ship. Fleta, lib. 1. c. 25.

ATTORNARE REM. To alturn or turn over money and goods, viz. to assign or appropriate them to some particular use and service. Kennet's Paroch. Antiq. p. 283.

ATTORNATO FACIENDO VEL RE. CIPIENDO. An old writ to command a sheriff or steward of a county-court or hundred-court, to receive and admit an attorney, to appear for the person that owes suit of court. F. N. B. 156. Every person that owes suit to the county-court, court-baron, &c. may make an attorney to do his suit. Stat. 20 H. 3. c. 10.

ATTORNEY, attornatus.] Is one that is appointed by another man to do anything in his absence. West. Symb .: Crompt. Jurisdict. 105. An attorney is either public, in the courts of record, the King's Bench, and Common Pleas, &c. and made by warrant from his client: or private, upon occasion for any particular business, who is commonly made by letter of attorney. In ancient times, those of authority in courts had it in their power whether they would suffer men to appear or sue by any other but themselves: and the king's writs were to be obtained for the admission of attornies: but, since that, attornies have been allowed by several statutes. Attornies may be made in such pleas whereon appeal lieth not: in criminal cases there will be no attornies admitted. See stat. Glouc. 6 Ed. 1. st. 1. c. 8. An infant ought not to ap- & 5 W. & M. c. 18. unless where the court pear by attorney, but by guardian, for he can- orders special bail. By stat. 13 W. 3. c. 6. · Vol. I.-17

Infants, after they come to full age, may sue by attorney, though admitted before by guardian, &c. See tit. Infant. In action against baron and feme, the feme being within age, she must appear by guardian: but if they bring an action, the husband shall make attorney for both. 1 Dang. Abr. 602. Where baron and feme are sued, though the wife cannot make attorney, the husband may do it for both of them. 2 Sand. 213. See 3 Taunt. 261: and tit. Baron and Feme. One non compos mentis, being within age, is to appear by guardian; but after he is of age he must do it by attorney. Co. Lit. 135. An ideot is not to appear by attorney, but in proper person. A corporation cannot appear otherwise than by attorney, who is made by deed under the seal of the corporation. Ploud. 91.

ATTORNIES AT LAW, are such persons as take upon them the business of other men, by

whom they are retained.

Before the statute of West. 2. c. 10. [13 Ed. 1. A. D. 1285] all attornies were made by letters patent under the great seal, commanding the justices to admit the person to be his attorney. These patents, where they were obtained, seem to have been enrolled by a proper officer, called the clerk of the warrants; and also the courts enrolled those patents on which any proceedings were. If such letters patent could not be obtained, the persons were obliged to appear each day in court in their proper persons. Gilb. H. C. P. 32, 33.

The said statute of West. 2. c. 10. gives to all persons a liberty of appearing, and appointing an attorney, as if they had letters patent; and therefore the clerk of the warrants received each person's warrant, and upon the warrant it equally appeared to the court, that he had appointed such a one his attorney to the end of the cause, unless revoked; so that on each act there is no occasion of the plaintiff's and defendant's presence, as was used before that time. This authority continues till judgment, and for a year and a day, and afterwards to sue out execution, and for a longer time, if they continue execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by a scire fac' or an action of debt on the judgment. Gilb. H. C.

P. 33.
The attornies of B. R. are of record as well as the attornies of C. B. 1 Roll. 3. And it is now the common course for the plaintiff and defendant to appear by attorney. F. N. B. 26. D. But where the party stands in contempt, the court will not admit him by attorney, but oblige him to appear in person. Ibid. 262. Outlawry is excepted by stat. 4 not make an attorney, but the court may as- attornics are to take the oaths to government

stat. 4 H. 4. c. 19. no steward, bailiff, nor minister of lords of franchises which have return of writs shall be attorney in any plea within the franchises or bailiwick whereof he is officer or minister in any time to come; and by stat. 1 H. 5. c. 4. "no under sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, shall be attorney in the king's courts, during the time he is in office with any such sheriff."

In Trinity term 31 G. 3. a rule of court was made to prevent the admission of persons under irregular articles of clerkship, &c. chiefly to prevent the clerks of attornies from acting as principals. See 4 Term Rep. 379.

Parties to fines, as well demandant or plaintiff as tenants or defendants, that will acknowledge their right of lands unto others in pleas of warrantia chartæ, covenant, &c. before the fines pass, shall appear personally, so that their age, idiotey, or other default (if any be) may be discerned; provided that if any, by age, impotency, or casualty, is not able to come into court, one of the justices shall go to the party and receive his cognizance, and shall take with him a knight or man of good fame. Barons of the exchequer and justices. shall not admit attornies, but in pleas that pass before them, and where they be assigned. Reserving to the Chancellor his authority in admitting attornies, and to the Chief Justices. Stat. 15 Ed. 2. stat. 1.

In respect of the several courts, there are attornies at large, and attornies special, belonging to this or that court only. An attorney may be a solicitor in other courts, by a special retainer: one may be attorney on record, and another do the business; and there are attornies who manage business out of the courts, &c. Stat. 4 H. 4. c. 18. was enacted, that the justices should examine attornies, and remove the unskilful; and attornies shall swear to execute their offices truly, &c.; and by stat. 33 H. 6. c. 7. the number of attornies in Norfolk and Suffolk were limited.

By 3 Jac. 1. c. 7. attornies, &c. shall not be allowed any fees laid out for counsel, or otherwise, unless they have tickets thereof signed by them that receive such fees; and they shall give in true bills to their clients of all the charges of suits, under their hands, before the clients shall be charged with the payment thereof. If they delay their client's suit for gain; or demand more than their due fees and disbursements, the clients shall recover costs and treble damages; and they shall be for ever after disabled to be attornies. None shall be admitted attornies in courts of record, but such as have been brought up in the said courts, or are well practised and skilled, and of an honest disposition; and no attorney shall suffer any other to follow a suit in his name, on pain of forfeiting 201. to be divided between the king and the party grieved. This statute, as to fees to counsel, doth not extend and make affidavits thereof. Persons admit-

under penalties and disability to practise. By to matters transacted in inferior courts, but only to suits in the courts of Westminster Hall. Carth. 147.

> By the stat. 12 G. 1. c. 29. (which was revised and made perpetual by stat. 21 G. 2. c. 3.) if any, who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney or solicitor in any suit or action in any court in England, the judge, where such action shall be brought (upon examination of the matter in a summary way in open court), hath power to transport the offender for seven years, by such ways, and under such penalties, as felons.

> The act 2 G. 2. c. 23. ordains, that all attornies shall be sworn, admitted, and enrolled, before allowed to sue out writs in the courts at Westminster; and after the 1st of December, 1730, none shall be permitted to practise but such as have served a clerkship of five years to an attorney, and they shall be examined, sworn, and admitted in open court; and attornies shall not have more than two clerks at one time, &c. Every writ, and copy of any process, served on a defendant, and also every warrant made out thereon, shall be indorsed with the name of the attorney by whom sued forth: and no attornies or solicitors shall commence any action for fees till a month after the delivery of their bills, subscribed with their hands; also the parties chargeable may, in the mean time, get such bills taxed, and, upon the taxation, the sum remaining due is to be paid in full of the said bills, or in default the parties shall be liable to attachment, &c. And the attorney is to pay the costs of taxation, if the bill be reduced a sixth part. A penalty of 50l. inflicted, and disability to practise, for acting

> By stat. 6 G. 2. c. 27. attornies of the courts of Westminster may practise in inferior

By 12 G. 2. c. 13. attornies, &c. that act in any county-court, without being admitted, according to the statute 2 G. 2. c. 23. shall forfeit 201. recoverable in the courts of record; and no attorney, who is a prisoner in any prison, shall sue out any writ, or prosecute suits; if he doth, the proceedings shall be void, and such attorney, &c., is to be struck off the roll. But suits commenced before by them may be carried on. A quaker, serving a clerkship, and taking his solemn affirmation instead of an oath, shall be admitted an attorney.

By the stat. 22 G. 2. c. 46. persons bound clerks to attornies or solicitors are to cause affidavits to be made and filed of the execution of the articles, names and places of abode of attorney or solicitor, and clerk, and none to be admitted till the affidavits be produced and read in court; no attorney having discontinued business to take any clerk. Clerks are to serve actually during the whole time,

ted sworn clerks in Chancery, or serving a | be admitted to practise in the Exchequer withelerkship to such, may be admitted solicitors. By the stat 23 G. 2. c. 26. any person duly admitted a solicitor, may be admitted an attorney, without any fee for the oath, or any stamp to be impressed on the parchment whereon his admission shall be written, in the same manner as by stat. 2 G. 2. c. 23. § 20. attornies may be admitted solicitors.
By stat. 49 G. 3. c. 28. clerks of the king's

coroner and attorney in the court of King's Bench, are allowed to be admitted attornies.

By 9 G. 4, c. 25, any person appointed on behalf of his majesty, solicitor for the Treasury, Customs, Excise, or Stamps, &c., may practise as such in all courts and places. See 6 Bing. 404. By 1 W. 4. c. 70. all attornies admitted and practising in the courts of Wales and Chester may, on payment of one shilling, be entered and practise in the courts at Westminster.

By the 1 and 2 G. 4. c. 48. § 1. (as amend. ed by the 3 G. 4. c. 16.) persons, who at the time of being articled have taken the degree of Bachelor of Arts, or Bachelor of Law, at Oxford, Cambridge, or Dublin, may be admitted as attornies after three years' service, provided the degree of B. A. have been taken within six years, and that of B. L. within eight years after matriculation, and provided four years have not elapsed between the time of taking the degree and the entering into articles; and by sect. 2. if any person articled for five years shall bona fide be a pupil to a barrister or special pleader for one year, he may be admitted an attorney in like manner as now done where the clerk has served part of his time with the agent of the person to whom he is bound.

By several stamp acts, every admitted attorney, solicitor, notary, proctor, agent, or procurator, shall annually take out a certificate from the courts in which they practise, on penalty of 50l.

By the last stamp act, 55 G. 3. c. 184. the duty is 12l. where the attorney resides in the limits of the two-penny post, if he has been admitted three years, and 61. if not admitted so long; if he reside elsewhere 81. if admitted three years, and 4l. if not so long. Bac. Ab. Attorney (A.) (7th ed.) Tidd. 75. (9th ed.)

Stamp duties are imposed by several acts on articles of clerkship to attornies and solicitors. Acts of indemnity are from time to time passed, allowing farther time for stamping articles, and taking out certificates.

By 9 G. 4. c. 49. articles under which any person has been bound in order to admission in the courts of Wales, and the counties palatine, may be stamped on the payment of 120l., and the party having served under them may thereupon be admitted in the courts at Westminster. By 1 Will. 4. c. 70. § 10. persons

out employing a clerk in court.

Attornies may now practise in the Exchequer. See that title. And it was provided, on the abolition of the courts of great session in Wales, and of the courts in the county palatine of Chester, that attornies of those courts might be admitted as attornies of the courts of Westminster. See Wales.

Attornies of courts, &c., shall not receive or procure any blank warrant for arrests from any sheriff, without writ first delivered, on pain of severe punishment, expulsion, &c. And no attorney shall make out a writ with a clause ac etium billa. &c. where special bail is not required by law. Pasch. 15 Car. 2. See tit. Appearance. Action upon the case lies for a client against his attorney, if he appear for him without a warrant; or if he plead a plea for him, for which he hath not his warrant. 1 Lill. Ab. 140. But if an attorney appear without warrant, and judgment is had against his client, the judgment shall stand, if the attorney be responsible: contra, if the attorney be not responsible. 1 Sulk. 88.

Action lies against an attorney for suffering judgment against his client by nil dicit, when he had given him a warrant to plead the general issue: this is understood where it is done by covin. 1 Danv. Ab. 185. If an attorney makes default in a plea of land, by which the party loses his land, he may have a writ of deceipt against the attorney, and recover all in damages. Ibid. An attorney owes to his client secrecy and diligence, as well as fidelity; and if he take reward on the other side, or cause an attorney to appear and confess the action, &c. he may be punished.

But action lies not against an attorney retained in a suit, though he knows the plaintiff hath no cause of action; he only acting as a servant in the way of his profession. 4 Inst. 117: 1 Mod. 209. Though where an attorney or solicitor is found guilty of a gross neglect, the court of Chancery has in some cases ordered him to pay the costs. 1 P. Wms. 593. He who is attorney at one time, is attorney at all times pending the plea. 1 Danv. 609. And the plaintiff or defendant may not change his attorney, while the suit is depending, without leave of the court, which would reflect on the credit of attornies; nor until his fees are paid. Mich. 14 Car. A cause is to proceed notwithstanding the death of an attorney therein; and not to be delayed on that account. For if an attorney dieth, the plaintiff or defendant may be required to make a new attorney. 2 Keb. 275. And an attorney retained in a cause cannot abandon it on the ground of want of funds without giving reasonable notice to the client. 2 Barn. & Adol.

Attornies are liable to be punished in a admitted to practice in K. B. and C. P. shall summary way, either by attachment, or having their names struck out of the roll for ill- | ment than negligence. 3 Wils. 325. But the practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty; but the court will not easily be prevailed on to proceed in this manner, if it appears the matter complained of was rather owing to neglect or accident than design; or if the party injured has other remedy by act of parliament, or action at law. 12 Mod. 251, 318, 440, 583. 657: 4 Mod. 867.

By stat. 7, 8 G. 4. c. 29. § 49 (9 G. 4. c. 55. § 42. for Ireland), for an attorney is liable to transportation for embezzling money or property entrusted to him. See tit. Embezzle-

If an attorney, defendant in an action, does not appear in due time, plaintiff may sign a forejudger, which enables him to strike the defendant off the roll, and then he may be sued as a common person (stat. 2 H. 4. c. 8.), and cannot be proceeded against by bill.-On making satisfaction to the plaintiff, an attorney so forejudged, may be restored. See Impey's Instructor Clericalis, C. P. 521.

Sometimes attorneys are struck off the roll on their own application, for the purpose of being called to the bar, &c.; and in this case they must be disbarred by their inn, before they are re-admitted attornies. Dougl. 144.

An attorney convicted of felony struck off

the roll. Cowp. 829.

Where a special case was stated for the opinion of the court, setting out a fictitious statement of previous proceedings at law, the court fined the attorney. 3 Barn. & C. 597: 5 Dow. & Ry. 389. So an attorney will be struck off the roll who is convicted of any offence unfitting him to be an attorney, 6 East, 143; or who signs a fictitious name to a demurrer; as the name of a barrister. 4. Dow & Ry. 738; and see Bac. Ab. Attorney (H,): Tidd. 73, 74. (9th ed.)

They are also liable to be punished for base and unfair dealings towards their clients, in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expence, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their client's writings with which they had been entrusted in the way of business; or money which had been recovered and received by them to their client's use, and for other such like gross and palpable abuses. 2 Hawk, P. C. 144: 8 Mod. 306: 12 Mod. 516.

In a criminal case the attorney for the defendant may be his bail. Doug. 467. See tit.

Payment to the attorney is payment to the principal. Doug. 623: 1 Black R. 3.

An action lies against an attorney for neglecting to charge a person in execution at his elient's suit, according to a rule of court;

court will not proceed against him for it in a summary way. 4 Burr. 2060.

In ordinary cases, if an attorney be defi-cient in skill or care, by which a loss arises to his client, he is liable to an action on the case for damages., 2 Wils. 325: 8 Moo. 340: 1 Bing. 347: and see Tidd, 85. (9th ed.) And in some instances the court will make him pay costs to his own client for neglect, or to the opposite party for vexatious and improper conduct. Tidd, 86.

An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands he may retain to the amount of his bill. He may stop it in transitu if he can lay hold of it; if he apply to the court, they will prevent its being paid over until his demand is satisfied. If the attorney give notice to the desendant not to pay till his bill be discharged, a payment by the defendant after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice. Doug. 238.

An attorney has a lien upon a sum awarded

in favour of his client as well as if recovered by judgment; and if after notice to defendant, the latter pay it over to his plaintiff, the plaintiff's attorney may compel a repayment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the detindent. Ormerod v. Tate, 1 East, 464; and see 5 Taunt. 429: 2 Barn. & A. 402: 3 Bing. 132: Tidd, 338; (9th ed.)

An attorney is bound to disclose, when called as a witness, the contents of a notice which he received to produce a paper in the hands of his client. 7 E. R. 357.

The court, under circumstances, will entertain a summary jurisdiction over an attorney in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. 3 Term. Rep. 275: see 1 Sulk. 87: 1 Lill. 148: Mod. Cas. Law & Eq. 306; the latter that an attorney cannot detain papers delivered to him on a special trust for money due to him in that very bu-

The court refused to compel an attorney to pay a sum he had received as attorney, he having, after the receipt, become bankrupt, and obtained his certificate. 8 Barn. &

The court refused to compel an attorney to deliver up, on payment of his demand, a deed placed in his hands for the purpose of making an assignment of it, there being no cause in court, nor any misconduct imputable to him. 8 E. R. 237. But see Aitkin's case, 4 B. & A. 47: Luxmore v. Lethbridge, 5 B. & A. 898; and as to attorncy's lien, see Tidd, 337.

Attornics have the privilege to sue and be sued only in the courts at Westminster, where they practise; they are not obliged to although it seems it was rather want of judg- put in special bail, when defendants; but

when they are plaintiffs they may insist upon representative of the crown in the courts. 4 special bail in all bailable cases. 1 Vent. 299: Wood's Inst. 450. But an attorney of one court may, in that court, hold an attorney of another court to bail. See tit. Privilege. By the 2 W. 4. c. 39, the proceedings by bill against attornies, and by attachment of privilege at suit of them are virtually abolished.

Those who have not been attending their employment in King's Bench for one year last past, unless hindered by sickness, are not to be allowed their privilege as attornies. 2

Maule & Sel. 606.

The business of an attorney is a profession and not a trade: and a person who serves under articles of clerkship is not an apprentice within the meaning of that term. fore, where by custom all persons who had served a seven years' apprenticeship in a corporate town were entitled to be admitted free burgesses, service with an attorney was held not to be within the custom. R. v. Doncaster

Corp., 7 Barn. & C. 630.

In the case of an attorney who takes securities from his client, such securities cannot be used as conclusive evidence of the consideration advanced, as expressed in the securities, but require extrinsic evidence of the money having been actually advanced to prove the transaction to have been bona fide. Lewes v. Morgan in Dom. Proc. April, 1816, and in the Exchequer, May, 1829. See 5 Price, 518: 3 Younge & I. 394. [It may be allowed here to quote the Law Magazine, vol. 2. p. 462, &c. for the abridgment of the Chief Baron Alexander's judgment on this complicated case.]

ATTORNEY OF THE DUTCHY COURT OF LANCASTER. Attornatus curiæ ducatus Lancastriæ.] Is the second officer in that court; and seems for his skill in law to be there placed as assessor to the chancellor, and chosen for some special trust reposed in him, to deal between the king and

his tenants. Cowel.

ATTORNEY GENERAL, is a great officer under the king, made by letters patent. It is his place to exhibit informations, and prosecute for the crown in matters criminal; and to file bills in the Exchequer, for any thing concerning the king in inheritance or profits; and others may bring bills against the king's attorney. His proper place in court, upon any special matters of a criminal nature, wherein his attendance is required, is under the judges, on the left hand of the clerk of the crown; but this is only upon solemn and extraordinary occasions; for usually he does not sit there, but within the bar in the face of the court.

For the new order of precedency of the Attorney and Solicitor General before the king's serjeants, see 6 Taunt. 424.

Burr. 2570.

By royal mandate, 14 Dec. 54 G. 3. the king's Attorney and Solicitor General have place and audience before the king's two ancient serjeants: and it may be presumed also before the king's Advocate General. The Attorney General when he prosecutes for the crown in his official character, has always a 1 Moo. & Malk. 439, 440: 3 right to reply. Mann. & Ry. 304.

ATTORNMENT, Attornamentum, from the French tourner, to turn.] Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law, the feudatory could not alien the feud without the consent of the lord; nor the lord alien or transfer his seignory without the consent of his feudatory. Wright's Tenures, 30, 31. It is certain that this doctrine formerly prevailed in England; if not at least

to equal extent in other countries.

This necessity of the consent of the tenant to the alienation of the lord, gave rise in our old law to the doctrine of attornment; which at common law signified only the consent of the tenant to the grant of the seignory; whereby he agreed to become tenant of the new lord. But after the statute quia emptores terrarum (18 Ed. 1. st. 1.) was passed, by which subinfeudation was prohibited, it became necessary that when the reversion or remainderman after an estate for years, for life, or in tail, granted his reversion or remainder, the particular tenant should attorn to the grantce. The necessity of attornment was, in some measure, avoided by the statute of uses (27 H. 8. c. 10.), as by that statute the possession was immediately executed to the use; and by the statute of Wills (34 and 35 H. 8 c. 5,) by which the legal estate is immediately vested in the devisec.

Attornments, however, still continued to be necessary in many cases; but both their necessity and efficacy are now almost totally taken away; for by stat. 4 Ann. c. 16. § 9, it is enacted that all grants and conveyances of manors, lands, rents, reversions, &c. by fine, or otherwise, shall be good without the attornment of the tenants; but notice must be given of the grant, to the tenant, before which he shall not be prejudiced by payment of any rent to the grantor, or for breach of the condition for non-payment. And by stat. 11 G. 2. c. 19. attornments of lands, &c. made by tenants to strangers, claiming title to the estate of their landlords shall be null and void, and their landlord's possession not affected thereby; though this shall not extend to vacate any attornment made pursuant to a judgment at law, or with consent of the landlord; or to a mortgagee on a forfeited mortgage.

Till the passing of these statutes, the doc-The Attorney General is the only legal trine of attornment was one of the most copious and abstruce points of the law. But jowner his remedy against the bidder, on the useless. See 1 Inst. 309.

ATTREBATII. People of Berkshire.

AVAGE, or Avisage. A rent or payment by tenants of the manor of Writtle in Essex, upon St. Leonard's day, 6 November, for the privilege of pannage in the lord's woods, viz. for every pig under a year old, a halfpenny; for every yearly pig, one penny; and for every hog above a year old, two-pence. Blount.

AVAIL of MARRIAGE. Valor Marita-

gii. See title Tenure.

DE AUCA. Owe.

AUCTIONS and AUCTIONEERS. der various statutes, every auctioneer must take out an annual license: paying certain duties within the bills of mortality and without; and duties are imposed on goods sold by action; which duties are a charge on the auctioneer, not on the purchaser.

The practice of puffing, as it is called, at auctions, was in Bexwell v. Christie, Cowp. 395. considered as illegal; but the legislature having enacted, that property put up to sale at auction shall, upon the knocking down the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act, be shown to have been bought in by the owner himself, or by some person by him authorised, seems indirectly to have given a sanction to this practice.

An auctioneer is an agent authorised by a buyer to sign a contract for him. 2 Taunt. 38: 4 Taunt. 209.

A sale was appointed for two certain days, for the disposal of furniture, but some not being sold, announcement was made that the remainder would be sold at a future day. The persons who then attended to buy were directed to retire to another room, where each was to write the sum offered by him on a piece of paper, and the person writing the largest sum was to be the purchaser.—Held to be a sale by auction, so as to subject the party directing that mode of bidding to penalty, for acting as an auctioneer, and not licensed as such. Attorney General v. Taylor, 13 Price, 636.

An auctioneer cannot, in conducting a sale, deviate from the strict terms of the conditions: if he does he will be personally responsible for all the consequences, as well in respect of his liability to actions for duties demandable against him, as of losing his right to bring actions for remedies to which he might otherwise resort, and the proper course to be pursued by such auctioneer where he has been called upon to pay the officer of the crown the duties on a sale by auction, is to proceed by action, on the implied assumpsit, against the vendor as his employer, which he may maintain if he has acted

these acts having made attornment both un- express contract in the conditions. Jones v. necessary and inoperative, the learning upon Manney, 13 Price, 76: 1 McClel. 25. An it may be said to have become almost entirely | auctioneer who is employed to sell an estate, and who receives a deposit from the purchaser, is a mere stakeholder, liable to be called upon to pay the money at any time; and, therefore, although he place it in the funds, and makes interest of it, he is not liable to pay such interest to the vendor when the purchase is completed, though the vendor (without the concurrence of the vendee) give, him notice to invest the money in government securities. Harrington v. Hoggart, 1 Barn. & Adol. 877.

AUDIENCE COURT, Curia audientiæ Cantuariensis.] A court belonging to the archbishop of Canterbury, having the same authority with the court of arches, though inferior to it in dignity and antiquity. It was held in the archbishop's palace; and in former times the archbishops were wont to try and determine a great many ecclesiastical causes in their own palaces; but before they pronounced their definitive sentence they comin the law, whom they named their auditors: who, at this day, is called causarum negotiorumque audientiæ Cantuariensis auditor officialis. And to the office of auditor was forwhich meddleth not with any point of contentious jurisdiction, that is, deciding of causes between party and party, but only such as are of effice, and especially as are voluntaria jurisdictionis; as the granting the custody of spiritualities, during the vacancy of bishoprics, institutions to benefices, dispensations, &c.; but this is now distinguished from the audience. The auditor of this court anciently, by special commission, was vicar general to the archbishop, in which capacity he exercised ecclesiastical jurisdiction of every diocese becoming vacant within the province of Canterbury. 4 Inst. 337. But now these three great offices of official principal of the archbishop, dean or judge of the peculiars, and official of the audience, are, and have been for a long time past, united in one person, under the general name of Dean of the arches.

The archbishop of York hath, in like manner, his court of audience. Johns. 255. See Arches Court.

AUDITA QUERELA. A writ whereby a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, for on a statute-merchant, statute-staple, or recognizance,] may be relieved upon good matter of discharge, which has happened since judgment: as if the plaintiff had given him a general release; or if the defendant hath paid the debt to the plaintiff, without procuring saproperly in conducting the sale, leaving the tisfaction to be entered on the record.

these and the like cases, wherein the defend- | tors for the same cause, &c. they may have ant hath good matter to plead, but hath had the writ audita querela. Plowd. 439. If two no opportunity of pleading it (either at the beginning of the suit or puis darrien continuance, which must always be before judgment), an audita querela lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court stating that the complaint of the defendant had been heard, (audita querela defendentis), and then, setting out the matter of the complaint, it at length enjoins the court to call the party before them, and, having heard their allegations and proofs, to cause justice to be done between them. Finch, L. 488. F. N. B. 102. It also lies for bail, when judgment is obtained against them by scire facias, to answer the debt of their principal, and it happens afterwards, that the original judgment against their principal is reserved: for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by audita querela; (1 Roll. Ab. 308.) 2 Mant. 37; which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party, who hath a good defence, is too late to make it in the ordinary forms of law. But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression (Lord Raym. 439: 1 Salk. 93.) has almost rendered useless the writ of audita querela, and driven it quite out of practice. 3 Comm. 406.

The audita querela is of common right.
Where it clearly affords relief to the party, the court of C. B. will relieve him on motion without putting him to the writ; 5 Taunt. 558; but not if the relief is questionable.

Ibid.

Some part of the old law on this subject is here stated, to give the student a general idea of this circuitous proceeding.-If necessary to enter more at large into this learning, let him look into Viner's Abridgment and Comyns's Digest: Buc. Ab. vol. 1. (7th ed.)

On a statute, the conusor or his heir may bring audita querela, before execution is sued out; but this may not be done by a stranger to the statute, or a purchaser of the land. Danv. Ab. 630: 3 Rep. 13. If a lessee covenants for him and his assigns to repair, and the lessee assign over, and the covenant is broken; if the lessor sues one of them, and recovers damages, and then sues the other, he may bring audita querela for his relief. Bro. 74. And where a man hath goods from me by my delivery, and another takes them from him, so that he is liable to both our suits; and one of us sue and recover against him, and then the other sues him, his remedy is by this writ. Dyer, 232. One binds himself as such till the contrary appeared; which the and his heirs in an obligation, if the obligee cognisor could not set forth before execution,

joint and several obligers are sued jointly, and both taken in execution, the death or escape of one will not discharge the other, so as to give him this action; but if such obligors be prosecuted severally, and a satisfaction is once had against one of them, or against the sheriff upon the escape of one, the other may have it. Hob. 58: 5 Rep. 87. Judgment is had against a sheriff on an escape of a person in execution, and after the first judgment is reversed for error, the sheriff shall have relief by audita querela. 8 Rep. 142.

If a plaintiff that sues as administrator, and recovers judgment and sues out execution, has his letters of administration revoked, the defendant must be relieved by audita querela.

Style, 417.

If A., being within age, becomes bail for B., and after two scire facias and nihil returned, judgment is given against A., &c., he may have an audita querela, and avoid the recognizance: and so the judgment there-upon, of consequence, shall be avoided. Yelv.

But if A., being within age, enters into a bond to B., who procures C., without any warrant, to appear for A., and confesses a judgment thereupon, yet A. shall not have an audita querela, but he must take his remedy by action of disceit against the attorney. Cro. Jac. 694.

The writ of audita querela may be had where a recognizance or statute entered into is defective, and not good; or being upon an usurious contract, by duress of imprisonment, or where there is a defeasance upon it, &c. Moor Ca. 1097: 1 Brownl. 39: 2 Bulst. 320. So, upon showing an acquittance of the cognisce, on a suggestion that he had agreed to deliver up the statute. 1 Roll. 309. Where one enters into a statute, and after sells his lands to divers purchasers; or judgment is had against a man, who leaves land to several heirs, &c. and one of the purchasers, or one heir alone, is charged, he may have this writ against the rest to contribute to him. 3 Rep.

Where a statute or recognizance is acknowledged before one who hath not power to take it, and afterwards the cognisor makes a feoffment of the land to another, and the cognisce taketh out execution, in such case the feoffee may have an audita querela, and avoid the

execution. Dyer, 27. 35.

If A. enters into a statute to B., and pays the money at the day assigned, upon which the statute is cancelled, and after B. forges a new statute in the name of A., in this case A. may relieve himself by audita querela; for the forged statute having all the essentials of a true one, the court was obliged to look on it recover of the heir, and after sue the execu- having no day to appear judicially in court,

execution founded on the injustice of the pre-

tended conusee. F. N. B. 104.

If upon an elegit the sheriff takes an inquisition, and there are several lands found subject to the extent, and several values found, and the shcriff returns, that he has delivered some of the lands in particular for the moiety, where it appears, according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety: yet this is not void, nor is it a disseisin by the entry; but only voidable by audita querela. 1 Roll. Ab. 305.

If two executors sue execution for damages, recovered by the testator, where one hath released, an audita querela lies against both.

1 Roll. Ab. 312.

If A., cognisee of a statute, releases to the tenant all right, interest, and demand, together with all suits and executions, and afterwards sues execution, the turtenant shall have an audita querela to set aside this exccution. Cro. Eliz. 40: 1 And. 133.

So in trespass or other action, if it be found for the plaintiff by nisi prius, and after, before the day in bank, the plaintiff releases to the defendant, and after judgment is given for the plaintiff, the defendant shall have an audita quercla upon this matter; because he could not plead the release at the day in bank. 1 Roll. Ab. 307.

In an audita querela, the process is a venire facias, distringas, alias, pluries; and if non est inventus be returned, or that he hath nothing, the plaintiff shall have a capias against the defendant. F. N. B. 104: Dyer, 297. b.

If an audita querela is founded on a record, or the person bringing it is in custody, the process upon it is a scire facias; but if founded on matter of fact, or the party is at large, then the process is a venire. 1 Salk. 92.

And if there be a default by the defendant upon a scire feci, or two nihils returned, the plaintiff shall have judgment. 1 Salk. 93. But, where an audita querela is sued quia timet, and the party is at large, there shall never be a scire facias. 1 Salk. 92: 1 Inst. 100. a.

An audita querela shall be granted out of the court, where the record, upon which it is founded, remains, or it may be returnable in the same court. F. N. B. 105. b. And, therefore, if a man recover in B. R. or C. B., the defendant, having a release after judgment, and before execution, shall sue the audita querela, out of B. R. or C. B. where the record is. F. N. B. 105. So, if a recognizance be acknowledged in C. B., and execution be sued upon it after release, the defendant shall sue the audita querela out of C. B. F. N. B. 105. But an audita querela may be by original; and, upon a judgment in C. B. it goes out of chancery returnable in C. B. F. N. B. 105.

The writ of audita querela shall be allowed

and therefore is put to this writ to avoid the only in open court. 1 Bulst. 140: 3 Bulst. 97: 2 Show. 240.

Upon audita querela brought, a supersedeas shall go to stay execution; and the judgment in this action is to be discharged of execution. Hob. 2. If an audita querela be unduly gotten, upon a false surmise, it may be quashed. 1 Bulst. 140. This writ lies not after judgment upon a matter which the party might have pleaded before. Cro. Eliz. 35. A bare surmise is not sufficient to avoid a judgment; but, generally, some speciality must be shown. Cro. Jac. 579. Upon a release of other deed pleaded, no supersedeus will be granted till the plaintiff, in the audita querela, hath brought his witnesses into court to prove the deed; and if execution be executed before, bail is to be put in by allowance of the court. 1 Lill. Ab. 151.

Upon a motion for an allowance of an audita querela, it was held, that bail must be given in court, and not elsewhere; unless in case of necessity, to be allowed by the court, and then it may be put in before two judges. Palm. 422.

A man nonsuited in an audita querela may have a new writ. F. N. B. 104. When lands are extended on any statute, &c. before the time audita querela licth. 22. 46 Ed. 3. A writ, in the nature of an audita querela, has been made out returnable in B. R. on a special pardon, setting forth the whole matter. Jenk. Cent. 109.

AUDITOR, Lat.] An officer of the king or other person or corporation, who examines yearly the accounts of all under-officers, and makes up a general book, which shows the difference between their receipts and charge, and their several allowances, commonly ealled allocations: as the auditors of the Exchequer take the accounts of those receivers who collect the revenues. 4 Inst. 1061. Receiversgeneral of fee-farm rents, &c. are also termed auditors, and hold their audits, for adjusting the accounts of the said rents, at certain times and places appointed. And there are auditors assigned by the court, to audit and settle accounts in actions of account, and other cases, who are proper judges of the cause, and pleas are made before them, &c. 1 Brownl. 24. See tit. Account.

AUDITOR OF THE RECEIPTS. officer of the Exchequer, that files the tellers' bills, and having made an entry of them, gives the lord treasurer, &c. weekly, a certificate of the money received; he makes debentures to the tellers before they pay any money; and takes their accounts: he also keeps the black book of receipts, and the treasurer's key of the treasury, and seeth every teller's money locked up in the treasury. 4. Inst. 107.

By stat. 46 G. 3. c. 1. the auditor of the Exchequer is empowered to constitute a trustee for the execution of the said office, whenever such auditor is a lord of the treasury.

i. e. the catechumens, or those who are newly instructed in the mysteries of the Christian Kent it is called the gratten, and in other religion before they were admitted to baptism; and auditorium was that place in the church where they stood to hear, and be instructed, now called the nave of the church: and in the primitive times, the church was so strict in keeping the people together in that place, that the person who went from thence in sermon time was excommunicated. Blount.

AUDITORS OF THE IMPREST. OF ficers in the Exchequer, who formerly had the charge of auditing the great accounts of the king's customs, naval and military expences, &c. But who are now superseded by the commissioners for auditing the public ac-

counts. See tit. Accounts Public.

AVALONIA, Æ.]--Glastonbury, in Somersetshire.

AVANAGE, from the Lat. avena.] A certain quantity of oats paid by a tenant to his landlord as a rent, or in lieu of some other duties. Blount.

AVENOR, avenarius, from the Fr. avoine, oats.] An officer belonging to the king's stables that provided oats for his horses; men-

tioned stat. 13 Car. 2. cap. 8.

AVENTURÆ, Adventures, or trials of skill at arms; military exercises on horseback .- Assisa de armis. Brady's Append. Hist. Eng. 250: Addit. Mat. Paris, p. 149.

AVENTURE (properly adventure.) A mischance causing the death of a man: as where a person is suddenly drowned, or killed by any accident, without felony. Co. Lit. 391.

AVERA, quasi overa, from the Fr. ouvre and ouvrage, velut operagium.] Signifies a day's work of a ploughman, formerly valued at 8d. It is found in Domesday. 4 Inst.

AVERAGE, averagium.] Is said to signify service which the tenant owes to his lord by horse or carriage: but it is more commonly used for a contribution that merchants and others make towards their losses, who have their goods cast into the sea, for the safeguard of the ship, or of the other goods and lives of those persons that are in the ship, during a tempest. It is in this sense called average, because it is proportioned and allotted after the rate of every man's goods carried. So if a ship or goods insured for a voyage reach their destination, but are in some degree injured by any of the accidents insured against, this is an average loss, and the insurer is bound to compensate the insured in the proportion which the average loss bears to the whole insurance. See tit. Insurance. And see Bac. Ab. Merchant, Average, vol. 5. (7th ed.)

other man's ship, for their care of the goods, See farther Vin. Ab. tit. Averment.

over and above the freight.

Vol. I.-18

Abolished. See Public Revenue. Average of Corn Fields. The stubble or AUDITORES. The same with audientes, remainder of straw and grass left in corn fields after the harvest is carried away. In parts the roughings, &c.

Average Prices, are such prices as are computed on all the prices of any article sold within a certain period or district. See tit.

AVER CORN, is a reserved rent in corn, paid by farmers and tenants to religious houses; and signifies, by Somner, corn drawn to the lord's granary, by the working cattle of the tenant. It is supposed that this custom was owing to the Saxon cyriac sceat, a measure of corn brought to the priest annually on St. Martin's day, as an oblation for the first-fruits of the earth: under which title the religious had corn-rent paid yearly; as ap-pears by an inquisition of the estate of the abbey of Glastonbury, A. D. 1201.

AVER LAND, seems to have been such lands as the tenants did plough and manure, cum averiis suis, for the proper use of a monastery, or the lords of the soil. Mon.

Angl.

AVER PENNY (or average penny.) Money paid towards the king's averages or carriages, or to be freed thereof. Rastal.

AVER SILVER. A custom or rent for-

merly so called. Cowel.

AVERIA, Cattle. Spelman deduces the word from the Fr. ouvrer, to work, as if chiefly working cattle: though it seems to be more probably from avoir, to have or possess; the word sometimes including all personal estate, as catalla did all goods and chattels. This word is used for oxen or horses of the plough: and in a general sense any cattle.

Averia elongata. See Elongata. AVERIIS CAPTIS IN WITHERNAM. A writ for the taking of cattle to his use, who hath cattle unlawfully distrained by another, and driven out of the county where they were taken, so that they cannot be replevied by the sheriff, Reg. Orig. 82. See tit. Dis-

AVERMENT, verificatio, from the Fr. averer, i. e. verificare, testari.] Is an offer of the defendant to make good or justify an exception pleaded by him in abatement or bar of the plaintiff's action; and it signifies the act, as well as the offer, of justifying the exception; and not only the form, but the matter thereof. Co. Lit. 362. Averment is either general or particular; general, which concludes every plea, &c. containing matter affirmative, and ought to be with these wordsand this he is ready to verify, &c. Particular averment is when the life of the tenant for life, or of tenant in tail, &c. is averred. Ibid. As to general averments, see tit. Pleading. Average is likewise a small duty, paid to With respect to particular averments, the fol-masters of ships when goods are sent in an lowing quotations may serve as examples. With respect to particular averments, the fol-

He that claims estate from tenant for life,

to aver his life. Br. Estate, pl. 18.

Where one thing is to be done in consideration of another, on contracts, &c., there must be an averment of performance; but where there is promise against promise, there needs no averment; for each party hath his action. 1 Lev. 87. The use of averment being to ascertain what is alleged doubtfully, deeds may sometimes be made good by averment, where a person is not certainly named; but when the deed itself is void for uncertainty, it cannot be made good by averment. 5 Rep. 155. Averment cannot be made against a record, which imports in itself an uncontrollable verity. Co. Lit. 26: Jenk. 232.

Where a statute is recited, there one may not aver that there is no such record: for generally an averment, as this is, doth not lie against a record; for a record is a thing of solemn and high nature, but an averment is but the allegation of the party, and not so much credit in law to be given to it. Lit. P. R. 155.

Averment lies not against the proceedings of a court of record. 2 Hawk. P. C. c. 1. § 14. Nor shall it be admitted against a will concerning lands. 5 Rep. 68. And an averment shall not be allowed where the intent of the testator cannot be collected out of the words of the will. 4 Rep. 44. One may not aver a thing contrary to the condition of an obligation, which is supposed to be made upon good deliberation, and before witnesses, and therefore not to be contradicted by a bare averment. 1 Lill. Ab. 156.

An averment of a wicked and unlawful consideration of giving a bond, may well be pleaded, though it doth not appear on the face of the deed: and any thing which shows an obligation to be void may well be averred, although it doth not appear on the face of the bond. Adjudged on demurrer, after two arguments. Collins v. Blantern, 2 Wilson, 747: and see Greville v. Atkins, 9 Barn. & C. 462.

If an heir is sued on the bond of his ancestor, it must be averred that the heirs of the obligor were expressly bound. 2 Saund. 136. In declaring you show that the obligor bound his heirs.—Another consideration than that mentioned in a deed may be averred, where it is not repugnant or contrary to the deed. Dyer. 146. But a consideration may not be averred, that is against a particular express consideration; nor may averment be against a consideration mentioned in the deed, that there was no consideration given. 1 Rep. 176: 8 Rep. 155. If an estate is made to a woman that hath a husband, by fine or deed, for her life; in this case it may be averred to be made to her for her jointure, although there be another use or consideration expressed. 4 Rep. 4. Averment may be of use upon any fine or common recovery; though

or in tail, or from parson of a church, ought in it: it may be received to reconcile a fine, and the indenture to lead the uses. Dyer, 311: 2 Bulst. 235: 1 A. 312.

If one has two manors known by the name of W., and levies a fine, or grants an annuity out of his manors of W. he shall by averment ascertain which of them it was. Per. cur. Mod. 235: Cha. Rep. 138.

If a piece of ground was anciently called by one name, and of late is called by another, and it is granted to me by this new name, an averment may be taken that it is all one thing, and it will make it good. Dyer, 37. 44. No averment lies against any returns of writs, that are definitive to the trial of the thing returned; as the return of a sheriff upon his writs, &c. But it may be where such are not definitive; and against certificates upon commissions out of any court; also against the returns of bailiffs of franchises, so that the lords be not prejudiced by it. Dyer, 348: 8 Rep. 121: 2 Cro. 13.

As to averments in actions on the case for words, see tit. Action, II. 1.

A special averment must be made upon the pleading of a general pardon, for the party to bring himself within the pardon. Hob. 67.

A person may aver he is not the same person on appeal of death in favour of life. 1 Nels. Ab. 305.

Where a man is to take a benefit by an act of parliament, there, in pleading, he must aver, that he is not a person excepted; but where he claims no benefit by it, but only to keep that which he had before, in such case it is not necessary to make such averment. Plow. Com. 87. 488.

Pleas merely in the negative shall not be averred, because they cannot be proved: nor shall what is against presumption of law, or any thing apparent to the court. Co. Lit. 362, 373. By stat. 4 and 5 A. c. 16. no exception or advantage shall be taken upon a demurrer, for want of averment of hoc parademurrer. tus est, &c., except the same be specially set down for cause of demurrer. See tit. Amendment: and see Bac. Ab. Pleas and Pleading, (7th ed.)

AVERRARE. To carry goods in a wagon, or upon loaded horses-a duty required of some customary tenants. Cartular. Glaston.

AVETTING, (abetting,) signifies helping

or assisting. Scotch. Dict. AUGMENTATION, augmentatio.] The name of a court erceted 27 H. 8. for the determining suits and controversies relating to monasteries and abbey lands. The intent of this court was, that the king might be justly dealt with touching the profits of such religious houses as were given to him by act of parliament. It took its name from the augmentation of the revenues of the crown, by the suppression of religious houses: and the office of augmentation, which hath many cunot of any other use than what is expressed rious records, remains to this day, though the

de Ley, 68.

AUGMENTATION of STIPENDS.—In order to secure a proper provision for the reformed clergy of the church of Scotland, a commission of parliament was appointed by several acts of the legislature. The powers conferred on this commission were, by the act of 1707, c. 9. transferred to the court of session. Under these powers, the court, as a commission of parliament, and as a separate court from the court of session, modify stipends to the clergy out of the teinds of the parish in which the minister officiates. See Tiends.

AUGUSTA. London.

AVISAMENTUM. Advice or counsel.-De avisamento et consensu concilii nostri concessimus, &c., was the common form of our ancient king's grants.

AULA, i. e. a court-baron, aula ibidem tent die, &c. Aula ecclesiæ is that which is now termed navis ecclesiæ. Eadm. lib. 6. p. 141.

DE AULA. Hall.

AULNAGE. See Alnage.

AUMONE. Fr. aumosne, alms.] Tenure in aumone is where lands are given in alms to some church, or religious house, upon condition that a service or prayers shall be offered at certain times for the repose of the donor's soul. Brit. 164. Vide Frankalmoign.

AUNCEL, or AUNCEL WEIGHT, quasi hand saleweight, or from ansa, the handle of the balance.] An ancient manner of weighing (mentioned in the old stat. 14 Ed. 3. st. 1. c. 12,) by the hanging of scales or hooks at each end of a beam or staff, which, by lifting up in the middle with one's finger or hand, discocovered the equality or difference between the weight at one end, and the thing weighed at the other. This weighing being subject to great deceit, was prohibited by several statutes, and the even balance commanded in its stead. But, notwithstanding, it is still used in some parts of England: and what we now call the stilliards, a sort of hand-weighing among butchers, being a small beam with a weight at one end (which shows the pounds by certain notches), seems to be near the same with the auncel weight .- See tit. Weights and Measures.

AVOIDANCE, in the general signification, is when a benefice is void of an incumbent; in which sense it is opposed to plenarty. Avoidances are either in fact, as by death of the incumbent; or in law: and may be by cession, deprivation, resignation, &c. See tit. Advowson.

AVOIRDUPOIS, or averdupois, Fr. avoir du poids, i. e. habere pondus, aut justi esse ponderis.] A weight different from that of troy weight, which contains but twelve ounces in the pound, whereas this hath sixteen ounces; and in this respect it is probably so called, because it is of greater weight than the other. It also signifies such merchandizes as The lord may avow upon disseisor. 20 H. 6

court hath been long since dissolved. Terms | are weighed by this weight; and is mentioned in divers statutes. See tit. Weights.

AVONA. Bungey, in Suffolk, and Hampton Court.

AVONÆ VALLIS. Avondale, or Oundale, in Northamptonshire.

AVOW. See Advow.

AVOWEE, of a church benefice. 29. See Advocate.

AVOWRY, is where a man takes a distress for rent or other thing, and the party on whom he takes sues for a replevin, then the taker shall justify his plea for what cause he took it; and if in his own right, he must show the same, and avow the taking; but if he took it in right of another, he must make cognisance of the taking, as bailiff or servant to the person in whose right he took the same. Terms de Ley, 70: 2 Lill. 454. The avowry must contain sufficient matter for judgment to have return: but so much certainty is not required in an avowry as in a declaration; and the avowant is not obliged to allege seisin within the statute of limita-tions. Nor shall a lord be required to avow on any person in certain; but he must allege seisin by the hands of some tenant within forty years. Stat. 21 H. 8. c. 19: 1 Inst. 268. In avowry, seisin in law is sufficient; so that where a tenant hath done homage or fealty, it is a good seisin of all other services to make an avowry, though the lord, &c., had not seisin of them within sixty years. See stat. 32 H. 8. c. 2: 4 Rep. 9. A man may distrain and avow for rent due from a copyholder to a lord of a manor: and also for heriots, homage, fealty, amercements, &c. 1 Nels. Ab. 315.

If a person makes an avowry for two causes, and can maintain his avowry but for one of them, it is a good avowry; and if an avowry be made for rent, and it appears that part of it is not due, yet the avowry is good for the rest: supposing sufficient rent due to justify a distress. An avowry may be made upon two several titles of land, though it be but for one rent; for one rent may depend upon several titles. 1 Lill. Ab. 157: Saund. 285. If a man takes a distress for rent, reserved upon a lease for years, and afterwards accepts a sur-render of the lands, he may nevertheless avow, because he is to have the rent due, notwithstanding the surrender. 1 Danv. Abr. 652. Where tenant in tail aliens in fee, the donor may avow upon him, the reversion being in the donor, whereunto the rent is incident. Ibid. 650. If there be tenant for life, remainder in fee, the tenant for life may compel the lord to avow upon him: but where there is tenant in tail, with such remainder, and the tenant in tail makes a feoffment, the feoffee may not compel the lord to avow upon him. 1 Danv. Ab. 648: Co. Lit. 268. If the tenant enfeoffs another, the lord ought to avow upon the feoffer for the arrearages before the feoffment, and not upon the feoffee. 1 Danv. 650.

And if a man's tenant is disseised, he may foffence more than once. 3 Inst. 213: see 1 be compelled to avow by such tenant, or his heir. A defendant in replevin may avow or justify; but if he justifies he cannot have a return. 3 Lev. 204. The defendant need not aver his avowry with an hoc paratus est, &c. By stat. 21 H. S. c. 19. it is enacted, that if in any replegiare for rents, &c. the avoury, cognisance, or justification be found for the avowant, or the plaintiff be nonsuit, &c., the defendant shall recover such damages and costs as the plaintiff should have had if he had recovered. See Bull. N. P. 57. that this statute does not extend to an avowry for a nomine pana or estray. And by stat. 17 Car. 2. c. 7. when a plaintiff shall be nonsuit before issue in any suit of replevin, &c. removed or depending in any of the courts at Westminster the defendant making suggestion in the nature of an avowry for rent, the court, on prayer, shall award a writ to inquire of the sum in arrear, and the value of the distress, &c.; upon return whereof the defendant shall recover the arrears, if the distress amounts to that value, or else the value of the distress with costs; and where the distress is not found to the value of the arrears, the party may distrain for the residue. See tit. Distress, Pleading, I. 2. Replevin, IV. 2.

AVOWTERER. An adulterer. The crime Terms de Ley is also termed Avowtry.

AURENEY, AURNEY, AURIGNEY.

DE AUREO VADO. Guildeford, or Guil-

AURUM REGINÆ. The queen's gold. -This is a royal revenue belonging to every queen-consort during her marriage, from every person who hath made a voluntary offering or fine to the king, of ten marks or upwards, in consideration of any grants, &c., by the king to him; and it is due in the proportion of one-tenth part more, over and above the entire fine to the king. 1 Comm. 221.

AUSCULTARE. Formerly persons were appointed in monasteries to hear the monks read, and direct them how, and in what manner they should do it with a graceful tone of accent, to make an impression on their hearers, which was required before they were admitted to read publicly in the church; and this was called ausculture. See Lanfrancus in Decretis pro Ordine Benedict. c. 5.

AUSTURCUS, and Osturcus. A goshawk; from whence we usually call a faulconer, who keeps that hind of haws, an ostringer. In ancient deeds there has been reserved, as a rent to the lord, unum austurcum.

AUTER DROIT. An expression used where persons sue or are sued in another's right; as executors, administrators, &c.

AUTERFOITS ACQUIT, is a plea by a criminal, that he was heretofore acquitted of the same treason or felony: for one shall not

Brod. & Bing. 473: 9 East, 437. There is also a plea of auterfoits convict, and auterfoits attaint: that he was heretofore convicted, or attainted, of the same felony. Now a previous conviction can only be pleaded in bar of an indictment for the same felony, though it was otherwise formerly. Archbold, C. L. 85. And so as to the plca of auterfoits attaint, it is no bar, unless for the same offence as that charged in the indictment. 7 and 8 G. 4. c. 28. § 4. And in effect the plea of auterfoits attaint is at an end. Conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death. 2 Hawk, P. C. c. 35, 36.

AUTHORITY, is nothing but a power to do something; it is sometimes given by word, and sometimes by writing; also it is by writ, warrant, commission, letter of attorney, &c., and sometimes by law. The authority that is given must be to do a thing lawful; for, if it be for the doing anything against law, as to beat a man, take away his goods, or disseise him of his lands, this will not be a good authority to justify him that doth it. Dyer, 102: Keilw. 83. An authority given to another person, to do that which a man himself cannot do, is void: and where an authority is lawful, the party to whom given must do the act in the name of him who gave the authority. 11 Rep. 87. Where an authority is given by law, it must be strictly pursued; and if a person acting under such authority exceeds it, he is liable to an action for the ex-

An authority in some cases cannot be transferred.—Thus a person, who has an authority to do any act for another, must execute it himself, and cannot transfer it to another: for this being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done. 9 Co. 77. b: 1 Roll. Abr. 330.

Some authorities likewise determine with the life of the person who gave them.

The authority given by letter of attorney must be executed during the life of the person that gives it; because the letter of attorney is to constitute the attorney my representative for such a purpose, and therefore can continue in force only during the life of me that am to be represented. 2 Roll. Abr. 9: Co. Lit. 52. Thus a warrant of attorney is generally countermanded by the death of the giver. Tidd, 550. (9th ed.) But if the warrant is to enter up judgment at suit of two, and one dies, judgment may be entered up by the survivor. 2 Maule & S. 76: 1 Y. & I. 206.

But if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean, but the be brought into danger of his life for the same attorney may well execute the power after their death: because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after seems not good. Co. Lit. 52: 2 Roll. Ab. 12.

It is a rule that every authority shall be countermandable, and determine by the death of him that gives it, &c. But where an interest is coupled with an authority, there it cannot be countermanded or determined. And. 1: Dyer, 190: and see Vin. Ab.: Bac. Ab.

tit. Authority. (7th ed.)

A devise to another, to have the disposing, selling, and letting his land; so a devise to upon condition, so as to make a conditional his son, but that his wife shall take the profits; feoffment, and the attorney delivers seisin so a devise, that his executor shall have the oversight and dealing of his lands; so a devise to an infant in tail but that G. D. shall have the oversight of his will, and the education of his son till of age, and to receive, set, and let for him; these and such like words give the devisee an authority, but no interest. Dyer, 26. b. 331: 2 Leon. 221: 3 Leon. 78. 216: Moor, 635. S. P.: Cro. Eliz. 674. 678. 734.

The law makes a difference where lands are devised to executors to sell, and where the devise is, that his lands shall be sold by his executors; for in the first case an interest passes to the executors, because the lands are expressly devised to them, but in the other case they have only an authority to sell. Golds. 2: Dyer, 219: Moor, 61: Keilw. 107. b: 1 And. 145.

The testator devised, that his executors should receive the issues and profits of his lands till his son came of age, to pay his debts and legacies, and to breed up his younger children; the testator died, so did the executor, during the minority of the son, having first made J. S. his executor; adjudged, that this executor of an executor may dispose of the issues and profits, for the purposes mentioned in the will, during the infancy of the son; because the first executor had not only a bare authority, but an interest vested in him. Dyer, 210.

Where the testator gives another authority to sell his lands, he may sell the inheritance, because he gave him the same power he had himself, and in such case the purchaser shall

be in by the devise. 2 Rep. 53.

An authority may be apportioned or divided, but an interest is inseparable from the person; and where an act, which is in its nature indifferent, will work two ways, the one by an authority, and the other by an interest, the law will attribute it to the interest. But where an interest and authority meet, if the party declare that the thing shall take effect by virtue of his authority, there it shall prevail against the interest. 6 Rep. 17.

In many cases authorities must be strictly executed according to the power given.

If a man devise that his executors shall sell his land, this gives but a naked authority; and the lands, till the sale is made, descend to the heir at law; and in this case all must join in the sale; and if one die, it being a bare authority, cannot survive to the rest. Co. Lit. 112. b. 113. a. 181. b.

But if a man by will give land to executors to be sold, and one of them die, the survivors may sell; for the trust being coupled with an interest, shall survive together with it. Co. Lit. 113. b. 181. b: Bac. Ab. Legacies and

Devises. (F.) (7th cd.)

absolutely, the livery is not good; because the attorney had no authority to create an absolute fee-simple; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority. 2 Roll. Abr. 9.

If a warrant of attorney be given to make livery to one, and the attorncy makes livery to two; or, if the attorney had authority to make livery of Black-Acre, and he made livery of Black-Acre and White-Acre, though the attorney has in these cases done more, yet there is no reason that shall vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity, and void. Park. sect. 189.

If a letter of attorney be given to two jointly to take livery, and fcoffor makes livery to one in the absence of the other, in the name of both, this is void; because they being appointed jointly to receive livery, are to be considered but as one. Co. Lit. 49. b: 2 Roll. Abr. 8.

But if a letter of attorney be made to three, conjunctim et divisim, and two only make livery, this is not good, because not pursuant to their authority; for the delegation was to them all three, or to each of them separately; yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because, when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent to it. Dyer, 62: 1 Roll. Abr. 329: Co. Lit. 181. b: 1 Roll. Rep. 299: Yelv. 26. A power to fifteen jointly or severally, to execute such policies as they shall think, may be well executed by four only. 5 Barn. & A.

If a letter of attorney be given to A. to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery; because, whilst the lessee continucs in possession, the attorney cannot de-

liver seisin of it; and therefore, to execute the lie service; as where taxes are granted by power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee. Co. Lit. 52: Poph. 103: Dyer, 131. a. 340. a. Where a power of sale was reserved in a deed to three trustees and their heirs, and on one dying, the other two executed the power, it was held not well executed. 1 Barn. & A. 608: and see 2 Barn. & A. 405: Sugden on Powers, 168.

If a sheriff makes a warrant to four or three, or a capias jointly or severally to arrest one, two of them may arrest the party, for the greater expedition of justice. Co. Lit.

181: Palm. 52: 2 Roll. Rep. 137.

So if the lord gives license to a copyholder for life, to lease the copyhold for five years, if the copyholder tamdiu vixerit, and he leases it for five years, generally without limitation, this is a good execution, and pursuant to the license; for the lease is determinable by his death, by a limitation in law; and therefore as much is implied by law, as if he had made an actual limitation. 1 Roll. Abr. 330, 331: Cro. Juc. 436. S. C.—See farther tit. Power, and Vin. Abr. tit. Authority.

AUTRE FOIS ACQUIT. See Auterfoits

acquit.

AVULSION, Avulsio. Is where lands are by an inundation or current torn off from the property to which they originally belonged, and gained to the estate of another person; or where a river changes its course, and in place of continuing to run betwixt two properties, cuts off part of one and joins it to the other property. The property of the part thus separated continues in the original proprietor, in which respect the term avulsio stands in contradistinction to the term alluvio, by which an addition is insensibly made to a property by the gradual washing down of a river, and which addition becomes the property of the owner of the lands to which the addition is made. See Alluvion, Occupancy.

AUXILIUM AD FILIUM MILITEM FACIENDUM ET FFLIAM MARITAN-DAM. A writ formerly directed to the sheriff of every county where the king or other lord had any tenants, to levy of them an aid towards the knighting of a son, and the marrying of a daughter. F. N. B. 82. See tit. Aid, Tenure.

AUXILIUM CURIÆ. A precept or order of court for the citing or convening of one party, at the suit and request of another, to warrant some thing. Kennet's Paroch. Antiq.

AUXILIUM FACERE ALICUI IN CU-RIA REGIS. To be another's friend and solicitor in the king's courts; an officer undertaken for and granted by some courtiers to their dependants in the country. Paroch.

AUXILIUM REGIS. The king's aid, or money levied for the king's use, and the pub- subject, and investing them with more or less

parliament. See tit. Aid, Taxes.

AUXILIUM VICECOMITI. A customary aid or duty anciently payable to sheriffs out of certain manors, for the better support of their officers. See Mon. Angl. tom. 2. p. 245. An exemption from this duty was sometimes granted by the king: and the manor of Stretton, in Warwickshire, was freed from it by charter. 14 H. 3. M. 4.

AWAIT, seems to signify what we now call waylaying, or lying in wait, to execute some mischief. By stat. 13 R. 2. st. 2. c. 1. it is ordained that no charter of pardon shall be allowed before any justice for the death of a man slain by await, or malice prepensed,

AWARD, from the Fr. Agard.] Perhaps, because it is imposed on both parties, to be observed by them. Dictum quod ad custodiendum seu observandum partibus imponitur.

That act by which parties may refer any matter in dispute between them to the private decision of another party, (whether one person or more,) is called a Submission; the party to whom the reference is made, an Arbitrator or Arbitrators: when the reference is made to more than one, and provision made, that in case they shall disagree, another shall decide, that other is called an Umpire. judgment given, or determination made, by an arbitrator or arbitrators, or umpire, is termed an Award; that by an umpire an Umpirage, or less correctly an award.

Excellent as the trial by jury undoubtedly is, as a mode of investigating the truth, yet there are some cases to which, for various reasons, that mode of proceeding is not applicable or fully satisfactory. Thus, when long and complicated accounts are to be examined, it can hardly be expected that 12 men placed at hazard on a jury should be able to determine accurately upon the allowance of particular items, or to strike a nice balance between the contending demands. It will also often happen that two parties lay claim to the whole of the same thing as a matter of mere right, which under proper regulation might very well serve for both, and of which it might be ruinous to either to be wholly deprived. A particular instance of this is a stream of water. Yet, in such case the verdict of a jury could only determine to whom the right belonged; it could not look to the consequences, nor make a beneficial division of the use between both. For these and many other reasons it has been a practice of very early date to refer disputes to arbitration. In this way the parties have the benefit of a more deliberate investigation; if the matter be of a scientific nature, or removed from the common information of man, they may select some one or more to decide it, whose habits have made them conversant with the AWARD.

power, the parties may have a decision less single and unbending than that of the law, prospective in its operations, and limiting in detail the future exercise of their disputed rights.

impeached. The court, therefore, in order to inform its discretion, opened its ear to complaints which the rules of law prevented it from receiving in the shape of a formal pleating its content of the action; nor was the court, therefore, in order to inform its discretion, opened its ear to complaints.

This submission to arbitration might always take place before or after the commencement of an action; but convenient as it was in many respects, it laboured in early times under severe disadvantages, which for a long time diminished its frequency. For (not to mention that courts of law had established subtle and narrow grounds of construction upon awards, and often set them aside upon mere technical and frivolous objections) it is obvious that in whatever way the parties had bound themselves to the performance of the award, still the arbitrator was not the judge of any court; there was no process to compel obedience; and therefore an obstinate person might still oblige the other party to resort to his action for the original matter in dispute, or to a like proceeding for the breach of the agreement to perform the award. In such case not only was all the benefit of the reference lost, but delay and expence were occasioned by it; the party's case was disclosed, and perhaps, by the death or absence of some necessary witness, a serious ultimate disadvantage was sustained. The arbitrator might also in some cases prove wrongheaded or corrupt, and yet, as the parties had voluntarily put the dispute on his judgment, the court would not permit that to be assigned as an excuse for the non-performance of the award, when an action was brought to enforce it, and the party was compelled to obey, or at a great expence to seek relief in a court

of equity.

Both the

Both these inconveniences have been gradually removed, partly by the enlarged application of legal principles by the courts of law, and partly by the interference of the legislature in passing the act 9 and 10 W. 3. c. 15. For in the first case, where the submission had taken place after the commencement of the action, the parties were obviously before the court, and within its jurisdiction; a cause was pending, and neither party could regularly or safely suspend the proceedings in such cause, unless by the consent and under a rule of the court. The judges then made it a part of this rule that the parties should perform the award when published; and, as disobedience to the rule of the court is a contempt of the court, and punished summarily as all other contempts, by attachment of the person; the court in this case gained a double power, the one direct, the other incidental, but almost equally beneficial: on the one hand it could enforce performance of the award without the party being driven to a second action; and, on the other hand, as the exercise of this power was purely discretionary, the court could abstain from it whenever the

inform its discretion, opened its ear to complaints which the rules of law prevented it from receiving in the shape of a formal plea to the action; nor was this negative relief all that was afforded; for in process of time it came to be held, that as the arbitrator acquired the main sanction of his authority from the rule of the courts, the same rule gave the court a general superintendance over the award; and therefore, though the judges wisely abstained from scrutinising too nicely the decision of that authority to which the parties had voluntarily submitted tnemselves, and refused to examine over again the questions upon which the arbitrator had come to an honest and deliberate opinion; yet, where the award upon the face of it appeared to be illegal, or there was manifest misbehaviour or error in the arbitrator, the court not only refused to enforce performance by attachment, but held themselves empowered (if the application was made within a reasonable time) to set aside the award; and thus the proceedings were rendered complete by the judicious interference of the courts in cases where the pendency of an action had given them jurisdiction: and, at length, the stat. 9 and 10 W. 3. c. 15. gave a complete remedy, so that both classes of submission before or after action now stand on the same footing. See Coleridge's note on 3 Comm. 17.

139

The subject may be conveniently distributed

under the following heads:

I. The Submission.

II. The Parties thereto.
III. The Subject of the Reference.

IV. The Arbitrators and Umpire. V. The Award or Umpirage.

VI. The Remedy to compel Performance, on an Award or Umpirage properly made.

VII. Of the Means of procuring Relief against it, when improperly made.

Ana

VIII. The Effect, in precluding the Parties from suing on the original cause of Action, or subject of Reference.

I. Of the Submission. The submission may be purely by the act of the parties themselves; or it may be by their act, with the interposition of a court of justice; in either case it may be either verbal or in writing; the general practice, as well as the most safe, is

to prefer the latter.

but almost equally beneficial: on the one hand it could enforce performance of the award without the party being driven to a second action; and, on the other hand, as the exercise of this power was purely discretionary, the court could abstain from it whenever the conduct of the arbitrator could be successfully

140 AWARD.

not perform the award. The submission may also be by indenture, with mutual covenants to stand to the award. 2 Mod. 73.

It is usual in articles of co-partnership, to insert a provision, that all disputes between the partners shall be referred to arbitration. This has so far the effect of a submission, that one of the parties cannot sue another either at law or in equity, for any matter within the terms or meaning of the proviso, without having first had an actual reference, which has proved ineffectual, or a proposal by the plaintiff to refer, and a refusal by the defendant. See 2 Atk. 585 (569): 2 Brownl. c.

All the cases of awards reported in the books for a long series of years appear to have been made on submissions, by the act of the parties only; but when mercantile transactions and accounts came to be frequently the subject of discussion in the courts, it became a practice, in cases of that kind (as well as others alluded to above), to refer the matters, by consent of parties, under a rule of nist prius; which was afterwards made a rule of that court, out of which the record proceeded, and performance of the award was enforced by process of contempt. This practice does not appear to have begun before the reign of Charles II., for the reports of that period show, that it was not before the latter end of that reign, that the courts granted their interference without reluctance. Their utility, however, was at length so well understood, that the legislature resolved to place arbitrations entered into, where no action was pending, on the same footing. Accordingly by stat. 9 and 10 W. 3. c. 15. it was enacted, "That it shall and may be lawful to and for all traders and merchants, and others, desiring to end by arbitration, any controversy, suit or quarrel, for which there is no other remedy, but by personal action, or suit in equity, to agree that their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's courts of record: and to insert such their agreement in their submission, or the condition of the bond or promise whereby they oblige themselves respectively; which agreement being so made and inserted, may on producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and on reading and filing the said affidavit in court, be entered of record in such court; and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitrator or umpirage, the party neglecting or refusing shall be subject to all the penalties of contemning a rule

who will incur the forfeiture if the parties do, of court."-On this statute, and awards made in consequence, see 1 Stra. 1.2: 2 Stra. 1178: 10 Mod. 332, 3: Barnes, 55. 8: 1 Salk. 72: Comyns, 114: 1 Ld. Raym. 664: 3 East,

> The above statute is merely declaratory of what the law was before its passing, where no

cause was depending. 2 Burr. 701.

Under this statute a submission to arbitration may be made a rule of court in vacation. 5 B. & A. 217. The statute does not extend to criminal matters, as an indictment for an assault. 8 Term R. 520: 2 Dow & Ry. 265: and see Bac. Ab. Arbitrament (B.) (7th ed.) But see 9 East, 497: 1 Moo. 120.

The extent of the submission may be various, according to the pleasure of the parties; it may be of one particular matter only, or of many, or of every subject of litigation

between them.

It is proper to fix a time, within which the arbitrators shall pronounce their award: but where the submission limits no time for the making of the award, that shall be understood to be within convenient time; and if in such a case the party request the arbitrators to make an award, and they do not, a revocation of the authority afterwards will be no breach of the submission. 2 Keb. 10. 20.

The submission being the voluntary agreement of the parties, the words of it must be so understood as to give a reasonable construction to their meaning, and to make their intention prevail: and where there is a repugnancy in the words of the submission, the latter part shall be rejected, and the former

stand. Poph. 15, 16.

It has been said that as all authority is in its nature revocable, even though made irrevocable, therefore a submission to an award may be revoked by either of the parties; such at least was the determination under the old law as reported in the year-books, and ancient reporters; but now it may reasonably be supposed, that the courts would sustain an action on the case, for countermanding the authority of the arbitrator. A case is reported in two books, one being evidently nothing more than a loose note; 1 Sid. 281: the other report is at length, and the manner of the pleadings distinctly given; the breach being assigned in a discharge by the defendant of the arbitrators from making any award; and the judgment of the court without much hesitation in favour of the plaintiff. 2 Keb. 10.

If one of the parties revokes the submission or hinders the arbitrator from proceeding, this is a contempt, and an attachment will issue. Salk. 73. But this is only when the submission has been made a rule of court before the revocation; if it has not, there is no contempt; 7 East, 608: 1 Bing. 88: 1 Jac. & Walk. 511; but the party may bring his action. 5 East, 266: 5 Barn. & A. 507.

This applies only, however, to the case of

an express revocation; not to that which mission to an award; but no one can who is of law from another act of the party. Thus, if a woman while sole, submit to arbitration, and marry before the making of the award, or before the expiration of the time for making it, the marriage operates as a revocation. W. Jones, 388: 3 Keb. 9. 745. See Charnley v. Winstanley, 5 East, 266: and 5 Barn. & A.

The court have no authority by 9 and 10 W. 3. c. 15. to make a parol submission to an award a rule of court. Ansell v. Evans, 7 T.

The court will not presume that the matters in difference submitted to arbitration, arose subsequent to the indenture of assignment and power of attorney from the principals to the plaintiff; but such matter may be pleaded by way of defence to the action. Ib. 517.

It is not necessary for the plaintiff, in setting the assignment to him from his principals (by virtue of which he was authorized to submit their demands to arbitration,) to make a profert of the same in his declaration.

R. 517.

The court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment; the stat. 9 and 10 W. 3. c. 15. for regulating "controversies, suits, or quarrels," by arbitration, being confined to civil disputes. Watson v. M Cullum, ib. 520. Nor will they entertain a motion for setting aside an award founded upon an indictment at the assises (for not repairing a road,) though the question in dispute be of a

civil nature. 2 Dow. & Ry. 265.
Where parties, by an indersement in general terms on the bonds of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference; amongst others, that the submission for such enlarged time shall be made a rule of court, and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time after the stat. 9 and 10 W. 3. c. 15. Evans v. Thomson, 5 East, 189: and see 2 Barn. & C. 179.

By the 3 and 4 W. 4. c. 42. § 39. a submission to arbitration by rule of court is not to be revocable without leave of the court

or a judge.

By § 40. where any such reference is made to the court or a judge, the rule may command the attendance of witnesses and the production of documents.

§ 41. Empowers the arbitrators, under a rule of court ordering the witnesses to be examin-

ed on oath, to administer an oath.

II. The Parties. Every one who is capable of making a disposition of his property, or a release of his right, may make a sub-

Vol. I.-19

must necessarily be implied by construction either under a natural or civil capacity of contracting. Therefore a married woman cannot be party to a submission, whatever may be the subject of dispute, whether arising before or after her marriage; but the husband may submit for himself and his wife. Str. 351.

On the principle that an infant cannot bind himself for any thing but necessaries, it is clear he cannot be party to a submission; whether the matter in dispute be an injury done to him, or an injury done by him to another; but a guardian may submit for an infant, and bind himself that he shall perform the award. See Comb. 318. Roberts v. Newbold, which established this principle, in contradiction to former determinations.

An executor or administrator may submit a matter in dispute between another and himself, in right of his testator and intestate; but it is at his own peril; for if the arbitrator do not give him the same measure of justice as he would be entitled to at law, he must account for the deficiency to those interested in the effects. See Dyer, 216. b. 217. a: Com. Dig. Admin. (l. i.) 3 Leon. 53: and Barry v. Rush, 1 Term Rep. 691: Bac. Ab. Arbitrament. (C.)

So the assignees of a bankrupt may submit to arbitration any disputes between their bankrupt and others. See § 88. of the new bankrupt act, 6 G. 4. c. 16; and see tit. Bank-

Those only who are actually parties to the submission shall be bound by the award.-For the case of partners, see 2 Mod. 228 .- Of coparishioners, Mudy v. Osam, Lit, 30.

So, in general, a man is bound by an award, to which he submits for another. Alsop v. Senior, 2 Keb. 707. 718. And see Bacon v. Dubarry; the case of an attorney submitting for his principal without authority from him. 4 Ld. Raym. 246: see Kyd on Awards, p. 27: and Colwell v. Child, 1 Rep. Ch. 104: 1 Ca.

But if a man authorise another on his behalf to refer a dispute, the award is binding on the principal alone; Dyer, 216. b. 217; unless the agent binds himself for the performance of the principal. 1 Wils. 28. 58.

When there are several claimants on one side, and they all agree to submit to arbitration, and some only enter into a bond to perform the award, the award shall bind the Wood and al. v. Thompson and al. M. 24 Car. B. R.: Roll. Abr. tit. Arbitr. F. 11.

Where there are two on one side, though they will not be bound the one for the other, yet if the award be general, that they shall do one entire thing, both shall be bound to the performance of the whole. Cro. Car. 434.

If the husband and wife submit to arbitration any thing in right of the wife, the wife shall, after the death of the husband, be

Rep. 268, 9.

An award creates a duty which survives therefore, on the one hand, be compelled to the performance if made against their testator or intestate; and on the other may take advantage of it, if made in his favour. 2 Vent. 249: 1 Ld. Raym. 248.

And it is a general rule, that all those who would be bound by an award may take ad-

vantage of it.

Generally speaking, a submission of all matters between the parties, when there are more persons than one, either on one or both sides, is the same as a submission of all matters between the parties, any or either of them; Comyns, 328; and therefore on submission by A. & B. on the one side, and C. and D. on the other, the award may be of matters between A. and C. alone, or between A. and B. together, with C. alone, or vice versa; and money may be awarded to be paid accordingly. This rule, however, may be controlled by the words of the submission, in which it is in this case more particularly requisite to be very exact. See Kyd on Awards, 121: 8 Co. 98. a. Hardr. 599: 1 Vern. 259: Com. 547: Roll. Abr. tit. Arbitr.

Where there were two causes, one between A. and B., and the other between A. and C., and an order was made in the first of all matters in difference, and by a subsequent order C. was made a party to the reference, and all matters in difference between A., B., and C. were referred to the arbitrator, so as he make his award of, and concerning the premises on, &c., and the arbitrator made two awards, in one of which he awarded that A. was indebted to B., without noticing C., and in the other awarded that A. was indebted to C., without noticing B.: both awards were held bad, as not determining all matters in difference, according to the condition. Winter v. Munton, and another, 2 Moo. 725: and see 1 Brod. & Bing. 350.

III. The Subject of the Reference. Though the courts have at all times manifested a general disposition to give efficacy to awards, yet there are some cases in which they have refused them their protection, because the subjects on which they were made were not the proper objects of such reference.

The only motive which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is, to have an amicable and easy settlement of something which in its nature is uncertain. An award, therefore, is of no avail when made of debt on a bond for the payment of a sum certain, whether it be single, or with a condition to be void on the payment of a less sum; nor if made of debt for arrears of rent ascertained by a lease; nor of covenant to pay a certain sum same acts to be done, which the parties them-

bound by the award. Lumly v. Hutton, 1 Roll. | of money; Blake's case, 6 Co. 43, 44; nor of debt on the arrears of an account, as formerly taken before auditors on an action of account; to executors of administrators; they shall 1 Lev. 292; nor of damages recovered by a judgment: Gouldsh. 91, 92; for in all these cases the demand is ascertained. But see Lumley v. Hutton, Roll. Abr. tit. Arbitr. B. 8. and Coxal v. Sharp, 1 Keb. 937; as it seems that when joined with other demands of an uncertain nature, those which are certain, may also be submitted; even in the case of a verdict and judgment.

But in general where the party complaining could recover by action only uncertain damages, the subject of complaint may be the object of a reference to arbitration; as any demand not ascertained by the agreement or contract of the parties, though the claimant demands a sum certain; as a claim of 5l. for different expenses in the service of the other party. Sower v. Bradfield, Cro. Eliz. 422. So an action of account may be submitted; for till the account be taken, the sum remains uncertain. Roll. Abr. tit. Arbitr.

It is said, and it appears justly, that all kinds of personal wrong, the compensation for which is always uncertain, depending on the verdict of a jury, may be submitted to arbitration; where the injury done to the individual is not considered, by the policy of the state, as merged in the public crime, which latter can never be the subject of arbitration.

In the case of deeds, when no certain duty accrues by the deed alone, but the demand arises from a wrong or default subsequent, together with the deed, as in the case of a bond to perform covenants, or covenant to repair a house, there the demand being for damages for a breach, may be submitted to award. Blake's case, 6 Co. 43, 44: Cro. Jac. 99. However, in all cases, where the demand arises on a deed, the submission ought also to be by deed; because a specialty cannot be answered but by a specialty. Lumley v. Hutton, before quoted. See Bac. Ab. Arbitrament, (A.)

Much doubt and uncertainty seems anciently to have prevailed on a question, " How far a dispute concerning land could be referred to an arbitrator; and how far, on an actual reference, the parties were bound by his award." But it appears that the real difficulty was how to enforce an award made on a reference of a dispute concerning land; for whenever the submission was by bond, it was almost universally held, that the party who did not perform the award, forfeited the bond. Keilway, 43. 45.

The present rule of law therefore is that "Where the parties might, by their own act, have transferred real property, or exercised any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the selves might do by their own agreement." the power of the arbitrators ceases, and that Knight v. Burton, 6 Mod. 231: Trusloe v. Aseware. Cro. El. 233: Dy. 183. in marg.

As real property cannot be transferred by the parties themselves without deed, wherever that makes a part of the dispute, the submission as well as the award [and whatever act is by the award directed to be performed by the parties, as to real property,] must also be by deed. Though an award cannot convey lands, yet it will stop one party to the reference from disputing the title of the other party, in whose favour the arbitrator has awarded. Doe v. Rosser, 3 East, 15: and see 8 East, 38: 3 Camp. 444. And the property in a chattel will not pass by the mere force of an award, without the assent of the party. 15 East, 100.

IV. The Arbitrators and Umpire. Every one whom the law supposes free, and capable of judging, whatever may be his character for integrity or wisdom, may be an arbitrator or umpire; because he is appointed by the choice of the parties themselves, and it is their folly if they choose an improper person.

An infant cannot be an arbitrator nor a married woman; nor a man attainted of treason or felony. But an unmarried woman may be an arbitratrix. Duchess of Suffolk's case,

8 E. 4. 1: Br. 37.

It is a general rule of law, founded on the first principles of natural justice, that a man cannot take on himself to be judge in his own cause; but should he be nominated an arbitrator, by or with the consent of the opposite party, the objection is waived; and the award shall be valid. Matthew v. Allerton, Comb. 281: 4 Mod. 226: Hunter v. Benison, Hardr. 43.

The nomination of the umpire is either made by the parties themselves, at the time of their submission, or left to the discretion of the arbitrators. Where two arbitrators, (as is most frequently the case) have this power, the law provides that the choice shall be fair and impartial, and that it shall not even be left to chance, election being an act of the will

and understanding. 2 Vern. 485.

On a rule nisi to set aside an award, made by an umpire and one of two arbitrators, it appeared that the umpire had been chosen by lot out of four persons, two of whom were nominated by each of the arbitrators.—Held that the appointment was bad, and that the appointment of the third person in such cases must be the act of the will and judgment of the two; must be matter of choice, and not of chance, unless the parties consent to or acquiesce in some other mode. Cassell's case, 9 B. & C. 624.

There is no part of the law relative to awards in which so much uncertainty and confusion appear in the reported cases, as on this respecting the unipire. The time when the power of the arbitrators ceases, and that of the umpire begins; the time when the umpire may be nominated; and the effect of his nomination; have each in its turn proved questions of sufficient magnitude to exercise and distract the genius of the lawyers. The time limited for the umpire to make his umpirage has sometimes been the same with that limited for the arbitrators to make their award. It is now, however, most usual, and certainly more correct, to prolong the time beyond that period.

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In this case of a prolongation of time, the authority of the arbitrators is determined, and that of the umpire immediately begins, on the expiration of the time specified to be allowed

to the arbitrators.

The point on which, on all the forms of submission, the greatest difficulty has been felt, has been to decide whether any conduct of the arbitrators can authorise the umpire to make his umpirage before the expiration of the time limited for making their award.

On this head the following seems to be undeniably the clearest and most accurate opinion. If the arbitrators do in fact make an award within the time allowed to them, that shall be considered as the real award; if they make none, then the umpirage shall take place; and there is here no confusion as to the concurrence of authority with respect to the time. The umpire has no concurrence absolutely, but only conditionally, if the arbitrators make no award within their time. This applies equally to the case where the umpire is confined to the same time with the arbitrators, and to that where a farther time is given to him. Chase v. Dare, Sir T. Jones, 168: see also Godb. 241: 1 Lev. 174. 285: 1 Ld. Raym. 671: 12 Mod. 512: Lutw, 541. 4: Cro. Car. 263: 1 Mod. 274: Sir T. Raym. 205: 1 Salk. 71.

It is now finally determined that the arbitrators may nominate an umpire before they proceed to consider the subject referred to them; and that this is so far from putting an end to their authority, that it is the fairest way of choosing an umpire. 2 Term. Rep. 646. And it is in fact not unusual for the parties to make it a condition in the submission that the umpire shall be chosen by the arbitrators, before they do any other act. They may also, when a farther day is given to the umpire, and the choice left to them in general terms, choose him at any time after the expiration of their own time, provided it be before the time limited for him. 3 Keb. 387: Freem. 378: 2 Mod. 169: 15 E.R. 556: and see 9 Barn. & Cress. 407. And if the arbitrators disagree before the time of making the award expires, they may appoint an umpire immediately, and he may make his award before the arbitrators' time expires. 3 Maule & S. 559. And he need not state that the arbitrators have disagreed. 5 Maule & S.

an umpire jointly, on a reference to them severally, is bad. 9 Price, 612.

From the opinion that the arbitrators having once elected an umpire had executed their authority, it has been thought to follow as a necessary consequence, that if they elected one who refused to undertake the business, they could not elect another. This opinion has been supported by two chief justices, but over-ruled (surely with propriety) by determinations of the court. 3 Lev. 263: 2 Vent. 113: Palm. 289: 2 Saund. 129: 1 Salk. 70: Ld. Raym. 222: 12 Mod. 120: 11 East. 367.

When the person to whom the parties have agreed to refer the matters in dispute between them has consented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of such appointment to the parties or to their attorneys; if the submission be by rule of reference at nisi prius, the witnesses should be sworn at the bar of the court, or afterwards (if neglected) before a judge.

The parties must attend the arbitrators, according to the appointment, either in person or by attorney, with their witnesses and documents. The arbitrators may also, if they think proper, examine the parties themselves,

and call for any other information.

Where a time is limited for making the award, it cannot be made after that time, unless it be prolonged. When the submission is by the mere act of the parties, that prolongation may be made by their mutual consent; otherwise a rule of court is necessary for the purpose. See Tidd, 827. (9th ed.)

The law has secured each of the parties against the voluntary procrastination of the other, by permitting the arbitrator, on due notice given, to proceed without his attend-Waller v. King. 9 Mod. 63: 2 Eq. Ab. 92: c. 3. Or the willing party may press his opponent by rule of the court to attend the arbitrator, who on failure may make this award without such attendance. Hetley v.

Hetley, in Scac. Mich. 1789.

It has been formerly held that an umpire cannot proceed on the report of the arbitrators, but must hear the whole matter ancw; but there seems to be no good reason why the umpire, if he think proper, may not take those points on which the arbitrators agree to be as they report them. The nature of his duty is only to make a final determination on the whole subject of dispute, where the arbitrators cannot do it; and by adopting their opinion as far as they agree, and incorporating it with his own on the other points, he effectually makes that final determination. And in this manner umpires do usually act; and they are justified in so doing unless requested to re-examine the witnesses. 4 Term Rep. 589. See *Tidd*, 827. (9th ed.)

193. But an award made by arbitrators and | ceed according to the order of evidence which governs the courts of law. 1 McClel. & Y. 160. Where he is empowered to examine the parties to the suit on oath, he may in his discretion examine a party in support of his own case, or may waive the objection to a witness that he is intended and ought to have been made a party. 3 Barn. & C. 590: 5 Dow. & Ry. 301: 2 Taunt. 324: S. C. 8 Taunt. 694.

Though the words in the submission which regulate the appointment of an umpire be not perfectly correct; but might from the grammatical order seem to imply that the arbitrators and the umpire should all join together to make an award, yet an award made by the arbitrators without the participation of the umpire, will be considered as satisfying the terms of submission. Roll. Ab. tit. Arbitr. p. 6.-And on the other hand, an umpirage made by the umpire jointly with the arbitra-tors, is good; their approbation, shown by joining with him, being mere surplusage, does not render the instrument purporting to be his umpirage in any degree less the act of his judgment. Soulsby v. Hodson, 2 Blackst. 463: 4 Taunt. 232.

Unless it be expressly provided in the submission, that a less number than all the arbitrators named may make the award, the concurrence of all is necessary; and where such a proviso is made all must be present, unless those who do not attend had proper and sufficient notice, and are wilfully absent. Barnes.

As to the necessity imposed on the arbitrators or umpire of giving notice of their award, the following are the clearest determinations. If the award be made before the day limited in the submission, the parties shall not be bound by any thing awarded to be done, before that day, unless they have notice; but they must take notice at their peril of any thing ordered at the day. 8 Ed. 4.1: Br. 37: Keilway, 175; see Cro. El. 97: Cro. Car. 132, 3.

It has long been the practice to guard against the consequences of the want of notice, by inserting a proviso in the condition of the arbitration-bond, not only that the award shall be made, but that it shall be delivered to the parties by a certain day: and then the bond will not be forfeited by non-performance, unless the party not performing had notice; and the award ought to be delivered to all the persons who are parties on either side. Hungate's case, 5 Co. 103: Cro. El. 885: Mo.

The object of every reference is a final and certain determination of the controversies referred. A reservation of any point for the future decision of the arbitrator, or of a power to alter the award, is inconsistent with that object; and therefore it is established as a general rule that such a reservation is void; 3 B. & Adol. 295; but the reservation of a The arbitrator is in general bound to pro- mere ministerial act, as the measuring of land, the calculation of interest at a rate set which are the subjects of variance. 1 Ld. tled, &c. does not vitiate the award. 12 Mod. 139: 2 Ro. Rep. 189. 214, 215: Palm. 110. 146: Cro. Jac. 315: Hob. 218: Lutw. 550; Hardr. 43. So also where the question was as to the construction of an act of parliament, and the arbitrator made his award, but recommended that the parliament roll should be examined as to the wording of the act, the award was held final. 1 Maule & S. 105.

The submission to the decision of an individual arises from the confidence which the parties repose in his integrity and skill; and is merely personal to him; it is therefore inconsistent that the arbitrators or umpire should delegate any part of their authority to another; and such delegation is absolutely void. But it was settled in the case of Lingood v. Eade, 2 Atk. 501. (515.) that arbitrators, where they award the substance of things to be done, may refer it to another to settle the manner in which it shall be put in execution.

Since the introduction of references at nisi prius, there can be no question, but the arbitrator has a jurisdiction over the costs of the action, as well as over the subject of the action itself; unless some particular provision is made to the contrary by the form of the sub-mission. Instead of ascertaining the costs, the arbitrator may refer them to be taxed by the proper officer of the court, but to no one else. 2 Atk. 504. (519): 1 Salk. 75: 6 Mod. 195: Hardw. 181: Barnes, 56. 8: 1 Sid. 358: Str. 737. 1035: Com. 330. When it is agreed that costs shall abide the event, it means the legal event. See 3 Term Rep. 139. And also as to awarding the costs of the arbitration, 2 Term. Rep. 645. And the arbitrators may award damages to either party, though in point of law there was no cause of action. 2 Vent. 243. If the arbitrator takes no notice of the costs, but awards mutual releases, it shall be presumed to be meant that each party shall pay his own costs. See Kyd. 143.

V. The Award, or Umpirage .- Every award should be consistent with the terms of the submission; the whole authority of the arbitrators being derived from thence. See Bac. Ab. Arbitrament. (E.) Therefore,

1. The award must not extend to any matter not comprehended in the submission; thus, if the submission be confined to a particular subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these things is void as far as it respects them. 2 Mod. 309: see 13 Price, 533: 3 Taunt. 426: 1 Brod. & B. 80.

If two submit to the award of a third person all demands between them; without more; the word demands implies all matters between them concerning the lands of both parties Raym. 115: Keilw. 99.

If the submission be, "of all causes of action, suits, debts, reckonings, accounts, sums of money, claims and demands," an award, "to release all bonds, specialities, judgments, executions, and extents," is within the submission; for as all debts are submitted, of course a release may be awarded of the secu-

rities for them. 2 Saund. 190.

Where the submission is, "of all debts, trespasses, and injuries," an award "to release all actions, debts, duties, and demands," does not exceed the submission; the word injuries comprehending demands. 3 Bulst.

The rule, however, is not so strictly interpreted as to extend to every thing literally beyond the submission; if the award be of any thing depending on the principal, it is good. Roll. Arb. B. 2. C. 4, 5, 6.

Thus if the submission be of all trespasses, and the award be, "that one shall pay to the other 101., and that he shall enter into a bond for the sum," this is good, because it only renders the award more effectual. 96.

In like manner if it can reasonably be presumed that nothing is in reality awarded beyond the submission, it has, in general, been supported. 10 Co. 131: 2 Jenk. 264: Roll. Arb. 21: see 6 Mod. 232.

On the submission of a particular difference when there are other matters in controversy, though an award of a general release is void; yet the proof of such other disputes existing is thrown on the party objecting. 2 Mod. 309: 1 Sid. 154: vide Hob. 190. (See post, Div. 3. of this head.)

If in a similar case the arbitrators award "that all suits shall cease," this shall be confined to suits relating to the subject of the submission, and void only for the residue. Roll. Rep. 362: 2 Roll. Rep. 122: Cro. Jac. 663.

If the arbitrator go beyond the submission to direct the mode in which any of the matters ordered by the award is to be done, this may be rejected as a nullity, as forming no part of the award. 13 Price, 639: 2 Barn. & C. 170: 3 Barn. & Adol. 295. But where an arbitrator, to whom a cause was referred before issue, awarded a verdict and damages, it was held that awarding a verdict was an excess of authority, and as the award was only in one sentence, the direction could not be rejected. 1 McClel. & Younge, 200.

On a dispute between a parson and one of his parishioners, whether the tithes should be paid in kind or not; the arbitrator awarded that the parson should have 71. for the tithes due before the submission, and that the parishioner should pay 4l. annually for the future tithes. This was held to be a good award, because the submission comprehended

a question concerning the future rights. Roll. Arb. D. 8. But an award made on the 23d of June, ordering so much rent to be paid, by which award itself appeared not to be due till the 24th, was held bad. 10 Mod. 204.

If partners refer all matters in difference between them, the arbitrators may dissolve the partnership. 1 Black. Rep. 475. But they cannot award that a part of the sum paid as a consideration for the partnership shall be refunded. 2 Bos. & Pull. 131; and see Dow. & Ry. 317. Where an arbitrator, to whom a cause was referred at nisi prius, found that the plaintiff was entitled to a way for carriages, which he at first claimed by his declaration, but afterwards abandoned, this was held an excess of his jurisdiction, and the award was set aside pro tanto. McClel. & Younge, 509.

If the reference be "of all matters in dispute in the cause between the parties," the power of the arbitrator is confined solely to the matters in dispute in that suit. If it be "of all matters in difference between the parties in the suit," his power is not confined to the subject of that particular cause, but extends to every matter in dispute between them. 2 Black. 1118: 2 Term Rep. 644, 5:

3 Term Rep. 626.

As an award of a thing out of the submission cannot be enforced by an action at law, so neither shall a man by such an award be precluded from claiming his right in equity.

Finch. Rep. 141.

2. The award should not extend to any one who is a stranger (that is, not a party) to the submission. Thus, if two submit to arbitration concerning the title to certain lands, and the arbitrators award that all controversies touching the lands shall cease; and that one of the parties, his wife and son, his heir apparent, by his procurement, shall make to the other such assurance of the land as the other shall require, this is void; because the wife and son are strangers to the submission. Roll. Arb. N. 9: and see Samon's case, 5 Rep. 77. b.

Lord Coke (10 Rep. 131. b.) says, that an award is void, which directs money to be paid by one of the parties to a third person not included in the submission; but this must be understood to hold good only when such payment can be of no benefit to the other party; for an award that one of the parties shall pay so much to the creditor of the other in discharge of a debt is unquestionably good. 1 Ld. Raym. 123: Roll. Arb. E. 6. F. 8. See Bac. Ab. Arbitrament. (E.)

And in general a distinction is taken between the case of an act awarded to be done by a stranger, and that of an act awarded to be done to him, by a party to the submission: in the latter case the award is said to be good; and if the stranger will not accept the money

a question concerning the future rights, awarded to be paid to him, the party's obliga-Roll. Arb. D. 8. But an award made on tion is saved. 3 Leon. 62.

So where a stranger is only an instrument to the performance of the award, no objection shall be allowed on that account: as if it be, that one of the parties shall surrender his copyhold into the hands of two tenants of the mansion who shall present the surrender; this award is good. Roll. Arbitr. E. 7, 8; 1 Keb. 569: and see Division 4, of this hand

If the persons comprehended in the ward were in contemplation of the submission, though they were not directly parties to it, yet the award is good. Lutw. 530. 571: 1 Mar. 78: Comyns, 183: Roll. Arb. B. 18.

An award shall not affect the rights of persons not parties to the submission. Finc.

180. 4: and see Id. 141.

3. The award ought not to be of part only of the things submitted. This, however, must be understood with a considerable degree of limitation; for though the words of the submission be more comprehensive than those of the award, yet if it do not appear that any thing else was in dispute between the parties, beside what is comprehended in the award, it will be good. 8 Co. 98: Roll. Arb. L. 5.

If a submission be "of all the premises or of any part of them," in this case the arbitrator may undoubtedly make an award of part

only. Roll. Arb. L. 6.

Upon a reference of all actions, controversies, &c. and also of two distinct matters in difference, if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award. 7 E. R. 81: and see 8 East, 13: 2 Mod. 723.

If an award be made of all matters except a bond, and of this it be awarded that it shall stand, the award is good; for it shall be presumed there was no cause to discharge the bond. Cro. Jac. 277. 400: Bridg. 91.

If arbitrators award for one thing, and say that they will not meddle with the rest, all is void; because they have not pursued their authority. Cro. El. 858: see Dy. 216, 217.

Where a submission is of certain matters specifically named, with a provisional clause "so that the award be made of and upon the premises," the arbitrator ought to make his award of all, otherwise it will be void. 8 Co. 98: Roll. Arb. L. 9.

But where the submission is general of all matters in difference between the parties; though there should happen to be many subjects of controversy between them, if only one be signified to the arbitrator, he may make his award of that: he is, in the language of Lord Coke, in the place of a judge, and his office is to determine according to what is alleged and proved. It is the business of the parties grieved, who knew their own particular grievances, to signify their causes of controversy to the arbitrator; for he is a stranger,

and cannot know any thing of their dispute | Arb. E. 2. 3. F. 10: Bulst. 39: 1 Keb. 92: 1 but what is laid before him. 8 Co. 98. b: 1 Brownl. 63: 2 Brownl. 309; see 1 Barn. &

In the case of such a general submission, if an award concerning one thing only be made, it shall be presumed (till the contrary be shown by the party objecting) that nothing else was referred. Cro. Jac. 200. 355: 1 Burr. 274. et seq.: 8 E. R. 445: 1 Barn. & A. 106. But the arbitrators ought to decide on all matters laid before them, or they cannot do complete justice. And it is said that on a reference by rule of a court of equity, the award ought to comprehend all the matters referred. 1 C. C. 87. 186. See Bac. Ab. Arbitrament (E.) (7th ed.)

It is, however, no valid objection to an award, that the arbitrator had notice of a certain demand, and that he made no award of that, if in other respects the award be good; as though the sum in question may not be mentioned in the award, the arbitrator may have shown his opinion that the demand was unfounded; as by ordering general releases,

&c. See 1 Saund. 32.

An award of one particular thing for the ending of an hundred matters in difference is sufficient, provided it concludes to them all.

1 Keb. 738: 1 Lev. 132, 3.

4. If an award be to do any thing which is against law, it is roid, and the parties are not bound to perform it. Roll. Arb. G.: 1 Sid. 12: 2 Vent. 243. So also is an award of a thing which is not physically or morally possible, or in the power of the party to perform; as that he shall deliver up a deed which is in the custody or power of a person, over whom he has no control. 12 Mod. 585: and see Roll. tit. Arbitr. And an award that the defendant shall be bound with sureties such as the plaintiff shall approve is void, for it may be impossible to force the approbation of the plaintiff. 3 Mod. 72. 23. But in this case the party should enter into a bond himself, and tender it to the plaintiff.

An award between a lessee and a neighhour, awarding an act to be done for the benefit of the latter, by the lessee, which would be waste on the estate of the lessor, is bad. 5 Taunt. 454; and see 1 Swant. R. 55.

Where an award is that one of the parties shall procure a stranger to do a thing, there is a distinction taken between the case where he has no power over the stranger to compel him, and where he has power, either by the common law or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good. Roll. Arb. F. 1. 248. n. 11: March. 18: 1 Mod. 9 .- (See ante, Division 2.)

Neither must an award be to do a thing unreasonable; nor by the performance of which the party awarded to do the act may subject himself to an action from another. Roll. Ro. Rep. 6: Cro. Car. 226: 3 Lev. 153.

What shall or shall not be unreasonable, is, however, matter of construction in which the cases differ considerably. See Roll. Arb. B.

12: J. 4, 5: 2 Mod. 304.

An award must not be of a thing which is merely nugatory, without any advantage to the parties. Roll. Arb. J. 10-15. And if a man and a woman submit to arbitration, and it be awarded that they shall intermarry, this is said not to be binding (Id. ib.), for one reason among others, that it cannot be presumed to be advantageous to them. Mutual releases are advantageous, and therefore an award of them is good. Freem. 51.

5. The award must be certain and final. As the intention of the parties in submitting their disputes to arbitration is to have something ascertained which was uncertain before, it is a positive rule that the award ought to be so plainly expressed, that the parties may certainly know what it is they are

ordered to do. 5 Co. 77. b. 78. a.

On the construction of certainty and uncertainty the cases are multifarious; and it may be observed, that they principally depend on such circumstances as are peculiar to each case, and very seldom form any general precedent. The rule, therefore, serves better to regulate the conduct of arbitrators than the numerous exceptions; as it is the interest of the party against whom the award is made to be ingenious in finding out objections, an award cannot be too particular or precise in laying down what is to be done by the parties, and the manner, time and place of their doing it. Though the two latter have been deemed immaterial (Stra. 905.) yet it is safest to specify them.

Awards are now so liberally construed, that trifling objections are not suffered to prevail against the manifest intent of the parties. See 1 Burr. 277: and post, Division 6. In favour of the equitable jurisdiction of the arbitrators, if that, to which the objection of uncertainty is made, can be ascertained either by the context of the award, or from the nature of, and circumstances attendant on the thing awarded, or by a manifest reference to something connected with it, the objection shall not prevail. See 2 Ld. Raym. 1076: 12 Mod. 585; Lutw. 545; Stra. 903. Where there is no date to the award, it shall be taken as dated from the day of the delivery, which may be ascertained by averment; and all other uncertainties may be helped by proper averments in pleading. 1 Ld. Raym. 246. 612 : Cro. Eliz. 676 : Sty. 28 : 2 Saund. 292.

As an award must be certain, so also must it be final; (at the time of making it: see 1 Sid. 59: Lutw. 51: Comb. 456.) in order to prevent any future litigation on the subject of the submission.

On this principle, an award that each party

shall be non-suited in the action which he has brought against the other, is not good: because (amongst other reasons) a nonsuit does not bar from bringing a new action; but an award that a party shall discontinue his action, or enter a retraxit, is good. 2 Godb. 276: Roll. Arb. F. 7.

An award—that all suits shall cease—or, that a bill in Chancery shall be dismissed—or, that a party shall not commence or prosecute a suit—is final: for it shall be taken to mean, that the debt and action shall cease for ever; that alone being a substantial performance of the award. 6 Mod. 33. 232: 2 Ld. Raym. 961. 4: 1 Salk. 74, 75: Roll. Arb. O. 7: but see 2 Stra. 1024: 9 E. R. 497.

An award finding a debt due, but containing no order to pay it, cannot be enforced by attachment. 3 Bing. 634. An award that A. or B. shall do an act, is bad for uncertainty. 1 Younge & J. 16: and see Bac. Ab. Arbitrament (E.) An award that nothing was due to the plaintiff has been held final, as intending that the plaintiff had no right to recover of him in the action. 5 Barn. & C. 528: and see 6 Bing. 225.

Lastly, the award must be mutual; not giving an advantage to one party without an

equivalent to the other.

The principal requisite, however, to form that mutuality, about which so much is said in all the cases usually classed under this rule, is nothing more than that the thing awarded to be done should be a final discharge and satisfaction of all debts and claims by the party in whose favour the award is made, against the other, for the matters submitted: and therefore the present rule amounts to nothing more than a different form of expression of that which requires that an award should be final. See Comb. 439: 1 Ld. Raym. 246: Cro. Eliz. 904: Comyns, 328.

6. The rules which at present govern the construction of awards are, that they shall be interpreted, as deeds, according to the intention of the arbitrators. That they shall not be taken strictly, but liberally, according to the intent of the parties submitting, and according to the power given to the arbitrators. 1 Burr. 277: 2 Atk. 504. (519)—That all actions mentioned in the award shall be construed to mean, all actions over which the arbitrators have power by the submission .--That if there be any contradiction in the words of an award, so that the one part cannot stand consistently with the other, the first part shall stand, and the latter be rejected; but that if the latter be only an explanation of the former, both parts shall stand. Palm. 108: 3 Bulst. 66, 7.—And that where the words of an award have any ambiguity in them, they are always to be construed in such a manner as to give effect to the award. 6 Mod. 35. A mistake in a matter of calculation that turns the balance to the other side

shall be non-suited in the action which he has than that on which it ought to fall, will not brought against the other, is not good; be vitiate an award in toto. Ambl. 245.

Much unnecessary difficulty occurs in all the old reports on the construction that ought to be put on the award of a release; but it is clearly settled, that an award of release up to the time of making the award, is not altogether void; but that it shall be construed so as to support the award; and that for two reasons. 1st. That it shall be presumed that no difference has arisen since the time of the submission, unless it be specially shown that there has: 2d. That a release to the time of the submission is a good performance of an award, ordering a release to the time of the award; not because the meaning of the arbitrators is so, but because their meaning must be controlled so far as it is void by construction of law. 10 Mod. 201: 6 Mod. 33. 5: 2 Ld. Raym. 964, 5: 1 Ld. Raym. 116: see 12 Mod. 8. 116. 589: Godb. 164, 5: 2 Keb. 431: 1 Sid. 365.

Formerly, if one part of an award was void, the whole was considered so: now, however, it is the rule of the courts, in many cases, to enforce the performance of that which, had it stood by itself, would have been good, notwithstanding another part may be bad. 12 Mod. 534. But if that part of the award which is void, be so connected with the rest, as to affect the justice of the case between the parties, the award is void for the whole. Cro. Jac. 584. See Bac. Ab. Arbitrament (F.) (7th ed.)

When from the tenor of the award, it appears that the arbitrator has intended that his award should be mutual, awarding something in favour of one of the parties as an equivalent for what he has awarded in favour of the other; if then that which is awarded on the one side be void, so that performance of it cannot be enforced, the award is void for the whole, because that mutuality, which the arbitrator intended, cannot be preserved. Yelv. 98: Brown 92: Roll. Arb. K. 15: Cro. Jac. 577,8.

If one entire act awarded to be done on one side, comprehend several things, for some of which it would be good, and for others not, the award is bad for the whole, because the act

cannot be divided. Cro. Jac. 639.

When it appears clearly that both parties have the full effect of what was intended them by the arbitrator, though something be awarded which is void; yet the award shall stand for the rest. 1 Ld. Raym. 114: Lutw. 545; and see 12 Mod. 588.

An award ought regularly to be made in writing, signed and sealed by the arbitrators, and the execution properly witnessed: it may, however, be made by parol, if it is so expressly provided in the submission. An award, though under seal, is not a deed, unless delivered by the arbitrator as such. 4 East, 584.

7. It is not in all cases absolutely necessary that performance should be exactly according to the words of the award; if it be substantively and effectually the same, it is sufficient.

3 Bulst. 67. And if the party, in whose favour | be for the payment of money, or for the perdiffering in circumstances from the exact letter of the award, that is sufficient; for consensus tollit errorem. 3 Bulst. 67.

Where the concurrence and presence of both parties is not absolutely necessary to the performance, each ought to perform his part without request from the other. 1 Ld. Raym. 233, 234: and see Roll. Arb. Z. 6.—If an award order that the defendant shall re-assign to the plaintiff certain mortgaged premises, it will be a breach if he do not re-assign without request. 1 Ld. Raym. 234.

If the award be to pay at, on, or before a particular day, payment before the day is equivalent to payment on the day. 3 Keb. 675, 676.

A considerable number of years having elapsed since the making of the award, is no objection to the parties being called upon to perform it. Finch, Rep. 384. Nor can the statute of limitations (28 Jac. 1. c. 16. § 3.) be pleaded in bar. 2 Saund. 64.

On an award, that one party shall enter into a security for money (note, bond, &c.), the giving the security is a performance of the award: and on non-payment, the person to whom it is given can only proceed against the other on that security, and not on the submission or arbitration-bond. Bendl. 15: Stra. 903. 1082.

An award that the defendant shall pay to the plaintiff such a sum of money, unless within twenty-one days (which was after the time limited for making the award) the de-fendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a less sum, is illegal and void, because uncertain and inconclusive. 7 Term Rep. 73.

If an award be made on an improper stamp, and no application be made to enforce it, the court will not set it aside. Preston v. East-

wood, 7 Term Rep. 95.

The court will not set aside an award on the ground that the arbitrator was mistaken in law, unless the principles of law on which he decided appear on the face of the award. Chitt. 674: see also 1 D. & R. 366.

Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third; held that they were jointly responsible for the sum awarded to be paid by each. Mansell v. Burredge, 7 Term Rep. 352.

VI. The Remedy to compel Performance, on an Award or Umpirage properly made.-The remedy to compel performance of an award is various, according to the various forms of the submission.

the award is made, accept of a performance formance of a collateral act. 1 Ld. Raym. 122; and see ante, Division I.

Where the award is either verbal, or in writing, for the payment of money, and made on a submission, either by parol or by deed, the action on the award may be an action of debt: it may also be an action of assumpsit: and in all other cases on a parol submission, an assumpsit is the only species of action that can be maintained. 1 Leon. 72: Cro. Jac. 354.

In all actions on the award, it must necessarily be shown, in direct unequivocal terms, that the parties submitted, before the award can be properly introduced. 2 Stra. 923. The submission too must be so stated as to correspond with the award, and to support it. 2 Lev. 235; 2 Show. 61.

When the action is on a mutual assumpsit, to pay a certain sum on request, if the defendant should not stand to the award, an actual request to pay that sum, before the action brought, must be positively stated. 1 Saund. 33: 2 Keb. 126.

When the submission is by bond, if the award be for payment of money, an action of debt on the award lies, as well as an action on the bond; but the latter is the action most usually brought; in this the order of pleading commonly observed is, that the plaintiff declares on the bond, as in ordinary cases of action on a bond; the defendant then prays over of the condition, which being set forth, he pleads that the arbitrators, or the umpire, made no award; then the plaintiff replies, not barely alleging that they did, but setting forth the award at large, and assigning the breach by the defendant: (as to which see post, and Winch. 121: Yelv. 24. 78. 153: 1 Ld. Raym. 114. 123: 2 Vent. 221: 3 Lev. 293.) and on that the whole question arises as on an original declaration .- The defendant then either rejoins that they made "no such award;" (Jenk. 116: Cro. Jac. 200: Palm. 511.) on which the plaintiff takes issue-or he demurs, and the plaintiff joins in a demurrer. Vide Stra. 923 : Freem. 410. 415 : 1 Sid. 370: 3 Burr. 1729, 1730 : 5 E. 4. 108 : Brooke pl. 33 : Cro. Eliz. 838.

Every thing necessary to show that the award was made according to the terms of the submission, must be stated by the plaintiff. Lutw. 536: 2 Ld. Raym. 989. 1076. Where also, by the terms of the award, performance on the part of the plaintiff is a condition precedent to that on the part of the defendant; there the plaintiff must show that he has done every thing necessary to entitle him to call on the opposite party.—But tender by the plain tiff, and refusal by the defendant, will be sufficient, unless the thing to be done by the plaintiff can be done without the concurrence of the other. Hurdr. 43, 44.

A material variance between the real award, Though the submission be verbal, an action and that set forth in the pleadings, will be famay be maintained on the award, whether it tal to the plaintiff; and if on the trial the jury

Vol. I.-20

a special verdict may be taken for the opinion of the court. 1 Salk. 72:1 Ld. Raym. 715: S. C. 1 Burr. 278.

In an action on the award, the defendant may plead "that he did not submit;" but in an action on the bond such a plea is not good.

1 Sid, 290; 2 Stra. 923.

More exactness is required in setting forth a written than a verbal award—in the former nothing must be alleged by inducement. 2 Vent. 242. The breach must also be assigned with such precision, as to show that the award was made of the thing in which the breach was alleged. 1 Roll. Rep. 8: Cro. Jac. 339: 2 Bulst. 93. And in an action on the assumpsit to perform the award, the plaintiff may assign several breaches. Jenk. 264; and see Yelv. 35. But in an action on the arbitration bond, where several things are ordered to be done by the defendants, it is not necessary to assign breaches of every matter, because the breach of any one is a forfeiture of the penalty of the bond; and when the plaintiff has once recovered, then he can never maintain another action on the same bond, to recover the penalty again on a second breach. 2 Wils. 276.9; and vide Id. 293. S. P.

If the defendant set forth the award, and allege the performance generally, and then on a breach being assigned in the replication, he rejoin, and show a special performance, this will be a departure. 1 Ld. Raym. 234.

It has several times happened that the defendant, by setting forth an award partially, has imposed considerable difficulty on the plaintiff how to answer him. See 1 Keb. 568: 1 Saund. 326: 3 Lev. 165: Lutw. 525. In this case, if the plaintiff demand over of the award, and have it set forth at full length, assigning a breach in the same manner as if the defendant had pleaded no award, he will be secure against any objection from the manner of pleading. Lutw. 451: and see Godb. 255: 1 Roll. Rep. 6.

If, from the default of the defendant, no award has been made within the time limited, the plaintiff may, to the plea of no award, reply that default of the defendant. See 8 Co. 81.—On a submission by bond, providing that the award shall be made within a limited time, though that time is enlarged by mutual consent, and the award made within the enlarged time, an action cannot be maintained on the bond to recover the penalty for non-performance. 3 Term Rep. 529. n.—And as to such enlargment of time, see 2 Term. Rep. 643, 644: 3 Term Rep. 601.

On the practice obtaining, of references at Nisi Prius, performance of the award was consequently enforced by means of an attachment, and the following is the present course of proceeding to obtain that remedy.-The award must be tendered to the party bound to perform it, and on his refusal to accept it, affidavit must be made of the due execution

doubt whether the variance is material or not, | of the award, and of such tender and refusal; and on that, application made to the court to make the order of Nisi Prius a rule of court. A copy of this rule must be personally served on the party; and if he still refuse to accept the award, an affidavit must be made of such service and refusal: on which the court will grant an attachment of course. 1 Crompt. Pract. 264. When the award is accepted, but the money, being demanded, is not paid, an affidavit must be made of such refusal, and of the due execution of the award. 2 Black. Rep. 990, 991.—Where there is any dispute as to the proper performance of an award, it is discretionary in the court to grant or refuse an attachment. 1 Stra. 675: 1 Burr. 268.

If an award finds a debt, but contains no order for payment of it, an attachment will not be granted. 3 Bing. 634. If one of the parties revoke the submission, the court will grant an attachment, provided that the submission has been made a rule of court before the revocation. 7 East, 608: Bac. Ab. Arbitrament. (H.) Where there appeared to be objections to the award which were pleadable to any action brought upon it, though not sufficient to set it aside, the court refused an attachment. 2 Bing. 199: 9 Moo. 38: and see Bac. Ab. ubi supra.

When an award is not for the payment of money, but for the performance of any collateral act, it may sometimes be enforced by a bill in equity, on which the court will decree a specific performance. See I Atk. 74. (62): 1 Eq. Ab. 51: 1 C. R. 46: 3 C. R. 20: 2 Vern. 24: 3 P. Wms. 187. 189, 190. But though a court of equity may assist a plaintiff to procure the execution of an award, it will not compel a defendant to discover a breach by which he may charge himself with the penalty of a submission-bond. Bishop v. Bishop, 1 C. R.

The performance of an award is compelled in equity, on the ground that the award only ascertains the terms of a previous agreement between the parties; and although the court will not decree the execution of illegal acts directed by the award, yet if the acts are legal, the court will not inquire into their reasonableness, since it considers the determination of the arbitrator conclusive, as the judge chosen by the parties. 1 Swanst. 43: 17

Ves. 242.

Upon an application for an attachment for non-performance of an award, the parties may object to any illegality apparent on the award, though the time for applying to set aside the award is expired. Pedley v. Goddard, 7 Term Rep. 73. But the court will not set aside an award for any defect after the time limited by the stat. 9 and 10 W. 3. c. 15.

If an arbitrator, under a reference between A. and B., administrator, award that B. shall pay a certain sum, as the amount of A.'s demand, B. cannot afterwards object that he had no assets, but may be attached for non- | termarriage, performed her part of the cove-Worthington v. Barlow, administratrix. 7 Term Rep. 453. See 5 Bing. 200.

acc.: and 4 Dow. & Ry. 814.

An agreement to enlarge the time for making an award must contain a consent that it shall be made a rule of court, otherwise no attachment will be granted for not performing an award made under it. Jenkins

v. Law, 8 Term Rep. 87.

To covenant in a deed (made for the performance of several matters,) the defendant cannot plead that, in the deed, there is a covenant that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators, to be chosen, &c., and that he offered to refer the matter in dispute, &c., but the plaintiff refused, &c. Thompson v. Charnock, 8 Term Rep. 139.

A. and B. in 1797, assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same: under which the plaintiff, in 1799, submitted to arbitration the matters in difference then subsisting between his principals and the defendants; and the plaintiff and defendants promised to each other to perform the award. The arbitrators having awarded a sum to be paid to the plaintiff as such attorney, he may maintain an action for it in his own name. Banfill v. Leigh, 8 Term Rep. 571.

Applications to set aside awards, though for objections appearing on the face of them, must be made within the time limited by the 9 and 10 W. 3. c. 15. Lowndes v. Lowndes,

1 East, 276.

Where a verdict is taken, pro forma, at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the court for leave so to Lee v. Lingard, 1 East, 401.

If an arbitrator profess to decide upon the law, and he mistakes it, the court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. So it seems it would be if such reasons appeared in any other authentic manner to the court. Kent v. Eistob and al., 3 East, 18.

But where the law is not clear and settled, the court will not set aside the award on an objection to the arbitrator's law. 3 Atk. 494: and see 3 Barn. & A. 237: 2 Barn. & A. 691: and see Bac. Ab. Arbitrament. (K.) (7th ed.)

A. declared in covenant against B. and her husband, for that B., before her intermarriage, covenanted with A., by deed, to leave certain accounts in difference between them to arbitration, and to abide and perform the award, provided it were made during their lives; and A. protesting that B. had not, before her in- court of equity will not entertain a bill to re-

nant, averred that, after the making the indenture, and the intermarriage of the defendant, the arbitrator awarded B. to pay a certain sum, and then alleged a breach for non-payment of such sum. After verdict on non est factum pleaded; held that, upon this declaration, it must be taken that B. intermarried after the submission, and before the award made; in which case, although the plaintiff could not recover upon the breach assigned for non-payment of the sum awarded, because the marriage was a countermand to the authority of the arbitrator; yet as, by the marriage itself, B. had by her own act put it out of her power to perform the award, the covenant to abide the award was broken, and therefore the judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover as for a breach of non-performance of the award. Charnley v. Winstanley and Ux., 5 East, 266.

Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom matters in difference are referred by a rule of Nisi Prius, he cannot award a greater sum than that for which the verdict was taken; and if he do, no assumpsit by implication will arise to pay even to the extent of the verdict so taken. Bonner v. Charlton, 5 East,

VII. Of the means of procuring Relief against it, when improperly made.-Relief may be obtained against an award, made contrary to the prescribed rules of law, when the award is put in suit. But when the submission is by the mere act of the parties, the defendant is not permitted to impeach the conduct of the arbitrators at law; so as to make it a defence to an action on the award or submission-bond. See 1 Saund. 237: 2 Wils. 149. In such case the only relief is in equity. 2 Vezey, 315. But a court of equity will not interfere to set aside an award, where the submission is voluntary (or by order of Nisi Prius, 1 C. C. 140: 1 Vern. 157.), except for corruption or improper conduct in the arbitrators; or where the award appears on the face of it to be contrary to the rules of equity: as, to the prejudice of an infant, &c. 1 C. C. 276. 279, 280: 3 Atk. 529. (496): 2 Eq. Ab. 63, 64: 3 C. R. 49: Amb.

In bills to have an award set aside for corruption or partiality, it is usual to make the arbitrators defendants; together with the party in whose favour the award is made. Finch Rep. 141: 3 Ath. 644. 397. The arbitrators may plead the award in bar; but they must show themselves impartial, or the court will make them pay costs. 2 Atk. 396. (412.)

Where the submission is by order of Nisi Prius, or under the stat. 9 and 10 W. 3. a

ed that relief on application; or the time for Vez. 316, 317: See Bunb. 265.

By the stat. 9 and 10 W. 3. c. 15. it is enacted, that "any arbitration or umpirage, procured by corruption or undue means, shall be void; and be accordingly set aside by any court of law or equity, so as complaint be made to the court, where the rule for submission is made, before the last day of the next term after such arbitration made and published to the parties." See 1 Stra. 301: 2 Burr. 701: Barnes, 55. 57.

Although the statute, in terms, confines the objection to the corruption or undue practices of the arbitrator, and also limits the time of making those objections to the last day of the term following the publication of the award, the court have construed this clause liberally. They will listen to all such objections as might be taken to an award made under a rule of court at common law: and although no application to set aside an award under the statute can be made after the time so limited, yet on motion to enforce it by attachment made at any time, the court will hear the same objection in answer to that application, and will use them as reasons, if wellfounded, to influence their decision in withholding the attachment, as they would have done on application to set aside the award.

It seems that a court of equity may relieve, on manifest grounds, after the time required by the act for complaint at law, though no such complaint is made at all in the common law courts. Bunb. 265: 1 Barn. K. B. 75. 152.

Ever since the above statute, it is competent to either party before the submission is made a rule of court, to revoke by deed his submission, and notify the same to the arbitrators before the authority is executed. 7 E. R. 608; 5 Taunt. 452.

Where the submission is by reference at Nisi Prius, there is no time limited for making an application to set aside an award for any cause. 2 Atk. 155. (162.): Str. 301: 2 Burr. 701: 8 E. R. 466. But in such case the motion to set aside an award must be made within the time allowed to move for a new trial, unless a sufficient reason be shown for the delay. 6 Barn. & C. 629. When the submission is according to the statute, no application can be made to have the award set aside till the submission be actually made a rule of court, which may be either before or after making the award. 1 Stra. 301: 2 Vez. 317: 2 Str. 1178: 3 P. Wms. 362.

The most frequent subject of complaint against an award, arises from some imputed misconduct of the arbitrators, and when the complaint is made out, it is generally successful: as if one of the arbitrators unjustly ex-

lieve against an award for corruption or par- | clude the rest from the award; or hold private tiality, unless the court of law has not afford- | meetings with one of the parties; 2 Vern. 515; or appoint an umpire by lot; Id. 485; complaining at law, under the statute, is or manifest any other undue partiality; *Id.* elapsed. 2 *Atk.* 155. (162.) 396. (412.): 2 101. 251: 3 *P. Wms.* 262: 2 *Vez.* 216. 18: 1 Vez. 317. See Bac. Ab. Arbitrament. (K.)

> If it appear that the arbitrators went on a plain mistake, either as to the law, or in a point of fact, that is an error appearing on the face of the award, and sufficient to set it aside. 2 Vern. 705. As to mistakes, see Barn. & Adol. 234. So if the arbitrators appear to have an interest in the subject of reference. 2 Vern. 251. So also where any circumstance is suppressed or concealed from either of the arbitrators, and the arbitrator declares that had he known the circumstance, he would have made a different award. 1 Atk. 77. (64.)

> Where the submission is under the statute, or by reference at Nisi Prius, the court will on some occasions send back the award to be re-considered, on suggestion that the arbitrator had not sufficient materials before him, and perhaps too to rectify any trifling or apparent mistake; but such application must be made in the former case within the time prescribed by the statute. 2 Term Rep. 781.

> Where a rule to show cause is obtained in King's Bench to set aside an award, the objections intended to be insisted upon must be stated in the rule to show cause. Reg. Gen. K. B. E. T. 2 G. 4: 4 B. & A. 539. And the same in the Exchequer. 11 Price, 57.

> A motion for setting aside an award must be made before the last day of the next term after such award is published; otherwise it is too late, and an attachment for non-performance may issue. Cowp. 23. And the court will not hear such a motion on the last day of term. 1 Tidd's Prac. 503.

> The court will not grant a second rule to set aside an award, when a rule for that purpose has been already discharged. 2 Chitt.

> Applications to set aside awards must be made within the time limited by the statute, although the objection appears on the face of the award. 2 Term Rep. 781: 1 East, 276.

> VIII. The Effect in precluding the Parties from suing on the original Cause of Action or Subject of Reference.-An award may be pleaded in bar to every action brought for a cause or complaint which had been previously referred to the arbitrators, on which the award was made. See 4 Term Rep. 146.

> The award thus pleaded must have all the qualities necessary to constitute a good award; and must be such, if it be pleaded without performance, that the plaintiff may have a remedy to compel performance: but if performance be alleged. as it may be (see 1 Ro. Rep. 7, 8: Cro. Jac. 339: 2 Bulst. 93: Roll. Arbitr. (F. 2): Al. 86: 3 Leon. 62.) even a

void award may frequently be a good bar. ing, and ready to be delivered to the parties in tain, and cannot be ascertained by averment, cannot be pleaded in bar. 2 Saund. 292: 2 Keb. 736.

The cases which have determined an award not to be pleadable in bar, where it does not create a new duty, seem irreconcileable to the present state of the law on the subject-particularly as they allow that an action may be maintained on the submission, whether that is by bond or otherwise. 1 Ld. Raym. 248: 12 Mod. 130: Comb. 440: 1 Salk. 69: Lutw.

An award, however, which does not extend to the whole of the thing demanded, is not a good plea to an action on the demand. Al. 5: 1 Ld. Raym. 612: see Lutw. 51. And in order to make an award a good plca, it must appear that both parties were equally bound

by it.
Where the plaintiff lays several counts in his declaration, and the award, from the terms of it, can only be a bar to one of them; if in reality they are all for the same cause, the best way of pleading seems to be, to plead the award to that count to which it is answerable in terms; and the general issue to the rest. Kyd. 245.

There were anciently some distinctions in the manner of pleading an award, with respect to the necessity of alleging performance of the thing awarded, which are not now essential; for since it has been held that an action will lie on the mere submission, it is in no case necessary for the defendant, in pleading an award in bar of an action, to allege performance of the thing awarded, unless where the award is void, and consequently the plaintiff could not enforce it. 1 Ld. Raym. 122

Where the lessor of the plaintiff and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, the award excludes the defendant from disputing the lessor's title in an action of ejectment. Morris and al., v. Prosser, 3 East, 15.

Form of an Award, on a Submission.

To all people to whom this present writing indented of Award shall come, greeting. Whereas there are several accounts depending, and divers controversies and disputes have lately arisen between A. B. of, &c., Gent., and C. D. of, &c. all which controversies and disputes are chiefly touching and concerning, &c. And whereas, for the putting an end to the said differences and disputes, they the said A. B. and C. D., by their several bonds or obligations bearing date, &c. are become bound each to the other of them in the penal sum of, &c. to stand to and abide the award and final determination of us E. F., G.

An award, however, which is in itself uncer- difference on or before, &c. next, as by the said obligations, and the condition thereof may appear. Now know ye, That we the said arbitrators whose names are hereunto subscribed, and seals affixed, taking upon us the burthen of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do, for the settling amity and friendship between them, make and publish this our award, by and between the said parties, in manner following, that is to say, First, We do award and order, that all actions, suits, quarrels, and controversies whatsoever had, moved, arisen or depending between the said parties in law or equity, for any manner of cause whatsoever, touching the said, &c. to the day of the date hereof, shall cease and be no farther prosecuted, and that each of the said parties shall pay and bear his own costs and charges, in anywise relating to or concerning the said premises. And we do also award and order that the said A. B. shall pay, or cause to be paid to the said C. D. the sum of, &c. within the space of, &c. And also at his own costs and charges do, &c. And we do award and order that, &c. And lastly, we do award and order that the said A. B. and C. D., on payment of the money above-mentioned, shall in due form of law execute each to the other of them general releases, sufficient for the releasing by each to the other of them, his executors and administrators, of all actions, suits, arrests, quarrels, controversies and demands whatsoever touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world until the day of, &c. last. In witness,

> AWM, or aume (Teut. ohm. i. e. cadus vel mensura.) A measure of Rhenish wine, containing forty gallons; mentioned in some statutes. This word is otherwise written awame. The rood of Rhenish wine of Dordreight is ten awmes, and every awme 50 gallons. The rood of Antwerp is fourteen awmes, and every awme 35 gallons.

AXELODUNUM. Hexam, in the bishop-

ric of Durham.

B.

BACA. A hook, or link of iron, or staple. Consuctudin. domus de Farendon. MS. f. 29. BACINNIUM, or Bacina. A basin or

vessel to hold water to wash the hands. Simeon Dunelme, anno 1126. Mon. Angl. tom. 3. p. 191. Petrus filius Petri Picot tenet medietatem Heydenæ per serjantiam serviendi de II. &c., so as the said award be made in writ- bacinis. This was a service of holding the king's coronation. Lib. Rub. Scaccar. f. 137. BACHELACANÆ SYLVÆ. Bagley.

BACHELERIA. The commonalty or yeomanry, as distinguished from the baronage.

Annal. Burton, p. 426. sub. an. 1259. BACHELOR, Baccalaureus, from the Fr.

bacheleir, viz. tyro, a learner. In the universities there are bachelors of arts, &c., which is the first degree taken by students, before they come to greater dignity. And those that are called bachelors of the companies of London, are such of each company as are springing towards the estate of those that are employed in council, but as yet are inferiors; for every of the twelve companies consists of a master, two wardens, the livery (which are assistants in matters of council, or such as the assistants are chosen out of,) and the bachelors, in other companies called the yeomanry. The word bachelor is also used, and signifies the same with knight bachelor, a simple knight, and not knight banneret, or knight of the Bath. The name of bachelor was also applied to that species of esquire, ten of whom were retained by each knight banneret on his creation. Anno 28 Ed. 3. a petition was recorded in the Tower, beginning thus: A nostre Seigneur le Roy monstrent votre simple bachelor, Johan de Bures, &c. Bachelor was anciently attributed to the admiral of England, if he were under the degree of a baron. In Pat. 8 R. 2. we read of a baccalaureus regis. Touching the farther etymology of this word, see Spelman.

The term bachelor also denotes in law a man who has never been married; and as such, taxes have at times been levied, or the taxes laid on others increased, if paid by bachelors: as in the case of the duty on ser-

vants, under stat. 25 G. 3. c. 43.

BACKBERINDE, Sax.] Bearing upon the back, or about a man. Bracton useth it for a sign or circumstance of theft apparent, which the civilians call furtum manifestum. Bract. lib. 3. tract. 2. cap. 32. Manwood remarks it as one of the four circumstances or cases, wherein a forester may arrest the body of an offender against vert or venison in the forest: by the assise of the forest of Lancaster, (says he,) taken with the manner, is when one is found in the king's forest in any of these four degrees, stable-stand, dog-draw, backbear, bloody-hand. Mamw. 2 part, Forest Laws. BACK-BOND. A term in Scotch law,

meaning a deed which in conjunction with an absolute disposition constitutes a trust. It expresses the nature of the right actually had by the person to whom the disposition is made. It is equivalent to the English deed of

declaration of trust.

BACO. A bacon hog, used in old charters.

BACTILE. A candlestick properly so call. ed, when formerly made ex baculo, of wood, for him, before certain persons for that pur-

basin, or waiting at the basin, on the day of the | or a stick. Clodingham Hist. Dunelm. apud Wartoni, Ang. Sac. p. 1798.

BADGER, from the Fr. baggage, a bundle, and thence is derived bagagier, a carrier of goods. One that buys corn or victuals in one place, and carries them to another to sell and make profit by them: and such a one was exempted in the stat. 5 and 6 Ed. 6. c. 14. from the punishment of an ingrosser within that statute. But by 5 Eliz. c. 12. badgers are to be licensed by the justices of peace in the sessions; whose licenses will be in force for one year, and no longer: and the persons to whom granted must enter into a recognisance that they will not by colour of their licenses forestal, or do any thing contrary to the statutes made against forestallers, ingrossers, and regrators. If any person shall act as a badger without license, he is to forfeit 51., one moiety to the king, and the other to the prose-

cutor, leviable by warrant from justices of peace, &c. Vide 13 El. c. 25. § 20.
BADIZA. Bath, in Somersetshire.

BADONICUS Mons. Barnes Down, near Bath.

BAG. An uncertain quantity of goods and merchandize, from three to four hundred. Lex Mercat'.

BAGA. A bag or purse. Mon. Angl. tom.

3. p. 237.

BAGAVEL. The citizens of Exeter had granted to them by charter from Edw. I. the collection of a certain tribute or toll upon all manner of wares brought to that city to be sold, towards the paving of the streets, re-pairing of the walls, and maintenance of the city, which was commonly called in old English begavel, bethugavel, and chippinggavel. Antiq. of Exeter.

BAHADUM. A chest or coffer. Fleta, lib.

BAJARDOUR, Lat. bajulator.] A bearer of any weight or burthen. Petr. Bles. Contin.

Hist. Croyland, p. 120. BAIL, baillum, from the Fr. bailler, which comes of the Greek Badden, and signifies to deliver into hands.] Is used in our common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, or surety taken for his appearance at a day and place certain. Bract. lib. 3. tract. 2. c. 8. The reason why it is called bail is because, by this means, the party restrained is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison: and the end of bail is to satisfy the condemnation and costs, or render the defendant to prison.

Bail and mainprize are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, that they save a man from imprisonment in the common gaol; his friends undertaking BAIL, I. 155

pose authorized, that he shall appear at a must put in bail for both; but if the husband certain day, and answer whatever shall be objected to him in a legal way. 2 Hawk. P. C. c. 15. § 29: 4 Inst. 180. The chief difference is, that a man's mainpernors are barely his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a Sunday, and confine until the next day, and then render him. 6 Mod. 231: Ld. Raym. 706: 12 Mod. 275.

Special bail are two or more persons who undertake generally, or in a sum certain that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal; generally there are but two persons who become bail for a defendant.

Where the defendant has been arrested or discharged out of custody, upon giving a bail bond to the sheriff, he must, at the return of the writ, to discharge such bond, appear thereto, namely, by putting in special bail, or, as it is termed, bail above, so called, in contradistinction to the sheriff's bail, or bail below; nor can he render himself in discharge of such bond without first putting in bail above. 5 Burr. 2683.

By rule M. 1654, no attorney shall be bail for a defendant in any action, nor his clerk. Cowp. 228. By rules of H. T. 1832, if a practising attorney, or his clerk, be put in as bail, except for the purpose of rendering, the plaintiff may treat the bail as a nullity. Vide Doug. Rep. 466. that an attorney may be admitted as bail in a criminal case.

No sheriff's officer, bailiff, or other persons concerned in the execution of process, shall be permitted to be bail in any action or suit depending in K. B. nor persons outlawed after judgment. R. M. 14 G. 2. The keeper of the Poultry Compter was rejected. Doug. 466.

I. OF BAIL IN CIVIL CASES. As to the form and requisites of affidavits to hold to bail, see tit. Affidavit, Arrest.] In actions of battery, trespass, slander, &c., though the plaintiff is likely to recover large damages, special bail is not to be had, unless by order of court, and the process is marked for special bail: nor is it required in actions of account, or of covenant, except it be to pay money; nor against heirs, executors, &c. for the debt of the testator, unless they have wasted the testator's goods. 1 Danv. Ab. 681: Bac. Ab. Bail in Civil Causes (B.): Tidd. Prac. 171. (9th ed.): 9 East, 325.

By 7 and 8 G. 4. c. 71. no person shall be held to bail where the cause of action does not originally amount to 201. over and above all costs, charges, and expenses, so that spccial or common bail is no longer discretionary in the court, but is governed by the arrest. See Tidd's Prac. 239. (9th ed.)

does not appear upon the arrest, the wife must file common bail before she can be discharged: for otherwise the plaintiff could not proceed to obtain judgment. Golds. 127: Cro. Eliz. 370: Cro. Jac. 445: Style, 475: 1 Mod. 8: 6 Mod. 17. 105: Tidd. Pract. 240.

A feme covert was discharged out of custody, because she was arrested without her husband; though the writ was sued against both, and non est inventus returned as to the husband. 1 Term Rep. 486. See tit. Arrest: and see Bac. Ab. Bail in Civil Causes (B. 5.):

1 Barn. & A. 165.

In all actions brought in B. R. upon any penal law, the defendant is to put in but common bail. Yelv. 53; see Bac. Ab. Bail (B.) In actions where damages are uncertain, bail is to be at the discretion of the court; on a dangerous assault and battery, upon affidavit of special damages, a judge's hand may be procured for allowance of an ac etiam in the writ: and in action of scandalum magnatum, the court, on motion, ordered special bail. Raym. 74. When bail is taken by the chief justice, or other judge, on a habeas corpus, the bail taken in the inferior court is dismissed, though the last bail be not filed presently, nor till the next term. Yelv. 120, 121. Yet it has been held, where a cause is removed out of an inferior court by habeas corpus, if the bail below offer themselves to be bail above, they shall be taken, not being excepted against below, unless the cause comes out of London. For the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency in the court above, though he was in London, 1 Salk. 97.

In London, it is said, special bail is to be given in action of account, &c. But on removal by habeus corpus into B. R. that court will accept common bail. 2 Keb. 404.

Bail in Error.—There is not only bail to appear, &c., on writs of error; but also in audita querela a recognizance of bail must be acknowledged; and upon a writ of attaint, to

prosecute, &c. Jenk. Cent. 129.

By the stat. 3 Jac. 1. c. 8. no execution shall be delayed by any writ of error or supersedeas thereupon, unless bail shall be given in double the sum adjudged, to prosecute the writ of error with effect; and also to satisfy the debt, damages, and costs adjudged, &c. This statute, which applied only to judgment on bonds and specialties, is now extended to all judgments in personal actions by 6 G. 4. c. 96. The statutes only apply to writs of error brought by defendants. 5 East, 545: 10 East, 2. As to bail in error, see Tidd. 1149. 1153. (9th ed.)

If a cause removed from an inferior court, If baron and feme are sued, the husband be remanded back by procedendo the same

BAIL, L 156

are chargeable, but not if remanded in another term. Cro. Jac. 363. One taken on a writ of execution is not bailable by law; except an audita querela be brought; but where a writ of error is brought and allowed, if the defendant be not in execution, there shall not be an execution awarded against him at the request of the bail, though he be present in court. 1 Nels. Ab. 331. The bail ought not to join with the principal, nor the principal with the bail, in a writ of error to reverse the judgment against either. Cro. Jac. 384.

On capias ad satisfaciendum against the defendant returned non est inventus, scire facias is to issue against the bail, or an action may be brought. Where a defendant renders his body in discharge of the bail, the plaintiff is, by the rules of the court, to make his choice of proceeding in execution whether he will charge body, goods, or lands. 183. And if the principal, after judgment, renders not himself in discharge of his bail, it is at the election of the plaintiff to take out execution either against him, or proceed against his bail; but if he takes the bail in execution, though he hath not full satisfaction, he shall never after take the principal; and if the principal be taken, he may not after meddle with the bail.

Where two are bail, although one be in execution, the plaintiff may take the other. Cro. Jac. 320; 2 Bulst. 68. If a principal render himself, and there is none to require his commitment, the court is ex officio to commit him; and if the plaintiff refuse him, he shall be discharged, and an entry made of it upon the record. Moor, Cas. 1249: 1 Leon. 59: see *Hob.* 210.

There must be an exoneretur entered, to discharge the bail. If the defendant dies before a capias ad satisfac. against him returned and filed, the bail will be discharged. Lill. 177.

The bail upon a writ of error cannot render the party in their discharge; because they are bound in a recognizance that the party shall prosecute the writ of error with effect, or pay the money if judgment be affirmed. Lill. Abr. 173: 2 Cro. 402: 3 Mod. 87. Nor can the bail in such case surrender the principal, though he become a bankrupt pending the writ of error. 1 Term Rep. 624. See Scire Facias.

Before a scire facias taken out against bail, the principal may render his body in discharge of the bail: and if the bail bring in the principal before the return of the second sci. fac. against them, they shall be discharged. 1 Roll. Abr. 250: 1 Lill. 471. Anciently the bail were to bring in the principal upon the first scire facias, or it would not be allow-3 Bulst. 182.

If the bail mean to acquit themselves of

term, the original bail in the inferior court of the death of the defendant, then they must render him in their discharge before the return of the ca. sa.; as the death of the principal afterwards will not discharge them. 67: 2 Cro. 165: Jon. 139: Str. 511. But if they do not, then they have until the return day (if the proceedings be by bill), sedente curia, of the first scire facias, if it be returned scire feci, but if a nihil is returned thereon, then until the return day, sedente curia of the second sci. fa. N. on R. E. 5 G. 2. And if the proceedings be by original, they have till the quarto die post of the return of the first sci. fa. if returned scire feci; if not then till the quarto die post of the return day of the second. 4 Burr. 2134; 1 Wils. 270. If an action be brought, then eight days in full term after the return. R. Trin. 1 Ann.—See the books of practice. Tidd. 1129, 1130.

If bail surrender the principal at or before the return of the second scire facias, it is good, although there be not immediate notice of it to the plaintiff; and if, through want of notice, he is at farther charge against the bail, that shall not vitiate the surrender, but the bail shall not be delivered till they pay such charges; if at any time after the return of the capias, the bail surrender the principal at a judge's chamber, and he thereupon is committed to the tipstaff, from whom he escapes, &c., this will not be a good surrender; but if it be before on a capias returned, it is otherwise; the one being an indulgence, and the other matter of right. Mod. Cas. 238. When a person makes his escape out of prison, and is retaken and bailed, the bail shall be discharged on a writ to the sheriff commanding him to keep the prisoner in dis-

The judges of the courts at Westminster have power by statute to appoint commissioners in every county to take recognizances of to make such rules for justifying the bail, as they shall think fit, &c. Stat. 4 and 5. W.

charge of the bail. Stat. 1 Ann. st. 2. c. 6.

& M. c. 4.

The commissioners are to take bail, but are obliged by rule of court to keep a book, wherein are the names of the plaintiff, defendant, and bail, and the person who transmits the same, and who makes affidavit that the recognizance was duly acknowledged in his presence; on such affidavit the judges make a conditional allocatur, and the bail are to stand absolute, unless the plaintiff excepts against them within twenty days; and if he excepts, the bail may justify by affidavit before commissioners in the country. Gilb. H. C. B. 32.

If a defendant puts in bail by a wrong name, the proceedings shall, nevertheless, be good; for otherwise every man impleaded may give a false name to his attorney by which he will be bailed, and then plead it in arrest of judgment. Goldsb. 138. But it hath their recognizance entirely, and run no hazard | been held, that if the bail be entered in one

BAIL, I. 157

name, and the declaration and all the pro- the notice being insufficient, the bail was not ceedings are by a contrary name, it will be erroneous. Cro. Eliz. 223. So if there is bail, and the bail be taken off the file, the plaintiff is without remedy: though where a habeas corpus and bail-piece were lost in B. R. new ones were ordered to be made out. Style,

Stat. 21 Jac. 1. c. 26. enacts, that it is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any bail in the name of another person not privy or consenting thereto; provided that it shall not corrupt the blood, or take away dower.

By stat. 1 W. 4. c. 66. § 11. any person who shall acknowledge any recognizance of bail in the name of any other not privy or consenting to the same (whether such recognizance of bail be filed or not), is punishable by trans-

portation or imprisonment.

Special bail, which is taken before a judge, or by commissioners in the country, when accepted, is to be filed: after twenty days' notice given of putting in special bail before a judge, on a cepi corpus, if there be no excep. tion, the bail shall be filed in four days. 1 Lill. Abr. 174. Upon a cepi corpus twenty days are allowed to except against the bail; so on a writ of error; and you need not give notice; but you cannot take out execution without giving a four days' rule to put in better bail; in all other cases, notice must be given. Upon a habeas corpus eight-andtwenty days are appointed to except against the bail, and after that if it be not excepted against, it shall be filed in four days. 1 Salk. 98; R. M. 8 Ann.: Tidd. Prac. 256. (9th

The exception to bail put in before a judge must be entered in the bail-book, at the judge's chambers, at the side of the bail there put in, after this manner: I do except against this bail, A. B. attorn. for the plaintiff. if there be no such exception, the defendant's attorney may take the bail-piece from the judge's chamber, and file it. Bail is not properly such until it is filed, when it is of record; but it shall be accounted good, till the same is questioned and disallowed.

Bail could not be justified before a judge in his chamber, except by consent, or for necessity in vacation; but now, by 1 W. 4. c. 70. § 12. bail may be justified before a judge in chambers, or in some other convenient place by him appointed, as well in term as in

vacation, and whether the defendant be ac-

tually in custody or not.

It being doubtful whether Sunday should be reckoned as one day in notice to justify bail, it was determined per cur. that for the future Sunday shall not be counted one (it not being a proper day to inquire after bail); but two days' notice must be given, of which Sunday shall not be one; upon motion for defendent to justify bail, notice was served Sa- But the court of K. B. has not yet said, that

suffered to justify. Notes in C. B. 200.

After the plaintiff has entered his exception, and given notice thereof to the defendant, the bail (to discharge the bond) must personally appear in court within the time limited by the rules thereof, and justify themselves [or by affidavit, if taken before commissioners in the country]; and the plaintiff may oppose them by his counsel: if it appear they are insufficient, the court will reject them, and leave the plaintiff at liberty to proceed upon the bail-bond, or against the she-

Bail coming to justify and not being present at the sitting of the court, must wait until the rising. See Tidd, 262. (9th ed.)

Generally, bail are opposed on five grounds with effect. 1st. That there is some mistake in the notice to justify; namely, that it should have been given two days previous, instead of one; 2nd. That the bail have assumed names that are either feigned, or belong to other persons, contrary to the stats. 21 Jac. 1. and 4 and 5 W. & M. But the court will not vacate the proceedings against the party personated, until the offender be convicted. 1 Vent. 301. Nor can a conviction take place until the bailpiece be filed. 2 Sid. 90. 3dly. A third ground of opposing bail is, that they are not house-keepers; and if they be, the rent paid is immaterial, though under 10l. Loft. 148. Nor is it necessary they should have been assessed to the poor's rate. Ibid. 328. Though bail have been rejected for not paying arrears of king's taxes. 1 Chitt. R. 309: and see as to the grounds of opposing bail, Tidd, 268. et seq. 4thly. They may be opposed on the ground of their not being worth double the sum sworn to, after payment of all their debts. Under this head may be ranked bankrupts, who have not obtained their certificates; or such as have been twice bankrupts, and not paid 15s. in the pound. M. 24 G. 3. Lastly, after the expiration of the rule to bring in the body. Loft. 438: M. 20 G. 3.

If the bail do not justify at the day given (being the last day they have) they are out of court. Nor can they justify after the rule upon the sheriff to bring in the body is expired, without leave of the court. Loft. 88.

In case the defendant by neglect has suffered the plaintiff to take an assignment of the bond, and he has lost a trial; if he would wish to try the cause, he must move the court for that purpose on a special affidavit containing merits, if it be in term time; if in vacation, he may apply and obtain a judge's order. which will be granted upon putting in and perfecting bail, paying the costs incurred, receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so as not to delay the plaintiff, and consenting that the bond stand as a security. turday, June 23, to justify bail, Monday, 25; the plaintiff shall take judgment on the ac-

Vol. I .- 21

Common Pleas is so.

If the bond be irregularly assigned, defendant may move the court to set the proceedings aside for irregularity, upon an affidavit, stating the particular facts.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in abatement, but in chief. Salk. 519. Nor will the court order the bond to be delivered up to be cancelled, on the ground of a mis-

nomer. 3 Term Rep. 572.

Pending a rule to set aside proceedings for irregularity, and to stay the proceedings, plaintiff took an assignment of the bond in the meantime; the court agreed that the proceedings were totally suspended, by an act of the court, and made the rule absolute to set aside the assignment of the bond, as having been made too soon. 4 Term Rep. 176.

The court may adjudge bail sufficient, when the plaintiff will not accept of it. Also the court on motion, or a judge at his chamber, will order a common appearance to be taken. when special bail is not required, on affidavit made by the defendant of the smallness of the debt due, &c. The putting in of a declaration, and the acceptance of it by the defendant's attorney, with the privity of the plaintiff's attorney, is an acceptance of the bail.

When the sheriff hath taken good bail of the defendant, he will on a rule return a cepi, and assign the bail-bond to plaintiff, which may be done by indorsement without stamp; so as it be stamped before action brought thereupon; and then the defendant and bail may be sued on the bond, by the plaintiff in his own name, i. e. as assignee of the sheriff. Stat. 4 and 5 Ann. c. 16. The action must be brought in the same court, where the original writ was sued out. 3 Burr. 1923: 1 Burr. 642. But by rule H. T. 1832, an action may be brought by the sheriff on the bail-bond in any court. The venue may be laid in any county. Str. 727: 2 Ld. Raym. 1455. But if the plaintiff takes an assignment of the bail-bond, though the bail is insufficient, the court will not amerce the sheriff. 1 Salk. 99.

In case the defendant doth not put in bail, the attorney for the plaintiff is to call on the sheriff for his return of the writ; and so proceed to an attachment against the sheriff. If on a cepi corpus no bail is returned, a rule will be made out to bring in the defendant's body; though a defendant, with leave of the court, may deposit money in court instead of bail; and in such case the plaintiff shall be ordered to waive other bail. Lill. Abr. Trin. 23 Car. B. R: see 43 G. 3. c. 46: Tidd. 227.

If more damages, &c. are recovered than mentioned in the plaint, or than the sum wherein the bail is bound, the bail will not be liable for the surplus. 1 Salk. 102.

A bail cannot be witness for the defendant

tions upon the bond, although the practice in | discharge the bail, upon giving other sufficient bail. Wood's Inst. 582. Bail-pieces are written on a small square piece of parchment, with the corners cut off at the bottom. For farther matter see the books of practice.

Bail are not regularly put in, unless the name of the proper county be inserted in the bail-piece. Smith v. Miller, 7 T. R. 96.

If a sheriff's officer on an arrest take an undertaking for the appearance of the party instead of a bail-bond without the plaintiff's assent, and bail above is not duly put in, the sheriff is liable to an action for an escape, and the court will not relieve him by permitting him to put in and justify bail afterwards. Fuller v. Prest, Ibid. 109.

But if the sheriff permit the defendant to go at large without taking a bail-bond, he may retake him before the return of the writ.

7 T. R. 109.

Where a bail-bond has been taken, it may be cancelled if the defendant return into the shcriff's custody before the return of the writ. Stamper v. Milbownce, Ib. 122.

The court on the application of the defendant's bail, granted a habeas corpus to the sheriff of H. in whose custody the defendant was under a charge of felony to bring him up in order that he might be surrendered by

his bail. Sharp v. Sheriff, Ib. 226.

If an action be brought here against bail on a recognizance of bail taken in C. B., they have the same indulgence (of eight days in full term after the return of the writ against them) to render the principal as if the recognizance had been taken in this court. Fisher v. Branscombe, 7 T. R. 344.

If a defendant be sent out of the kingdom under the alien bill after he has given a bailbond and before the return of the writ, the court will order the bail-bond to be cancelled.

Postel v. Williams, Ib. 517.

Bail to the sheriff are liable for the plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail-bond. Stevenson v. Cameron, 8 T. R. 28: Bac. Ab. Bail. (D.

But now, by rule Hil. T. 1832, bail are only liable to the sum sworn to by the affidavit of debt and costs, not exceeding, in the whole,

the amount of their recognizance.

Bail in the original action after judgment recovered against them on the bail-bond, may be holden to bail in an action on such judgment. Prendergast v. Davis, Ib. 85.

But bail to the sheriffs, cannot themselves be holden to bail in an action on the bail-

bond. Ib.

An action on the bail-bond must be brought in the court where the original action was brought. Donatty v. Barclay, Ib. 152. But bail cannot take advantage of the action being in a different court on non est factum; 2 Camp. 396; and the sheriff now may sue on at the trial; but the court, on motion, will the bond in any court. Regula H. T. 1832.

Bail have eight days to render the principal from the return of that writ on which there is an effectual proceeding against them.

Wilkinson v. Vass, Ib. 422.

Bail may surrender the principal before the return of a rule against the sheriff to bring in the body, before they have justified, giving a proper notice. Reg. Gen. K. B. 5 T. R. 638: 1 H. B. 368.

And so they may after the assignment of the bail-bond, though they have not justified.

5 T. R. 491.

Therefore where the plaintiff sued the bail on their recognizance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled that the bail had eight days from the return of the process in the second action in which to render the principal. Ib.

A defendant who has given a bail-bond cannot be holden to bail in an action brought by the sheriff on that bond. Mellish v. Pathe-

rich, Ib. 450.

Bail above may be put in before the return of the writ; and consequently the plaintiff cannot afterwards proceed on the bail-bond.

Hyde v. Wishard, Ib. 456.

When the rule to bring in the body expires the last day of a term, the bail have the whole of the first day of the next term to justify; and if the defendant surrender in discharge of the bail on any part of that day, the sheriff cannot be attached for not bringing in the body. R. v. The Sheriff of Middlesex. Ib. 624.

The plaintiff may sue out a writ against the bail on their recognizance, on the return day of the ca. sa. against the principals. Shi-

vers v. Brooks, Ib. 628.

The same persons who were bail in B. R. may justify again or bail upon a writ of error returnable in Parliament. Martin v. Justice. Ib. 639.

If a defendant be arrested by process of K. B. and removed by habeas corpus to C. B., he may put in and justify bail in either court. Knowlys & al. v. Reading, C. B. 1 B. & P. 311.

Bail were allowed to justify after the rule to bring in the body had expired, on payment of the costs of the opposition. Weddall v.

Berger, 1b. 325.

If a man carry on business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place

is sufficient. Ib.

The court allowed the defendant to justify bail after an attachment had issued against the sheriff, but gave leave to the plaintiff to oppose them without prejudice. Williams v. Waterfield, Ib. 334.

Where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. England

v. Kerwan, 8 T. R. 335.

The court will not discharge a defendant on a common appearance on the ground of infancy. Madox v. Eden, Ib. 480.

A defendant cannot enter into the recogni-

zance of bail. Reg. Gen. Ib. 530.

But each bail shall bind himself in double

the sum sworn to. *Ibid*.

Two days' notice of justification must be given whether the bail originally put in, or added bail be brought up. Nation v. Barret, C. B. 2 B. & P. 30: Secus in B. R. Wright v. Ley, Ib. 31.

It is not a sufficient ground for rejecting a person as bail, that he is described to be "of A. in the county of B., gaol keeper." Faulk-

ner v. Wise, Ib. 150.

The court will not discharge a defendant on common appearance on the ground of his having obtained his certificate as a bankrupt. and of the debt being thereby barred, if the validity of the certificate is meant to be dis-

puted. Stacy v. Federici, Ib. 390.

Before the late bankrupt act if the bail had become bankrupt pending the writ of error and before affirmance, they were not discharged from their recognizance, because the debt was contingent, and not proveable under the commission; but now by that act contingent debts are proveable under the commission. 6 G. 4. c. 16.

If a defendant in error (the plaintiff in an action) upon judgment being affirmed, take in execution the body of the plaintiff in error, for the debt, damages and costs in error, he does not thereby discharge the bail in error, but may sue them upon their recognizance. Perkins v. Petit and Gale, Ib. 440.

A recognizance entered into by the bail in error without the principal is good. Dixon

v. Dixon, Ib. 443.

If on a bond debt, double the sum secured by the bond be the sum for which the bail bind themselves in the recognizance in error, it is sufficient, though a farther sum be due for interest and costs, and nominal damages have been recovered. Ib.

If bail be put in with the filazer of the county in which the defendant is arrested on a testatum capias, the bail may be treated as a nullity and an attachment issue. Clomp-

son v. Knox, Ib. 516.

But if the plaintiff appear to have been aware that the bail were actually put in. though with the wrong filazer, the court will relieve against the attachment. Id. Ib.

An indorser of a bill of exchange may be bail for the drawer, in an action against him on the same bill. Harris v. Manley, Ib.

An attorney's clerk, though not clerk to the defendant's attorney, cannot become bail above. Redit v. Broomhead, Ib. 564: and rule H. T. 1832.

Court will stay proceedings against both the bill on payment of the sum sworn to and costs, although less than the damages reco160 BAIL, II.

Clark v. Bradshaw, 1 East, 86.

Scire facias against bail must lie four days 570. in the office as well where scire feci is returned as nihil. Williams v. Mason, cited in above casc.

Where defendant was sued by original in London, the scire facias against the bail must be sued there also; and it does not help the plaintiff who sued out the scire facias in Middlesex that bail had by mistake been put in there. Harris and another v. Calvart and

another, 1 East, 603.

itself a supersedeas and may be pleaded by bail to have been issued and allowed after issuing, and before the return of the ca. sa. against the principal, so as to avoid proceedings against them in scire facias, upon the recognizance of bail prosecuted after a return by the sheriff of non est inventus made pending such writ of error. Sampson v. Brown, 2 East, 439.

An omission in the ac etiam part of the writ of the sum for which the defendant is arrested, or bailable process, is irregular, and he cannot be holden to special bail thereon. Davison v. Frost, Ib. 305: see Tidd, 294.

Time enlarged for bail to surrender a bankrupt under examination. Maude v. Jouett, 3

B. R. have power to bail in discretion in all cases of felony, as well as other offences. Rex

v. Marks, Ib. 163.

One, who was committed to Newgate by commissioners of bankrupt for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by habeas corpus issued on the crown side of the court, on which side also must be taken the subsequent rule of his surrender in the action, his commitment pro forma to the marshal, and his recommitment to Newgate charged with the several matters. Taylor's case, Ib. 232.

After notice of surrender, all proceedings against bail shall cease. (T. 1 Ann.) Byrne

v. Aguilar, Ib. 306.

Upon a writ of error sued out by the principal after the bail are fixed and proceedings against them in scire facias, the court will only stay proceedings against the bail pending the writ of error on the terms of the bail's undertaking to pay the condemnation money and the costs of the scire facias, and (if it be a case in which there is no bail in error) to pay the costs also of the writ of error if judgment should be affirmed. Buchanan v. Alders and another, Ib. 546.

If the second writ of scire facias be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the scire facias book in the sheriff's office,

vered or than the sum named in the process, which is merely a private book for his own convenience. Heywood v. Rennard & al., Ib.

> If bail apply to stay proceedings upon the bail-bond, or against the sheriff, they need not swear to merits, though a trial has been lost. 1 B. & P. See Tidd's Prac. 302. (9th ed.)

II. As to BAIL FOR CRIMES. At Common law, bail was allowed for all offences except murder. 2 Inst. 109. And if the party accused could find sureties, he was not to be committed to prison; for all persons might be A writ of error though not returned, is of bailed till convicted of the offence. 2 Inst.

> One indicted and found guilty of the death of a man by misadventure, as by casting a stone over a house, and by chance killing a man, woman, or child, is not bailable. 3 Ed.

3. Corone, 354.

One indicted of conspiracy, viz. that he with others conspired falsely to indict another of murder or felony, by means whereof he was indicted, and afterwards convicted, shall not be bailed. The resolution of all the judges, upon the question demanded by King Ed. III. himself, as appears, 27 Ass. 1.

One indicted for burglary may be bailed.

29 Ass. 4.

One indicted on suspicion of robbery was outlawed, and taken on outlawry, and brought writ of error, and being brought to B. R. by habeas corpus, prayed to be bailed, and took two exceptions to the indictment; 1st, that he was in prison, and knew nothing of the outlawry; 2dly, that the charge is too general, and nobody prosecutes; but per Roll. Ch. J., he cannot be bailed. Sty. 418. But see stat. 4 and 5 W. & M. c. 18. which enacts that persons outlawed, except for treason or felony, may appear by attorney and reverse the same without bail, except special bail shall be ordered by the court; and that persons arrested upon any capius utlagatum, except for treason or felony, may be discharged by an attorney's engagement to appear: and in cases where special bial is required, the sheriff may take bond with sureties.

By the common law the sheriff might bail persons arrested on suspicion of felony, or for other offence bailable; but he hath lost this

power by the stat. 1 Ed. 1. c. 15.

By stat. 7 G. 4. c. 64. In cases of felony, persons taken on a charge of felony, or suspicion thereof, before one or more justice or justices of the peace, and the charge being supported by positive and credible evidence of the fact, or by such evidence as, if well explained, shall raise a strong presumption of guilt, shall be committed to prison: but if one justice is present, and the whole evidence shall neither raise a strong presumption of guilt nor warrant the dismissal of the charge, the party shall be detained and taken before two justices: and where such party or any person in

the first instance shall be taken before two circumstances in his favour. 2 Inst. 185, justices, shall be charged with felony or sus- 186. 189: H. P. C. 104: 1 Salk. 61: 3 Bulst. justices, shall be charged with felony or suspicion thereof, and the evidence shall not be such as to raise a strong presumption of guilt and require committal, or such evidence shall be produced on behalf of the party charged as shall weaken the presumption of guilt, but there shall still be sufficient ground for inquiry, the party charged shall be admitted to bail. But the justices are not required to hear evidence for the defence, unless it be conducive to the ends of justice. By § 2. before persons charged with felony shall be bailed or committed, the justices shall take down in writing the examination of the prisoner and witnesses, and bind over the latter to appear at the trial: and such examinations shall be delivered to the proper officer before the opening of the court.

And by § 4. every coroner, in cases of murder and manslaughter, if accessories before the fact to murder, shall proceed as directed by § 2. with regard to justices. By § 5. justices and coroners may be fined for neglect of

In cases of misdemeanor, by § 3. of the above act, one justice may take the examination of the party charged, and the information of the witnesses, and shall put the same into writing before he shall commit or bail any party; and in case of bailment, shall certify the same, and bind witnesses in recognizances, and subscribe and return informations, bailments, and recognizances, as in cases of felony.

If a person be dangerously wounded, the offender may be bailed till the person is dead; but it is usual to have assurance from some skilful surgeon, that the party is like to do well. 2 Inst. 186. A man arrested and imprisoned for felony, being bailable, shall be bailed before it appears whether he is guilty or not: but when convicted, or if on examination he confesseth the felony, he cannot be

bailed. 4 Inst. 178.

Also, it seems that in discretion they may bail a person convicted before them of manslaughter, upon special circumstances: as if the evidence against him were slight, or if he had purchased his pardon. H. P. C. 101:

Cromp. 153.

The court of B. R. has power to bail in all cases whatsoever, and will exercise their discretion in all cases not capital; in capital cases where innocence may be fairly presumed, and in every case where charge is not alleged with sufficient certainty. Leach's Hawk. P. C. ii. c. 15. § 80. in note, where several cases are enumerated.

It is to be observed, that with respect to the nature of the offence, although this court is not tied down by the rules prescribed by the stat. of Westm. 1. yet it will in discretion pay a due regard to those rules, and not admit a person to bail who is expressly declared to be irrepleviable, without some particular

113: 2 Hawk. P. C. c. 15. § 80: 5 Mod. 454.
And therefore if a pereon be attainted of felony, or convicted thereof by verdict general or special, or notoriously guilty of treason or manslaughter, &c. by his own confession or otherwise, he is not to be admitted to bail, without some special motive to induce the court to grant it. Kelynge, 90: Dyer, 79: 1 Bulst. 87: 2 Hawk. P. C. c. 15. § 80.

The court of K. B. has a right, in all cases of felony, even of murder, to bail the accused

where there is any doubt either of the law or fact of the case. 3 E. R. 163. 4, 5.

And generally in all cases of felony the court will require four sureties. 6 D. § R.

Upon a commitment of either house of parliament, when it stands indifferent on the return of the habeas corpus, whether it be legal or not, the court of B. R. ought not to bail a prisoner. Leach's Hawk. P. C. ii. c. 15. § 73. But if it be demanded in case a subject should be committed by either of the Houses, for a matter manifestly out of their jurisdiction, what remedy can he have? I answer (says the learned and cautious Serjeant Hawkins) as this is a case which I am persuaded will never happen, it seems needless over nicely to examine it. See Leach's notes, 2 Hawk. P. C. c. 15. § 72. From the cases cited there (viz. the Hon. Alex. Murray's, 1 Wils. 229: John Wilkes's, 2 Wils. 158: Entick v. Carrington, 11 St. Tr. 317: Brass Crosby's, 3 Wils. 188: 2 Blackst. 775.) it appears that the courts in Westminster Hall have been positively of opinion, "that they have no power to decide on the privileges of parlia-ment; that the rights of the House of Commons are paramount to the jurisdiction of those courts; that the commons are the exclusive arbiters of their own peculiar privileges; that their power of commitment is inherent in the very nature of their constitution; and finally, that their adjudication is tantamount to a conviction, and their commitment equal to an execution; and that no court can discharge a prisoner committed in exccution by another court."

A defendant convicted of a misdemeanour, brought up for judgment and remanded, cannot be bailed without the consent of the pro-

secutor. 1 E. R. 159.

And when the House of Lords adjudge that any matter is a breach of privilege, their adjudication on the party accused is a conviction, and no court can bail him. 8 E. R. 314.

However, a person committed for a contempt, by order of either house of parliament, may be discharged by B. R. after a dissolution or prorogation, which determine all orders of parliament; also it is said on an impeachment, when the parliament is not sitting, and the party has been long in prison, B. R. may bail him. The court of B. R. hath bailed persons

committed to the Fleet Prison by the Lord Chancellor, when the crime of commitment was not mentioned, or only in general terms, &c. 2 Hawk. P. C. c. 15. § 76.

And B. R. having the control of all inferior courts, may at their discretion bail any person unjustly committed by any of those courts. In admitting a person to bail in the court of B. R. for felony, &c. a several recognizance is entered into to the king in a certain sum from each of the bail, that the prisoner shall appear at a certain day, &c. And also that the bail shall be liable for the default of such appearance, body for body. And it is at the discretion of justices of the peace, in admitting any person to bail for felony, to take the recognizance in a certain sum, or body for body; but where a person is bailed by any court, &c. for a crime of an inferior nature, the recognizance ought to be only in a certain sum of money, and not body for body. 2 Hawk. c. 15. § 83. And the bail are to be bound in double the sum of the criminal. Where persons are bound body for body, if the offender doth not appear, whereby the recognizance is forfeited, the bail are not liable to such punishment to which the principal would be adjudged if found guilty, but only to be fined, &c. Wood's Inst. 618. If bail suspect the prisoner will fly, they may carry him before a justice to find new sureties; or to be committed in their discharge. 1 Rep. 99.

Though a warrant of commitment for felony be informal, yet if the corpus delicti appear in the depositions returned to the court, they will not bail but remand the prisoner. 3 E. R. 157.

The courts of King's Bench, Common Pleas, and Exchequer, in term time, and the Chancery in the term or vacation, may bail persons by the habeas corpus act. See tit. Habeas Cor-

To refuse bail when any one is bailable on the one hand; or on the other to admit any to bail who ought not by law to be admitted, or to take slender bail, is punishable by fine, &c. 2 Inst. 291: H. P. C. 97.

No person shall be bailed for felony by less than two; and it is said not to be usual for the King's Bench to bail a man on a habeas corpus, on a commitment for treason or felony, without four sureties; the sum in which the sureties are to be bound ought to be never less than 40l. for a capital crime; but it may be higher in discretion, on consideration of the ability and quality of the prisoner, and the nature of the offence; and the sureties may be examined on oath concerning their sufficiency by him that takes the bail; and if a person be bailed by insufficient sureties, he may be required either by him who took the bail, or by any other who hath power to bail him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none. 2 Hawk. P. C. c. 15. § 4: H. P. C. 97.

But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand as in effect amounts to a denial of bail; for this is looked upon as a great grievance, and is complained of as such by 1 W. & M. st. 2. c. 2. (the bill of rights) by which it is declared that excessive bail ought not to be required. 2 Hawk. P. C.

If where a felony is committed one is brought before a justice on suspicion, the person suspected is to be bailed, or committed to prison; but if there is no felony done, he may be discharged. H. P. C. 98.106.

Persons committed for treason or felony, and not indicted the next term, are to be bailed. 31

Car. 2. c. 2. § 7.

Where bail may have writ of detainer against the prisoner. See 1 Ann. st. 2. c. 6.

Justices of peace are required to bail officers of customs and excise, who kill persons resisting. 9 G. 2. c. 35. § 35.

The court of King's Bench and Justiciary in Scotland not restrained from bailing persons committed for felonies, against the laws of customs or excise. 9 G. 2. c. 35. § 38:19 G. 2. c. 34. § 12.

By 1 and 2 G. 4. c. 218. (the metropolis police act) it is lawful for any constable or headborough attending at any watchhouse, to take bail from persons charged with petty misdemeanors, without warrant of a justice; and such recognizances shall be of equal obligation as if taken before his Majesty's justices of

BAILIFF, ballivus.] From the French word bayliff, that is, præfectus provinciæ, and as the name, so the office itself was answerable to that of France, where there were eight parliaments, which were high courts from whence there lay no appeal, and within the precincts of the several parts of that kingdom which belonged to each parliament there were several provinces to which justice was administered by certain officers called bailiffs: and in England we have several counties in which justice hath been, and still is, in small suits, administered to the inhabitants by the officer whom we now call sheriff or viscount; (one of which names descends from the Saxons, the other from the Normans:) and though the sheriff is not called bailiff, yet it is probable that was one of his names also, because the county is often called balliva: as in the return of a writ, where the person is not arrested, the sheriff saith, Infra-nominatus A. B. non est inventus in balliva mea, &c. Kitch. Ret. Brev. fol. 285. And in the statute of Magna Charta, c. 28. and 14 Ed. 3. c. 9. the word bailiff seems to comprise as well sheriffs as bailiffs of hun-

Bailies in Scotland are magistrates of burghs, possessed of certain jurisdictions, having the same power within their territory as sheriffs in the county.—The term is also there, suing a writ of non omittas capias in the first applied to any officer or person named by a instance, without a previous capias and return

proprietor to give infefftment.

As England is divided into counties, so every county is divided into hundreds; within which in ancient times the people had justice administered to them by the several officers of every hundred, which were the bailiffs. And it appears by Bracton (lib. 3. tract. 2. c. 34.) that bailiffs of hundreds might anciently hold plea of appeal and approvers: but since that time the hundred courts, except certain franchises, are swallowed in the county-courts; and now the bailiff's name and office is grown into contempt, they being generally officers to serve writs, &c. within their liberties; though, in other respects, the name is still in good esteem; for the chief magistrates in divers towns are called bailiffs: and sometimes the persons to whom the king's castles are committed are termed builiffs, as the bailiff of Dover Castle, &c.

Of the ordinary bailiffs there are several sorts, viz. bailiffs of liberties; sheriffs' bailiffs; bailiffs of husban-

dry, &c.

Bailiffs of liberties are those bailiffs who are appointed by every lord within his liberty, to execute process and do such offices therein, as the bailiff errant doth at large in the county; but bailiffs errant or itinerant, to go up and down the county to serve process, are out of use.

Bailifs of liberties or franchises, are to be sworn to take distresses, truly impanel jurors, make returns by indenture between them and sheriffs, &c., and shall be punished for malicious distresses by fine and treble damages, by ancient statutes. Vide 12 Ed. 2. st. 1. c. 5: 14 Ed. 3. st. 1. c. 5: 2 Ed. 3. c. 4: 5 Ed. 3. c. 4: 11 H. 7. c. 15: 27 H. 8. c.

24: 3 G. 1. c. 15. § 10.

The bailiff of a liberty may make an inquisition and extent upon an elegit. The sheriff returned on a writ of elegit, that the party had not any lands but within the liberty of St. Edmund's Bury, and that J. S., bailiff there, had the execution and return of all writs, and that he inquired and returned an extent by inquisition, and the bailiff delivered the moiety of the lands extended to the plaintiff, who, by virtue thereof, entered, &c. This was held a good re-Cro. Car. 319. These bailiffs of liberties cannot arrest a man without a warrant from the sheriff of the county: and yet the sheriff may not enter the liberty himself, at the suit of a subject (unless it be on a quo minus, or capias utlagatum), without clause in his writ, Non omittas propter aliquam libertatem, &c. If the sheriff, &c. enters the liberty without such power, the lord of the liberty may have an action against him, though the execution of the writ may stand good. 1 Vent. 406: 2 Inst. 453. But it was decided after full argument, that an action on the case cannot be maintained by the bailiff of a franchise for issuing a writ of non omittas capias in the first instance, without a previous capias and return by the sheriff, since the usage of the court has legalised the practice. Carratt v. Smallpage, 9 East, 330. A writ of fieri facias directed in the first instance to the bailiff of the Isle of Ely is erroneous and void, and the bailiff serving under it is a trespasser. Grant v. Bagge, 3 East, 128: and see 14 East, 289: 1 Brod. & B. 12. And Wood, Baron, held that the killing the officer making such an arrest was not murder, since the officer was a trespasser. Rex v. Mead, 2 Stark. Ca. 205: and see 3 Barn & A. 502.

Sheriffs' bailiffs are such who are servants to sheriffs of counties, to execute writs, warrants, &c. Formerly bailiffs of hundreds were the officers to execute writs; but now it is done by special bailiffs, put in with them by the sheriff. A bailiff of a liberty is an officer which the court takes notice of; though a sheriff's bailiff is not an officer of the court, but only the sheriff himself. Pasch. 23 Car. 1 B. R. The arrest of the sheriff's bailiff is the arrest of the sheriff; and if any rescous be made of any person arrested, it shall be adjudged done to the sheriff; also if the bailiff permit a prisoner to escape, action may be brought against the sheriff. Co. Lit. 61. 168. Sheriffs are answerable for misdemeanors of their bailiffs; and are to have remedy over against them. 2 Inst. 19. The latter are therefore usually bound in an obligation for the due execution of their offices, and thence are called bound bailiffs; which the common people have corrupted to a more humble appellation.

There are thirty-six serjeants at mace in London, who may be termed bailiffs, and they

each give security to the sheriffs.

By stat. 14 Ed. 3. c. 9. sheriffs shall appoint such bailiffs, for whom they will answer; and by stat. 1 H. 5. c. 4: no sheriff's bailiff shall be attorney in the king's court, R. M. 1654.

Bailiffs of lords of manors are those that collect their rents, and levy their fines and amercements: but such a bailiff cannot distrain for an amercement without a special warrant from the lord or his steward. Cro. Eliz. 698. He cannot give license to commit a trespass, as to cut down trees, &c., though he may license one to go over land, being a trespass to the possession only, the profits whereof are at his disposal. Cro. Jac. 337. 377. A bailiff may by himself, or by command of another, take cattle damage-feasant upon the land. 1 Danv. Ab. 685. Yet amends cannot be tendered to the bailiff, for he may not accept of amends, nor deliver the distress when once taken. 5 Rep. 76. These bailiffs may do any thing for the benefit of their masters, and it shall stand good till the master disagrees; but they can do nothing to the prejudice of their masters. Lit. Rep. 70. Bailiffs of courts-baron summon those

present all pound-breaches, cattle strayed,

Bailiffs of husbandry are belonging to private men of good estates, and have the disposal of the under-servants, every man to his labour; they also fell trees, repair houses, hedges, &c., and collect the profits of the land for their lord and master, for which they render account yearly, &c.

Besides these, there are also bailiffs of the forest, of which see Manwood, part 1, p.

An appointment of a Bailiff of a Manor.

Know all men by these presents, That I, W. B. of, &c. Esq. lord of the manor of D. in the county of G., Have made, ordained, deputed, and appointed, and by these presents do make, ordain, depute, and appoint J. G. of, &c. my bailiff, for me, and in my name, and to my use, to collect and gather, and to ask, require, demand, and receive of all and every of my tenants, that have held or enjoyed, or now do, or hereafter shall hold or enjoy, any messuages, lands or tenements, from, by, or under me, within my said manor of D., all rents, and arrears of rent, heriots, and other profits, that now are, or hereafter shall become payable, due, owing, or belonging to me within the said manor; and, in default of payment thereof, to distrain for the same from time to time, and such distress or distresses to impound, detain, and keep, until payment be made of the said rents and profits, and the arrears thereof. And I do also farther empower and authorize the said J. G. to take care of and inspect into all and every my messuages, lands, and woods within the said manor, and to take an account of all defects, decays, wastes, spoils, trespasses, or other misdemeanors, committed or permitted within my said manor, or in any messuages, lands, or woods there: and from time to time, to give me a just and true account in writing thereof; and farther to act and do all other things that to the office of a bailiff of the said manor belongs and appertains, during my will and pleasure. In Witness, &c.

BAILIS, are letters to raise fire and sword. Scotch Dict.

BAILIWICK, balliva.] Is not only taken for the county, but signifies generally that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appointeth a bailiff, with such powers within his precinct as an under-sheriff exerciseth under the sheriff of the county; such as the bailiff of Westminster, &c. Stat. 27 Eliz. cap. 12: Wood's Inst. 206.

BAILMENT, from bailler, Fr. to deliver.] " A delivery of goods in trust, upon a contract expressed or implied that the trust shall be

courts, and execute the process thereof; they | faithfully executed on the part of the bailee;" [the person to whom they are delivered,] 2 Comm. 451, which see; to which Sir W. Jones adds, "and the goods re-delivered as soon as the time or use, for which they are bailed, shall have clapsed or be performed." Law of Bailments, p. 117.

It is to be known that there are six sorts of bailments which lay a care and obligation on the party to whom goods are bailed: and which, consequently, subject him to an action, if he misbehave in the trust reposed in

1. A bare and naked bailment, to keep for the use of the bailor, which is called depositum: and such bailee is not chargeable for a common neglect; but it must be a gross one to make him liable. 2 Str. 1099.

2. A delivery of goods which are useful to keep, and they are to be returned again in specie, which is called accommodatum, which is a lending gratis; and in such case the borrower is strictly bound to keep them: for if he be guilty of the least neglect, he shall be answerable, but he shall not be charged where

there is no default in him. See post. 3. A delivery of goods for hire, which is called locatio, or conductio; and the hirer is to take all imaginable care, and restore them at the time; which care, if he so use, he shall

4. A delivery by way of pledge, which is called vadium; and in such goods the pawnee has a special property; and if the goods will be the worse for using, the pawnee must not use them; otherwise he may use them at his peril: as jewels pawned to a lady, if she keep them in a bag, and they are stolen, she shall not be charged: but if she go with them to a play, and they are stolen, she shall be answerable. So if the pawnee be at a charge in keeping them, he may use them for his reasonable charge: and if, notwithstanding all his diligence, he lose the pledge, yet he shall recover the debt. But if he lose it after the money tendered, he shall be chargeable, for he is a wrong-doer: after money paid (and tender and refusal is the same) it ceases to be a pledge, and therefore the pawnor may either bring an action of assumpsit, and declare that the defendant promised to return the goods upon request: or trover, the property being vested in him by the tender.

5. A delivery of goods to be carried for a reward, of which enough is said under title Carrier. It may here be added, that the plaintiff ought to prove the defendant used to carry goods, and that the goods were delivered to him or his servant to be carried. And if a price be alleged in the declaration, it ought to be proved the usual price for such a stage; and if the price be proved, there need no proof, the defendant being a common carrier: but there need not be a proof of a

price certain.

6. A delivery of goods to do some act about soever, takes of his own property. See post, them, as to carry without a reward, which is called by Bracton, mandatum, in English, an acting by commission; and though he be to have nothing for his pains, yet if there were any neglect in him, he will be answerable; for his having undertaken a trust is a sufficient consideration; but if the goods be misused by a third person, in the way, without any neglect of his, he would not be liable, being to have no reward.

The above is taken from Lord Chief Justice Holt's opinion, in the case of Coggs v. Bernard, 2 Ld. Raym. 909. as abridged, Bull. N. P. 72. See also Sir. W. Jones's Essay on the Law of Bailment, p. 35: Com. Rep. 133. with Mr. Rose's notes; and on this subject, 2 Inst. 39; 4 Rep. 83; 1 Roll. Ab. 338; 1 Inst. 89. b : Doct. & St. 122 : Bac. Ab. Bailment.

(ed. by Gwillim and Dodd.)

Having mentioned Sir W. Jones's Essay on the Law of Bailment, we cannot help recommending it to the attention of the rational student; and for the use of such, extracting the following analysis, which will in general be found to be consonant with the determinations in the books, and convey much know-ledge in a short compass. Sir W. Jones differs in a few points from Lord Holt and Lord Coke, and his reasons are deserving of much attention.

"I. DEFINITIONS .-- 1. Bailment, as before at the beginning of this article .- 2. Deposit is a bailment of goods to be kept for the bailor without recompense .- 3. Mandate is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them .- 4. Lending for use is a bailment of a thing for a certain time, to be used by the borrower without paying for it. -5. Pledging is a bailment of goods by a debtor to his creditor, to be kept till the debt be discharged.-6. Letting to hire is (1) a bailment of a thing to be used by the hirer for a compensation in money; or (2) a letting out of work and labour to be done, or care and attention to be bestowed by the bailee on the goods bailed, and that for a pecuniary recompense; or (3) of care and pains in carrying the things delivered from one place to another, for a stipulated or implied reward.-Innominate bailments are those where the compensation for the use of a thing, or for labour and attention, is not pecuniary; but either (1) the reciprocal use or the gift of some other thing; or (2) work and pains reciprocally undertaken; or (3) the use or gift of another thing in consideration of care and labour; and conversely .- 8. Ordinary neglect is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns.-9. Gress neglect, is the want of that care which every man of common sense, how inattentive Vol. I.—22

II. 8 .- 10. Slight neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels .- 11. A naked contract is a contract made without consideration or recompense.

"II. THE RULES which may be considered as axioms flowing from natural reason, good morals, and sound policy are these :- 1. A bailee who derives no benefit from his undertaking, is responsible only for gross neglect. 2. A bailee who alone receives benefit from the bailment, is responsible for slight neglect. -3. When the bailment is beneficial to both parties, the bailee must answer for ordinary neglect.—4. A special agreement of any bailee to answer for more or less, is in general valid .- 5. All bailees are answerable for actual fraud, even though the contrary be stipulated .- 6. No bailee shall be charged for a loss by inevitable accident or irresistible force, except by special agreement.-7. Robbery by force is considered as irresistible; but a loss by private stealth is presumptive evidence of ordinary neglect .- 8. Gross negleet is a violation of good faith. -9. No action lies to compel performance of a naked contract.-10. A reparation may be obtained by suit for every damage occasioned by an injury .-- 11. The negligence of a servant acting by his master's express or implied order, is the negligence of the master.

"III. From these rules the following Pro-POSITIONS are evidently deducible;-1. A depositary is responsible only for gross neglect: or in other words for a violation of good faith. -2. A depositary whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed.

3. A mandatary to carry is responsible only for gross neglect, or a breach of good faith.-4. A mandatary to perform a work is bound to use a degree of diligence adequate to the peformance of it.-5. A man cannot be compelled by action to perform his promise of engaging in a deposit or mandate; but-6. A reparation may be obtained by suit for damage occasioned by the non-performance of a promise to become a depositary, or a mandatary.-7. A borrower for use is responsible for slight negligence.—8. A pawnee is answerable for ordinary neglect .- 9. The hirer of a thing is answerable for ordinary neglect.-10. A workman for hire must answer for ordinary neglect of the goods bailed. and must apply a degree of skill equal to his undertaking.-11. A letter to hire of his care and attention, is responsible for ordinary negligence.-12. A carrier for hire by land or by water, is answerable for ordinary neglect.

"IV. Exceptions to the above rules and

and officiously engages to keep or to carry the goods of another, though without reward, must answer for slight neglect .- 2. If a man through strong persuasion and with reluctance undertake the execution of a mandate, no more can be required of him than a fair exertion of his ability.—3. All bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed on a lawful demand .-- 4. A borrower and a hirer are answerable on all events, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement .- 5. A depositary and a pawnee are answerable in all events if they use the things deposited or pawned. But it rather seems that if the thing bailed be an animal requiring exercise, as a horse, or setting dog, there would be an implied authority from the bailor for moderate use. See Bac. Ab. Bailment (A.) (7th ed.)-6. An innkeeper is chargeable for the goods of his guest within his inn, if the guest be robbed by the servants or inmates of the keeper .- 7. A common carrier by land or by water, must indemnify the owner of the goods carried, if he be robbed of them.

"V. It is no exception, but a Corollary from the rules, that every bailee is responsible for a loss by accident or force, however inevitable or irresistible; if it be occasioned by that degree of negligence for which the nature of his contract makes him generally answerable."

The cases cited and commented on by Sir Wm. Jones, besides the above of Coggs v. Bernard, and which lead to the whole law on this subject, are 1 Str. 128. 145: 2 Str. 1099: Allen, 93: Fitz. Detinue, 59: (Bonion's case, the earliest on this subject: 8 Rep. 32: 1 Wils. 281: Burr. 2298: 1 Vent. 121. 190. 238: Carth. 485. 7: 2 Bulst. 280: 1 Ro. Ab. 2. 4. 10: 2 Ro. Ab. 567: 12 Mod. 480: 2 Raym. 220: Moor, 462. 543: Owen, 141. 1: Leon. 224: 1 Cro. 219: Bro. Ab. tit. Bailment: Hob. 30: 2 Cro. 339. 667: Palm. 548; W. Jo. 159: 4 Rep. 83. q.: (Southcote's case)
1 Inst. 89. a. Many of them, however, are more peculiarly applicable to carriers.

The following cases may serve to illustrate

the above principles.

A man leaves a chest locked up with another to be kept, and doth not make known to him what is therein; if the chest and goods in it are stolen, the person who receives them shall not be charged for the same, for he was not trusted with them. See Bac. Ab. Bailment (A.) (7th ed.): and see 4 Barn. & A. 42.; 5 Barn. & A. 348. And what is said as to stealing is to be understood of all other inevitable accidents; but it is necessary for a man that receives goods to be kept, to receive them in a special manner, viz. to be kept as lity with what is borrowed. Dr. & Stud. 129.

propositions:-1. A man who spontaneously | his own, or at the peril of the owner. 1 Lill. Abr. 193, 194: and vide 1 Roll. Abr. 338: 2 Show. pl. 166.

If I deliver 100l. to A. to buy cattle, and he bestows 50l. of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed and charges, &c., but for the rest I shall recover. Hob.

If one deliver his goods to another person, to deliver over to a stranger, the deliverer may countermand his power, and require the goods again; and if the bailee refuse to deliver them, he may have an action of account for them. Co. Lit. 286.

If A. delivers goods to B., to be delivered over to C., C. hath the property, and C. hath the action against B., for B. undertakes for the safe delivery to C., and hath no property or interest but in order to that purpose. 1 Roll. Abr. 606: see 1 Bulst. 68, 69. where it is said that, in case of conversion to his own use, the bailee shall be answerable to both.

But if the bailment were not on valuable consideration, the delivery is countermandable; and in that case, if A. the bailor brings trover, he reduces the property again in himself, for the action amounts to a countermand; but if the delivery was on a valuable consideration, then A. cannot have trover, because the property is altered; and in trover the property must be proved in the plaintiff. 1 Bulst. 68: see 1 Leon. 30: see Bos. & Pull. 582: 8 Term R. 330: 2 Camp. 639; Bac. Ab. Action on the Case. (A.)

And where a man delivers goods to another, to be re-delivered to the deliverer at such a day, and before that day the bailee doth sell the goods in market overt; the bailor may at the day seize and take his goods, for the pro-

perty is not altered. Godb. 160.

If A. borrows a horse to ride to Dover, and he rides out of his way, and the owner of the horse meets him, he cannot take the horse from him; for A. has a special property in the horse till the journey is determined; and being in lawful possession of the horse, the owner cannot violently seize and take it away; for the continuance of all property is to be taken from the form of the original bargain, which, in this case, was limited till the appointed journey was finished. Yelv. 172. But the owner may have an action on the case against the bailee for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property; but no general action of trespass, because it is not an open and violent invasion of it. 1 Roll. Rep. 128.

As to borrowing a thing perishable, as corn, wine, or money, or the like, a man must, from the nature of the thing, have an absolute property in them; otherwise it could not supply the uses for which it was lent; and therefore he is obliged to return something of the same sort, the same in quantity and qua-

But if one lend a horse, &c. he must have | BALISTARIUS. A balister or cross-bowthe same restored. If a thing lent for use man. Gerrard de la War is recorded to have be used to any other end or purpose than that for which it was borrowed, the party may have his action on the case for it, though the thing be never the worse; and if what is borrowed be lost, although it be not by any negligence of the borrower, as if he be robbed of it; see Bac. Ab. Bailment (B.) (7th ed.); or where the thing is impaired or destroyed by his neglect, admitting that he put it to no more service than that for which borrowed, he must make it good: so where one borrows a horse, and puts him in an old rotten house ready to fall, which falls on and kills him, the borrower must answer for the horse. But if such goods borrowed perish by the act of God (or rather, as Sir Wm. Jones says it ought to be termed, by inevitable accident) in the right use of them; as where the borrower puts the horse, &c. in a strong house, and it falls and kills him, or it dies by disease, or by default of the owner, the borrower shall not be charged. 1 Inst. 89: 29 Ass. 28: 2 H. 7. 11.

If one delivers a ring to another to keep, and he breaks and converts the same to his own use; or if he deliver my sheep to another to be kept, and he suffers them to be drowned by his negligence; or if the bailee of a horse, or goods, &c. kill or spoil them, in these cases action will lie. 5 Rep. 13: 15 Ed. 4. 20, b: 12 Ed. 4. 13.

If a man deliver goods to another, the bailee shall have a general action of trespass against a stranger, because he is answerable over to the bailor; for a man ought not to be charged with an injury to another, without being able to retire to the original cause of that injury, and in amends there to do himself right. 13 Co. 69: 14 H. 4. 28: 25 H. 7. 14. See Rooth v. Wilson, 1 Barn. & A. 59: Croft v. Alison, 4 Barn. & A. 590. See the several heads under tit. Bailment in Bac. Ab. (7th ed.) and the notes of the last editor.

BAIRMAN. A poor insolvent debtor, left bare and naked. Stat. Wil. Reg. Scot. cap.

BAIRNS' PART (Children's part), is a third part of the defunct's free moveables, debts deducted, if the wife survived; and a half (if there be no relict) due to the children. Scotch Dict.

BALCONIES to houses in London are regulated by the Building Act, 14 G. 3. c. 78.

§ 48. &c.

BALE. (Fr.) A pack, or certain quantity of goods or merchandize; as a bale of silk, cloth, &c. This word is used in the old repealed statute 16 R. 2. c. 3. and is still in use.

BALENGER. By the stat. 28 H. 6. c. 5. seems to have been a kind of barge, or water vessel. But elsewhere it rather signifies a man of war. Walsing. in R. 2.

BALEUGA. A territory or precinct. Chart.

H. 2. See Bannum.

been balistarius domini regis, &c. 28 and 29

BALKERS, are derived from the word balk, because they stand higher, as it were, on a balk or ridge of ground, to give notice of something to others. Shep. Epitom. vide Conders.

BALLARE. To dance, Spelm. Perhaps, in this sense, it may be understood in Fleta. lib. 2. c. 87. de caseatrice; Anglice Dairy-

BALLIVA. A bailiwick or jurisdiction. Sec tit. Bailiwick,

BALLIVO AMOVENDO. A writ to remove a bailiff from his office, for want of sufficient land in the bailiwick. Reg. Orig.

See tits. Bailiff, Sheriff.

BAN; or bans, from the Brit. ban. i. e. clamor.] A proclamation or public notice; any public summons, or edict, whereby a thing is commanded or forbidden. It is a word ordinary among the feudists; and for its various significations, see Spelman, in v. Bannum. The word bans, in its common acceptation, is used for the publishing matrimonial contracts, which is done in the church before marriage; to the end that if any man can speak against the intention of the parties, either in respect of kindred, pre-contract, or for other just cause, they may take their exceptions in time, before the marriage is consummated; and in the canon law, Banne sunt proclamationes sponsi et sponsæ in ecclesiis fieri solitæ. But there may be a faculty or licence for the marriage, and then this ceremony is omitted. See tit. Mar-

BANCALE. A covering of ease and ornament for a bench, or other seat. Monasti-

con, tome 1. p. 222.

BANE, from the Sax. bana, a murderer.] Signifies destruction or overthrow: as, I will be the bane of such a man, is a common saying; so when a person receives a mortal injury by any thing, we say it was his bane. and he who is the cause of another man's death, is said to be le bane, i. e. malefactor.

Bract. lib. 2. tract. 8. cap. 1.

BANERET, banerettus, miles vexillarius.} Sir Thomas Smith, in his Repub. Angl. cap. 18. says, is a knight made in the field, with the ceremony of cutting off the point of his standard, and making it, as it were, a banner, and accounted so honourable that they are allowed to display their arms in the king's army, as barons do, and may bear arms with supporters. See Camden and Spelman, from whom it appears banerets are the degree between barons and knights. Spel. in v. Banerettus. It is said that they were anciently called by summons to parliament: and that they are next to barons in dignity appears by the stats. 5 R. 2. st. 2. cap. 4. and 14. R. 2. c. 11. William de la Pole was created baneret

by King Edward the Third by letters patent, was 5, 6 W. & M. c. 20; their charter has Anno Regni sui 13. And those banerets who are created sub vexiliis regiis, in exercitu regali, in aperto bello, et ipso rege personali-ter præsente, explicatis, take place of all baronets; as we may learn by the letters patent for creation of baronets. 4 Inst. 6. Some maintain that knights banerets ought not to be made in a civil war; but Henry VII. made divers banerets upon the Cornish commotion in the year 1495. See Selden's Titles of Honours, f. 799.

BANISHMENT, Fr. banissement; Exilium abjuratio.] Is a forsaking or quitting the realm; and a kind of civil death inflicted on an offender: there are two kinds of it, one voluntary and upon oath, called abjuration, and the other upon compulsion for some offence. Staundf. Pl. Cr. f. 117. See tits. Ab-

juration; Transportation.

Such a power to banish an offender was given by the stat. 60 G. 3. c. 8. § 4. upon conviction of printing or publishing a blasphemous or seditious libel. But this was repeal-

ed by stat. 1 W. 4. c. 73.

BANK. Lat. bancus, Fr. banque. In our common law is usually taken for a seat or bench of judgment: as Bank le Roy, the King's Bench, Bank le Common Pleas, the Bench of Common Pleas, or the Common Bench; called also in Latin, Bancus Regis, and Bancus Communium Placitorum. Cromp. Just. 67. 91. Jus Bucci, or the privilege of the bench, was anciently allowed only to the king's judges, qui summum administrant justitiam; for interior courts were not allowed that privilege.

There are in each of the terms, stated days, called days in bank, dies in banco, that is, days of appearance in the court of Common Pleas. They are generally at the distance of about a week from each other, and regulated by some festival of the church. On some one of these days in bank all original writs must be made returnable: and therefore they are generally called the returns of that term. See

tit. Day.

A Bank, in common acceptation, signifies a place where a great sum of money is deposited, returned by exchange, or otherwise dis-

posed of to profit.

THE BANK OF ENGLAND is managed by a governor and directors, established by parliament, with funds for maintaining thereof, appropriated to such persons as were subscribers; and the capital stock, which is enlarged by divers statutes, is exempted from taxes, accounted a personal estate assignable over, not subject to forfeiture; and the Company make dividends of the profits, half-yearly, &c. The funds are redeemable by the parliament, on paying the money borrowed; and the Company of the Bank is to continue a corporation, and enjoy annuities till redeemed, &c.

The first act for incorporating this Bank

been continued by a series of subsequent acts, the last being 39, 40 G. 3. c. 28. by which it was extended or renewed until the expiration of twelve months' notice, to be given after the 1st August, 1833, and until payment, by the public, to the Bank of the demands therein mentioned.

During the continuance of the Bank, no body politick, &c. other than the Company shall borrow any sums on bills payable at demand; and forging the common seal of the Bank, and forging and altering Bank-notes, or tendering such forged notes in payment, demanding to have them exchanged for money, &c., and forging the names of cashiers of the Bank, are all capital felonies.

By stat. 59 G. 3. c. 49. the restrictions on payments in cash under the foregoing acts, were farther continued to the 1st of May, 1823: but with provisions that the Bank should pay in standard gold ingots of 60 oz. each, if demanded, at the following rates, viz. From 1st of Feb. 1820, to 1st of Oct. 1820, at 4l. 1s. per oz. From thence till 1st May, 1821, at 3l. 19s. 6d.; and from thence till 1st May, 1823, at 3l. 17s. 101-2d. per oz. being the Mint price. The Bank were allowed to pay in cash at any time after 1st May, 1822. the same act the Bank was required, until the end of the period of restriction, to deliver to the Privy Council weekly accounts of the average amount of Bank-notes in circulation.

This plan of payment in ingots was adopted on very detailed and interesting reports from both Houses of Parliament; and it was supposed the plan would gradually regulate the prices of gold: which, however, fell from 4l. 1s. to 3l. 17s. 10 1-2d. the Mint price, be-

fore the 1st Feb. 1820.

Similar regulations were made as to payments by the Bank of Ireland, by 59 G. 3. c.

By stat. 59 G. 3. c. 76. to establish farther regulations respecting advances by the Bank of England for the public service, it is enacted, that the Bank shall not make any advances to government, without the express and distinct authority of Parliament. That all applications for such advances shall be made in writing, by the First Lord of the Treasury or Chancellor of the Exchequer, and that copies of all such applications, and the answers of the Bank thereto, shall be yearly laid before Parliament. Advances to supply the deficiences of the Consolidated Fund, according to stats. 57 G. 3. c. 48. and 59 G. 3. c. 19. are excepted; as also the actual purchase of Exchequer Bills, &c. by the Bank, but of which accounts are also to be laid before parlia-

Any officers or servants of the Company, embezzling any Bank notes, &c. wherewith they are entrusted, being duly convicted, shall suffer death as felons.

Persons making, or assisting in making,

transfers of stock in any other name than that warrants, or making false entries in the bank books, are made guilty of felony without clergy.—Persons making out false dividend warrants transportable for seven years. 35 G. 3. c. 66.

By act 1 W. 4. c. 66. (the general forgery act) any person who shall forge or alter, or shall offer either to dispose of or put off. knowing the same to be forged or altered, any note or bill of exchange of the Bank of England, commonly called a bank note, bank bill of exchange, or bank post bill, or any indorsement on or assignment of any bank note, bank note of exchange, or bank post bill, with intent to defraud any person whatsoever, shall be guilty of felony, and shall suffer death as a felon. This act repeals all former acts relating to such forgeries.

36 G. 3. c. 90. § 1. When trustees, in whose name stock stands in the bank, shall be out of the kingdom, &c. or become bankrupts, the courts may order such stock to be transferred, or the dividends paid, &c. And see 52 G. 3. c. 32. 158. and tit. Trustees.

By 37 G. 3. c. 28. notes issued by the bank

for sums under 5l. were declared valid.

By 37 G. 3. c. 28. afterwards continued and amended by several acts, the Bank of England was restrained from making payments in cash: and if the amount of any debt were tendered in bank notes, or bank notes and cash, the party tendering could not be arrested.- Like provisions were made as to the Bank of Ireland by several acts.]

The act renewing its charter is noticed

under England, Bank of.
BANK OF SCOTLAND. This bank was erected by an act of the Scots parliament, in 1695, with a capital of 1,200,000l. Scots (100,000l. sterling.)-By British acts, 14 G. 3. c. 32: 24 G. 3. c. 12: 32 G. 3. c. 25: 34 G. 3. c. 19: and 44 G. 3. c. 23. (local and personal) this capital has been increased to the amount, in

the whole, of 1,500,000l. sterling.

BANK OF IRELAND. This was established by an act of the Irish parliament, 21 and 22 G. 3. c. 16. amended and the charter continued by 31 G. 3. c. 22: 37 G. 3. c. 50: and 48 G. 3. c. 103: 3 G. 4. c. 26.—Payments in cash by this Bank were restrained during the war, in the same manner as by the Bank of England. By 42 G. 3. c. 87. this bank was enabled to purchase the parliament house in Dublin, rendered useless by the Union. By stat. 6 G. 4. c. 5. courts of equity in Ireland are empowered to direct or restrain transfers of stock in the Bank of Ireland, in suits between parties, without making the Bank a party. See tit. Ireland.

BANK-CREDITS. Credits peculiar to Scotch banking, by which, on proper security given to the bank, a person receives liberty to draw to a certain extent agreed on, and for which, with the interest on the sum drawn,

previous security is given. See the act 33 of the owner, or forging transfers or dividend | G. 3. c. 74. § 12. for securing such credits by granting securities on lands of the debtor.

BANKERS. The monied goldsmiths first got the name of bankers in the reign of King Charles the Second; but bankers now are those private persons in whose hands money is deposited and lodged for safety, to be drawn out again as the owners have occasion for it. See the preceding title and title Forgery.

By stat. 7 and 8 G. 4. c. 29. § 49. &c. (and in Ireland by 9 G. 4. c. 55. § 42. &c.) any banker (merchant, broker, attorney, or agent), who being entrusted with money, or security for money, with written directions for the application thereof, shall convert the same to his own use; or who, being entrusted with any security, or power of attorney, for safe custody, without authority to sell, &c., shall sell, negociate, or apply such security to his own use (in violation of good faith and contrary to the purpose specified), shall be guilty of a misdemeanor, punishable by transportation for seven or fourteen years, or fine and imprisonment. Not to affect trustees, or mortgagees, nor bankers, &c. receiving money due on securities, or disposing of securities in which they have a lien. Several acts are in force for regulating copartnerships of bankers in Ircland, the most material being 6 G. 4. c. 42. as amended by 1 W. 4. c. 32.

BANKRUPT. A trader who secretes himself, or does certain other acts, tending to defraud his creditors. 2 Comm. 285. 471. The word itself is derived from bancus or banque, the table or counter of a tradesman; (Dufresne, i. 969.) and ruptus, broken, denoting thereby one whose shop or place of trade is broken or gone.-It is observable that the title of the first English statute concerning this offence, stat. 34 H. 8. c. 4. "against such persons as do make bankrupt," is a literal translation of the French idiom qui font banque

route. 2 Comm. 472. n.

The bankrupt law has, from the time of Henry VIII., been a system of positive statute regulations, the earliest act being 34, 35 H. 8. c. 4, and the latest general act the 6 G. 4. c. 16. in which last the provisions of all former acts are now consolidated. This act extends only to English traders, and not to Scotland or Ireland, except in a few specified instances so far as relates to the property of English traders becoming bankrupt. effect of this act, and of the legal decisions upon it and the former acts, may be learned by consulting Mr. Deacon's valuable Treatise on the Bankrupt Law, and Mr. Eden's (now Lord Henly) Practical Treatise on the Bank-rupt Law. Mr. Eden was entrusted by Lord Chancellor Eldon with the preparation of the act itself, and the distinguishing features of the law are stated by himself in the introduction to the treatise, from which the following extracts have been made.

In the course of the two sessions of par-

public was called to the state of the bankrupt law, by the proceedings of a committee of the House of Commons.

The recommendation of the committee of the House of Commons to consolidate the whole body of the bankrupt statutes had been most unaccountably neglected, although this branch of statute law peculiarly suggested itself for consolidation. It had been scattered through the statute book in various different acts (the discordant produce of nearly two centuries and a half), many of them containing mere repetitions of each other, or repetitions with small variations, some repealing parts of others, and almost all presenting striking specimens of obscurity, prolixity, and redundance. By the sanction and patronage of the learned and venerable Lord Eldon, the arrangement and consolidation of this most difficult and intricate branch of the law was at last effected. In the session of 1823 a consolidation bill was first introduced into parliament; and in the session of 1824 it was considerably amended and passed. Stat. 5. G. 4. c. 98. But it had been provided that it was not to come into operation till the 1st of May, 1825; and as many most important and valuable amendments had been made in the interim, it was thought expedient in the next session to replace it by a new act (6 G. 4. c. 16.), to take effect from 1st day of September, 1825. This act now contains the existing bankrupt law.

The first considerable alteration consists in collecting and extending the descriptions of traders. The construction put upon the former acts excluded many persons who upon every sound principle ought to have been included within them. In this new act, besides a specific enumeration of the several classes of persons, the general words of description have been so enlarged as to comprehend every one who ought, upon sound principles, to be liable to the inconveniences, or entitled to the immunities of the bankrupt law.

The act has introduced several new acts of bankruptcy, which, owing to the narrow notion of bankruptey being a crime, and the consequence deduced from it, that it could not be committed abroad, were not formerly ranked as such. Such are the remaining abroad with the intent to defeat creditors, where the original departure from the realm was not with such intent; executing a fraudulent deed abroad; fraudulent executions; fraudulent surrenders of copyhold; fraudulent gifts, deliveries, or transfers of goods and chattels. The requisite period for lying in prison, in order to constitute an act of bankruptcy, is reduced to twenty-one days; and several alterations of minor importance have been introduced into the provisions as to acts of bankruptcy.

liament in 1817 and 1818, the attention of the I finds himself in insolvent circumstances ought to be able publicly to declare it, and to take steps to secure the distribution of his estate among his creditors, is adopted in this act; a measure intended to check the litigation caused by concerted commissions, and to give a fair opportunity for that species of equitable arrangement which no provisions, however severe, could entirely prevent. On the other hand, the doctrine that the conveyance of all a trader's property to trustees in trust for his creditors, is an act of bankruptcy, has been thus far limited:-that if certain formalities to insure publicity are complied with, a commission cannot be sued out upon it after six months. By this means, this cheap and beneficial mode of distributing an insolvent estate is put within the reach of creditors, while the evil of secrecy (in general so just an objection to trust deeds) is effectually provided against.

> Great expence and inconvenience having arisen from the petitioning creditor's debt being, after a lapse of time, discovered to be insufficient, two provisions are introduced to counteract this evil. 1st. A commission is declared valid notwithstanding an act of bankruptcy previous to the petitioning creditor's debt; and 2ndly. In case it be afterwards found insufficient to support the commission, the lord chancellor is empowered, on the petition of creditors (whose debts are of sufficient amount to support a commission) to direct it to be proceeded in. A creditor is also allowed to petition, although his debt has not

become actually payable.

The Messenger of bankrupts is effectually indemnified against the expence of actions brought to try the validity of the commission; and the commissioners receive the same protection which justices of the peace are allowed

in actions brought against them.

The Proof of various debts which were not before proveable is by this act permitted; as, for instance, contingent debts, costs, interest on promissory notes, by sureties for annuities, and peculiar indulgences are given to clerks, servants, and apprentices. As the bankrupt is stripped of all his property, it is but justice that every person who is substantially a creditor should be permitted to obtain a share of it; and that, on the other hand, the bankrupt should receive an effectual and co-extensive discharge. The commissioners have also the power of expunging proofs, thereby saving the great expence heretofore incurred by the necessity of a petition in every case.

The relation to the act of bankruptcy (that is, the principle that the bankrupt's estate vests in the assignees, retrospectively from the act of bankruptey,) has been greatly curtailed in its extent and operation. All payments whatever, either by or to the bankrupt, without notice of an act of bankruptcy, are protected down to the date of the commission; The important principle, that a trader who and upon the principle that there should be a

period when purchasers are not to be molest- All debts are allowed to carry interest in the ed, and litigation should cease, it is provided event of a surplus according to certain priorthat purchasers for valuable consideration, even with notice of an act of bankruptcy, shall not be impeached unless a commission issue within twelve months after such act of bankruptcy. The subject matter of the notice which is to affect the party dealing with the bankrupt, and which varied in almost every former act, is now made uniform; being notice only of an act of bankruptcy, not merely of insolvency or of stopping payments; and the presumption that the issuing of a commission (a fact known only to a few clerks) is notice of an act of bankruptcy to all the world, is abolished; the only constructive notice now being the circumstance of a commission having appeared so long a time in the Gazette, that the party to be affected by it might have seen it.

In order still more to check the immense expence attending litigation, it is provided that, in all cases where the assignees sue for a debt, for which the bankrupt himself might have sued had he been solvent, the deposition shall be conclusive evidence of the requisites to support a commission; and in other cases, that unless the party chooses to contest the commission at the hazard of paying costs if he fail, no proof shall be required at the trial of the debt, trading, and act of bankruptcy. In the former case provisions of indemnity are given to debtors from whom the assignees have recovered, or who bona fide pay to the assignees debts due to the bankrupt's estate, in the event of the commission being after-

wards superseded. A great number of other alterations, minute in appearance, but important in effect, have been introduced in order to embrace or exclude cases which the old law had improperly omitted or included. A few of the more striking are the following:-Auxiliary commissions are allowed to be issued for the examination of witnesses, as well as for the proof of debts; a more effective mode of taxation of bills under the commission is provided; the power of summoning and examining the various persons over whom jurisdiction is given to the commissioners, is more clearly and effectually defined. Important alterations are made in the following points: -The expences of witnesses; the warrant of commitment, proceedings upon habeas corpus, or actions for false imprisonment; proof under joint and separate commissions; the choice, the duties, and the liabilities of assignees; liens for rent, or under executions; in the mode of taking the account in case of set-off; in the audit and proceedings upon dividends; in the enlargement and adjournment of the bankrupt's examination; as to his maintenance and allowance; as to the legal objections to the certificate, and as to reities; and under a second commission, future effects are vested in the assignees, unless 15s. in the pound be paid; and, finally, an important provision has been adopted from the Scotch Sequestration Act, termed the composition contract, by which, if a composition, or security for a composition, be offered, which is approved by two meetings of creditors, and by a majority of nine-tenths in value of the creditors at each of such meetings, the lord chancellor is directed to supersede the commission.

The act concludes with a provision, that it shall be construed beneficially for creditors, and that nothing therein contained shall alter the former practice in bankruptcy, except where any such alteration is expressly declared; and that it shall extend to aliens, denizens, and women, as well to make them subject thereto, as to entitle them to all the benefits given thereby; and that all powers by the act given to, and all duties directed to be performed by, the lord chancellor, shall and may be exercised and performed by a lord keeper, or by lords commissioners of the great seal. And all powers, &c. of commissioners or assignees may be executed by the major part of them, or by one assignee where only one shall have been chosen. 6 G. 4. c. 16. § 136.

The new Bankrupt Court .- Such were the principal alterations in the bankrupt law effected by the consolidation act, 6 G. 4. c. 16. A most material innovation on the established mode of administering that law has been since effected by the new act, 1 and 2 W. 4. By this act, which it is convenient to state before we briefly digest the bankrupt law under its principal heads, the seventy commissioners of bankrupt are in effect abolished, and their functions and authority transferred to six barristers, commissioners of the Court of Bankruptey (with salaries of 1,500l. per ann.) The authority and jurisdiction of the lord chancellor and the vice chancellor sitting in bankruptcy are in effect done away, and vested in a new court composed of one chief judge and three puisne judges, the first having a salary of 3,000*l*. per ann., and the three last of 2,000*l*. This court is called "the Court of Bankruptcy," and is, together with every judge and commissioner thereof, constituted a court of record, with all the rights and incidents of such a court. The judges, or any three of them, form a court of review, and have superintendance and control in all matters of bankruptcy, and jurisdiction to hear and determine all such matters as are now usually brought by petition or otherwise, before the lord chancellor, and also to hear and determine all such other matters, as by the rules and regulations of the court shall be assigned to the said court of review. Such quiring that a new promise to pay a debt matters are to be brought on by petition, mobarred by the certificate shall be in writing. tion, or special case with an appeal to the lord

on the refusal or admission of evidence. The court may direct issues of fact to be tried by a jury before one of the judges thereof, or before a judge of assise. Any one or more of the commissioners may perform all the duties now performed by commissioners of bankrupt, as if authorised by a separate commission under the great seal, except that no single commissioner can commit any bankrupt or other person otherwise than to the custody of the officer of the court, to be brought before the Court of Review, or a subdivision court of three commissioners within three days after such commitment. Attornies and solicitors of the superior courts at Westminster may be admitted to practise in the Court of Bankruptcy, and may appear and plead in any proceedings without counsel (except proceedings before the Court of Review, and on the trial of issues by jury;) and all acts in force, as to attornies and solicitors, shall extend to attornies practising in the new court. The judges of the Court of Review, with the consent of the chancellor, are to make rules for regulating the practice of the court. 12th section in effect abolishes commissions of bankrupt, and in all cases where the lord chancellor had power to issue a commission of bankrupt, it enables the chancellor, the master of the rolls, the vice chancellor, and each of the masters of the Court of Chancery, acting under the appointment of the lord chancellor, to issue his *fiat* in lieu of a commission, authorizing the creditor to prosecute his complaint in the Court of Bankruptcy or elsewhere, before such persons as the lord chancellor, &c. shall appoint, who shall have the same authority as if appointed by virtue of a commission. The fiats are to be filed and recorded in the court. The chancellor may annul such fiat, which shall have the same effect as the supersedeas of a commission of bankruptcy. All the powers given to the six commissioners may be exercised by the judges of the Court of Review. An important change is made as to the bankrupt's assignees. Thirty persons, being merchants, brokers, or accountants, are to be chosen by the chancellor to act as official assignces in all bankrupteics prosecuted in the Court of Bankruptcy, one of which official assignces shall. in all cases, be an assignce of each bankrupt's estate together with the assignees chosen by the creditors; and till the other assignees are chosen, the official assignce may act as sole assignee. The provisional and other assignments of the bankrupt's estate are, by the act, abolished, and the real and personal estate of the bankrupt is to vest in the assignees without any assignment or conveyance-a provision which will save some expence. court is to have a seal for the sealing of documents, &c. There is an appeal from the com- quoted are distinguished by the abbreviation missioners to the Court of Review, and from am. when they contain extensive and importthe Court of Review to the chancellor, in ant amendments of the former law, and by

chancellor on matters of law and equity, or | matters of law and equity, and on the refusal or admission of evidence. Debts may, by this act, be proved by affidavit subject to such orders, touching the personal attendance of the creditor, as the Court of Review, with the consent of the lord chancellor, may direct. By § 37. the lord chancellor may direct an appeal from himself to the House of Lords, and the Court of Review may, on application by the parties, direct an appeal at once to the House of Lords instead of to the lord chancellor. The judges and commissioners of the court may take evidence vica voce or on affidavits, as they may direct, or as the lord chancellor may prescribe. By § 42. no commission shall be superseded or fiat annulled by reason of its being concerted between the petitioning creditor, his solicitor or agent, and the bankrupt. This is an important alteration, which will prevent much litigation. On every fiat 10l. is to be paid to the lord chancellor's secretary of bankrupts, to be paid into the Bank of England, "to the Secretary of bankrupts' account," and the official assignee of cach estate is to pay 20l. to the like account; out of this fund the salaries of the judges, commissioners, and officers of the court, are to be defrayed. The official assignee of every estate is also to pay 10l. to the credit of the accountant-general, to an account to be called "the secretary of bankrupts' compensation account," and also 11. for certain sittings of the court or commissioners mentioned in § 55. and a certain per centage on the sums divided in dividends. This fund is to be applied for compensating the patentees "for the execution of the laws and statutes concerning bankrupts," Mr. Thurlow and Mr. Scott, and also such of the old commissioners of bankrupt as the Lords of the Treasury shall think entitled to compensation, and also certain officers of the Court of Chancery. No judge, commissioner, registrar, &c. of the court, shall be eligible to sit in parliament.

The provisions of the stats. 6 G. 4. c. 16. & 1 W. 4. c. 56. (with notes of such decided cases as tend to explain their principle) may be arranged under the following heads:-

> I. Who may be made Bankrupt as a Trader.

II. By what Acts of his own a Trader may become Bankrupt.

III. Proceedings under a Fiat (formerly a Commission) of Bankrupt.

IV. The Effect of the Fiat (Commission) on the Property of the Bankrupt.

V. Practical Directions as to incidental Proceedings, the Effect of Bank-ruptcy on all Parties concerned, and miscellaneous Matters.

The sections of the stat. 6 G. 4. c. 16. as

the word new, where they have been introduced for the first time by that act. The sections not so distinguished are copied from former acts (which are referred to) without alteration, or with such only as it did not appear necessary to notice. These distinctions are marked out in the title Bankrupt, prepared by Mr. Dodd, in the 7th edition of Bacon's Abridgment, and also in the Appendix to Eden's Bankrupt Law.

It would far exceed the limits of this Dictionary to accompany this outline of the new consolidated bankrupt law, with references to many of the cases determined before the act 6 G. 4. c. 16. They will be found arranged and digested in Bacon's Abridgment, tit. Bankrupt, edited by Mr. Dodd, and in Mr. Eden's Practical Treatise, and in Mr. Deacon's work on Bankruptcy already referred to.

I. Who may be made Bankrupt as a Trader. -All bankers, brokers, persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust, or custody, persons insuring [the classes in italics are new in this act] ships or their freight, or other matters against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, by gross or by retail, and all persons, who, either by themselves, or as agents, or factors for others, seek their living by buying and selling, or by buying and let. ting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt. Provided that no farm. er, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber, to any incorporated commercial, or trading companies established by charter or act of parliament, shall be deemed as such a trader, liable, by virtue of this act, to become bankrupt. 6 G. 4. c. 16. § 2. Am.

Buying and selling government stock, or other public stocks or securities, does not render a man liable to be made a bankrupt, because they are held not "goods or commodities." Colt v. Netterville, 2 P. Wms. 308. Nor will the buying and selling land, or any interest therein, make a man liable to be a bankrupt, for the same reason. See Port v.

Turton, 2 Wils. 169.

As to the "workmanship of goods and commodities," it may be remarked, that purchasing the raw material, and manufacturing it into a vendible article for the purpose of sale, and with a view to profit, was always holden to be a buying and selling within the former statutes, although part of the gain was to be derived from bodily labour; Cooke, 48, 49. 56; by which it would appear, that all

Vol. I.—23

a view to profit, are within the foregoing clause, whether they purchase the raw material or have it from their own land, &c. (as a brick-maker, alum-maker, eider-maker, who were not within the former statutes) without purchase. If a man buy milk merely to sell it again, with a view to profit, he is liable to be a bankrupt; but if he sells the milk only which he procures from his own cows, even though he occasionally sell the cows when they are unfit for that purpose, he is not. Carter v. Dean, 1 Swansi, 64. So if a man buy timber (even standing timber) to sell again with the view of profit, he is subject to the bankrupt laws. Holroyd v. Gwynne, 2 Taunt. 178: and see 9 Barn. & C. 577. But if he sell only that which he cuts down upon his own land he is not. In such case it is a question for jury whether there is an intention to deal generally. 3 Stark. Ca.

As to the exception that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of any company, shall be liable to this statute, it is to be observed, that by one of the repealed statutes, 5 G. 2. c. 20. § 40. no farmer, grazier, drover of cattle, or receiver-general of taxes, was to be deemed a bankrupt. But still if a farmer exercised a trade distinct and separate from his business as a farmer; if, for instance, he purchased horses, not for the purposes of his farm, but as a horse-dealer, merely to sell again with a view to profit, (Bartholomew v. Sherwood, 1 T. R. 573: Wright v. Bird, 1 Price, 20: Exparte Gibbs, 2 Rose, 38.) or purchased large quantities of potatoes, not to be used upon his farm, but merely to sell again at a profit; (Mayo v. Archer, 1 Str. 513.) in these and similar cases he would be liable to be made bankrupt, notwithstanding this statute. But if he purchased them as a farmer, to be used about his farm, even although he sell them again, (Cooke, 67.) or having too much he sell the surplus, (Cooke, 69. 73.) or if he occasionally buy and sell hay and corn, &c. with a view to make a profit, but without making them the means of livelihood, he would be within this exception. The question in all such cases is, whether the buying and selling is with a view of making a profit as a trader, or whether it is merely ancillary to the profitable occupation of the farm. See Bac. A.b tit. Bankrupt (A.) (ed. by Gwillim and Dodd.)

It is observable that drovers, although excepted by former statutes, are not mentioned in this, unless they are meant to be included in the words "cattle or sheep salesmen;" but they seem to be made subject to be made bankrupts under the clause as to buying and selling. As to the denomination of a "drover," see Mills v. Hughes, Willes, 588: Bolton v. Sowerby, 11 East, 274.

As to the members or subscribers of certain specified incorporated companies, various sta-

tutes have provided that they should not be | London Gazette within eight days after such liable to the bankrupt laws. Vide stat. 13 and 14 Car. 2. (as to the origin of which see Bac. Ab. tit. Bankrupt, vol. i. p. 526. 7th ed.); as to members of East India or Guinea Companies, stat. 9 and 10 W. 3: 8 and 9 W. 3: and 8 G. 1. as to stockholders in the Bank of England.

II. By what Acts of his own a Trader may become a Bankrupt.—The following are specifically stated as the acts by which any person declared by the act to be a trader shall be deemed to have committed an act of bankruptcy: viz. if such trader, 1. shall depart this realm; 2. or being out of this realm, shall remain abroad; 3. or shall depart from his dwelling-house; 4. or otherwise absent himself; 5. or begin to keep his house; 6. or suffer himself to be arrested for any debt not due; 7. or yield himself to prison; 8. or suffer himself to be outlawed; 9. or suffer himself to be arrested, or his goods, monies, or chattels to be attached, sequestered, or taken in execution; 10. or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels; 11. or make or cause to be made any fraudulent surrender of any of his copyhold lands, or tenements; 12. or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels. These acts must be all done with an intent to delay or defeat creditors. 6 G. 4. c. 16. § 3. Am. 13. If any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, or upon any detention for debt, shall be in prison for twenty-one days; or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged; 14. or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy, from the time of such arrest, commitment, or detention. 6 G. 4. c. 16. § 5. Am. 15. If any such trader shall file, in the office of the lord chancellor's secretary of bankrupts, a declaration in writing, signed by such trader, and attested by an attorney or solicitor, that he is insolvent, and unable to meet his engagement, the said secretary of bankrupts or his deputy shall sign a memorandum that such declaration hath been filed, which memorandum shall be authority for the printer of the London Gazette to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement, be an act of bankruptcy, committed by such trader at the time when such declaration was filed: but no commission shall issue thereupon, unless it be sued out within two calender months next after the insertion of such advertisement, nor unless such

declaration was filed; and no docket shall be struck upon such act of bankruptcy before the expiration of four days next after insertion of such advertisement, in case such commission is to be executed in London; or before the expiration of eight days next after such insertion, in case such commission is to be executed in the country; and the Gazette containing such advertisement shall be evidence to be received of such declaration having been filed. 6 G. 4. c. 16. § 6. New.

No commission under which the adjudication shall be grounded, on the filing of such declaration as an act of bankruptcy, shall be deemed invalid by reason of such declaration having been concerted or agreed upon between the bankrupt and any creditor or other person. 6 G. 4. c. 16. § 7. New; and see ante, the general provision doing away with the objection of concert, in the Bankrupt Court act. 16. If any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debt than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck, the lord chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may or-der it to be superseded and a new commission may issue, and such commission may be supported either by proof of such last mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction, or security, or the full value thereof, to such person as the commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt. 16. § 8. Am.

A material difference between this and a similar clause in a former act (5 G. 2. c. 30. § 24.) is, that the former only had in view private bargains; but under this act, it appears to be immaterial whether the money, satisfaction, or security, be given to the petitioning creditor or not.

Being out of the realm, remaining abroad. This act of bankruptcy is first introduced in 6 G. 4. c. 16.

Suffering outlawry.—The outlawry must be in England or Wales, and an outlawry in a county palatine will be sufficient. Com. Dig. Bankrupt: Radworth v. Bludworth, 1 Leo. 13.

Procuring himself to be arrested, or his goods, monies, or chattels, to be taken in execution .- A similar clause was in 1 Jac. 1. c. advertisement shall have been inserted in the 15. § 2; but the words "taken in execution"

were omitted, and the above words were introduced into 6 G. 4. c. 16. as it was holden that a fraudulent judgment and execution thereon, were not within the meaning of that act. Harman v. Spottiswoode, Cooke, 118: Clabankrupt before the time so advertised, or

vey v. Haley, Cowp. 427.

Where any trader shall execute any conveyance or assignment by deed to a trustee or trustees of all his estate and effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader: provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader, and that the execution by every such trader and by every such trustee be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee and of such attorney or solicitor. 6 G. 4. c. 16. § 4. New.

Making any fraudulent surrender of copyholds.—This was formerly holden not to be an act of bankruptcy, because as it was said, it could not be done with intent to delay creditors, inasmuch as creditors could not have

execution of copyhold lands.

Making any fraudulent gift, delivery, or transfer of his goods or chattels.—This includes mere manual delivery or transfer, as well as conveyances by deed or otherwise, the former of which was not provided for by the repealed statutes. In other respects, this clause requires the same construction as the tenth

act of bankruptcy.

Petition under the Insolvent Act.—By the insolvent act, 7 G. 4. c. 57. § 13. the filing of a petitition of every person in actual custody who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the court (constituted by that act) to be discharged from custody, shall be accounted and adjudged an act of bankruptey, from the time of filing such petition; and any commission issuing against such person, and under which he shall be declared bankrupt before the time appointed by the said court, and advertised in the London Gazette, for hearing the matters of such petition, or at any time within two calendar months from the time of filing such petition, shall have effect to avoid any conveyance or assignment of the estate

been made in pursuance of the provisions of this insolvent act; provided that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised, or within such two calendar months; but every such conveyance and assignment shall be valid, notwithstanding any commission of bankrupt under which such person shall be declared bankrupt after the time so advertised, and after the expiration of such two calendar months as aforesaid.

As to members of Parliament being bankrupts.—If any trader having privilege of parliament shall commit any of the acts of bankruptcy specified, a commission of bankruptcy may issue against him, and the commissioners, and all other persons acting under such commission, may proceed thereon in like manner as against other bankrupts, but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases of felony. 6 G. 4. c. 16. § 9.

(As 4 G. 3. c. 33. § 4.)

If any creditor of any such trader, having privilege of parliament to such amount as is requisite to support a commission, shall file an affidavit in any court of record at Westminster, that such debt is justly due to him, and that such debtor is such trader as aforesaid, and shall sue out of the same court a summons or any original bill and summons (now a writ of summons under the act for uniformity of process, 2 W. 4. c. 39.) against such trader, and serve him with a copy of such summons, if such trader shall not within one calendar month after personal service of such summons, pay, secure, or compound for such debt or debts, to the satisfaction of such creditor, or enter into a bond in such sum and with two sufficient sureties as any of the judges of the court out of which such summons issue shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same; and within one calendar month next after personal service of such summons, cause an appearance to be entered to such action in the proper court in which the same shall have been brought; every such trader shall be deemed to have committed an act of bankruptcy, from the time of the service of such summons; and any creditor of such trader, to such amount as aforesaid, may sue out a commission against him, and proceed thereon in like manner as against other bankrupts. 6 G. 4. c. 16. § 10. (As 4 G. 3. c. 33. § 1: 45 G. 3. c. 124. § 1. except that the period of payment is reduced from two calendar months to one.)

vertised in the London Gazette, for hearing the matters of such petition, or at any time mounced in any cause depending in any court of equity, or any order made in any matter of bankruptcy (or lunacy) against any trader any conveyance or assignment of the estate and effects of such person which shall have

trader shall disobey the same, having been depart withal, and with all his money, fees, duly served upon him, the persons entitled to receive such such sum under such decree or order, or interested in enforcing the payment thereof pursuant to such decree or order, may apply to the court, by which the same shall have been pronounced, to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose; and if such trader, being personally served with such last-mentioned order eight days before the day therein appointed for payment of such money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy, from the time of the service thereof, and any such creditor or creditors may sue out a commission against him, and proceed thereon in like manner as against other bankrupts. 6 G. 4. c. 16. § 11. (As 45 G. 3. c. 124. § 7.) stat. 52 G. 3. c. 114. (which is not repealed by 6 G. 4. c. 16.) in case a commission of bankrupt against a member of parliament be not superseded, or all debts satisfied within twelve months, the seat of the member shall become actually void: and after the bankruptcy, he is incapable of sitting and voting till such supersedeas or satisfaction. See tit. Parliament.

Where a trader committed an act of bankruptcy in March 1825, on which a commission might have issued on the statutes then in force, and on the 1st May those statutes were repealed; and on the 2d May the repealing act was repealed, and the former acts thereby revived, and in July a commission issued: it was held to be supported by the act of bankruptcy in March. 10 Barn. & C. 39: and see 9 Barn. & C. 750.

III. Proceedings on and Effect of a Fiat (formerly a Commission) of Bankruptcy.—As to issuing the Fiat, Proceedings thereon, and the Power of the Commissioners.

It is necessary to state here the provisions of the 6 G. 4. c. 16. as to the petitioning creditor's debt, and the bond, since they remain in force. As to the issuing of a fiat under the new act, see post.

The lord chancellor shall have power upon

petition made to him in writing, against any trader having committed an act of bankruptcy, by any creditor of such trader, by commission under the great seal, to appoint such persons as to him shall seem fit, who shall, by virtue of this act, and of such commission, have full power and authority to take such order and direction with the body of such bankrupt, as thereinafter mentioned, as also with all his lands, tenements, hereditaments, both within this realm and abroad, as well copyhold, or customaryhold, as freehold, which he shall have in his own right before he became bankrupt; as also with all such interest, in any such lands, tenements, and he- tificate thereof, 20s. and no more. 6 G. 4. c. reditaments, as such bankrupt may lawfully 16. § 14. Am.

offices, annuities, goods, chattels, wares, merchandize, and debts, wheresoever they may be found and known, and to make sale thereof in manner thereinafter mentioned, or otherwise order the same for satisfaction and payment of the creditors of the said bankrupt. 6 G. 4. c. 16. § 12. (As 13 Eliz. c. 7. § 2.) The petitioning creditor shall, before any commission be granted, make an affidavit in writing before any master ordinary or extraordinary in Chancery, (which shall be filed with the proper officer,) of the truth of his debt, and shall likewise give bond to lord chancellor, in the penalty of 200l. to be conditioned for proving his debt, as well before the commissioners as upon any trial at law. in case the due issuing forth of the commission be contested; and also for proving the party to have committed an act of bankruptcy at the time of taking out such commission, and to proceed on such commission; but if such debt shall not be really due, or if after such commission taken out it be not proved that the party had committed an act of bankruptcy at the time of the issuing of the commission, and it shall also appear that such commission was taken out fraudulently, or maliciously, the lord chancellor shall and may, upon petition of the party against whom the commission was so taken out, examine into the same, and order satisfaction to be made to him for the damages by him sustained; and for the better recovery thereof, may assign such bond or bonds to the party so petitioning, who may sue for the same in his own name. 6 G. 4. c. 16. § 13. (As 5 G. 2. c. 30. § 3.)

The petitioning creditor, or creditors, shall at his, or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall at the meeting for such choice, ascertain such costs, and by writing under their hands, direct the assignees to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the com-mission; and all bills of fees or disburse-ments of any solicitor or attorney, employed under any commission for business done after the choice of assignees, shall be settled by the commissioners, except that so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the court in which such business shall have been transacted, and the sum so settled shall be paid by the assignees to such solicitor or attorney; provided that any creditor who shall have proved to the amount of 201. or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a master in Chancery, who shall receive for such settlement, and the cer-

No commission shall be issued, unless the the persons so appointed shall have the like single debt of one creditor, or of two or more persons being partners, petitioning for the same, shall amount to 100l. or upwards; or unless the debt of two creditors, so petitioning, shall amount to 150l. or upwards; or unless the debt of three or more creditors, so petitioning, shall amount to 2001. or upwards. And every person who has given credit to any trader, upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition, or join in petitioning [whether he shall have any security, in writing or otherwise, for such sum or not.] 6 G. 4. c. 16. § 15. (As 5 G. 2. c. 30. § 23. the words in italics added.) If after adjudication, the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, the lord chancellor (upon the application of any other creditor having proved any debt or debts sufficient to support a commission, incurred not anterior to the debt or debts of the petitioning creditor,) may order the said commission to be proceeded in, and it shall by such order be deemed valid. 6 G. 4. c. 16. § 19. New. No commission shall be deemed invalid by reason of acts of bankruptcy prior to debts of petitioning creditors, or any of them, provided there be a sufficient act of bankruptcy subsequent to such debts. 6 G. 4. c. 16. § 19. New. Lord chancellor may issue an auxiliary commission for proof debts under 201., and for examination of witnesses, and for other purposes; and commissioners shall possess the same powers to compel attendance of witnesses, &c. as commissioners in original commissions. 6 G. 4. c. 16. § 20. New.

The flat of bankruptcy.—The new Bankrupt Court act abolishes commissions of bankrupt, and substitutes a fiat; but as the petitioning creditor's debt and the bond are still unaffected, the preceding provisions are in force. The 1 and 2 W. 4. c. 56. § 12. enacts that in every case where the lord chancellor, by any former act, had power to issue a commission of bankrupt, it shall be lawful for him, and also for the master of the rolls, the vice-chancellor, and each of the masters in Chancery, acting under the appointment of the lord chancellor for that purpose, on petition made to the lord chancellor against any trader having committed any act of bankruptcy, by any creditor of such trader, and upon his filing such affidavit and giving such bond as by law required, to issue his flat under his hand, in lieu of such commission; thereby authorizing such creditor to prosecute his said complaint in the Court of Bankruptcy, or elsewhere, before such proper persons as the lord chancellor, or the master of the rolls, vice-chancellor, or one of the masters in Chancery, acting as aforesaid by such fiat, may

power and authority as if they were appointed by a commission under the great seal. By & 13. any such fiat shall be filed and entered of record in the said court (see post), and it shall be lawful for any one of the commissioners of the court to proceed thereon in all respects as commissioners acting in the execution of a commission of bankrupt, save as the proceeding may be altered by that act. By § 14. the judges who go the circuits may be directed by the chancellor to return to him so many names as he shall think fit of barristers, solicitors, and attornies, practising in the counties; and on such persons being approved by the chancellor, the fiats not directed to the Court of Bankruptcy shall be directed to some one or more of such persons in rotation, to act as commissioners, according to the districts for which such persons shall be returned, and to no other person. Provided that the lord chancellor may remove any person from the lists to be returned for such cause as shall to him seem fit. By § 16. all laws and statutes, rules and orders, relating to bankrupts, or commissions of bankrupt, or to proceedings under commissions, or to the subject-matter of such proceedings, shall extend as far as applicable to fiats issued under the acts, and to all proceedings under the same, and to all the subject-matters of such proceedings, and to all persons concerned therein or affected thereby, as if every such fiat were a commission of bankrupt.

The commissioners shall receive and be paid the fee of 20s. each commissioner for every meeting, and the like sum for every deed of conveyance executed by them, and for the signature of the bankrupt's certificate; and where any commission shall be executed in the country, every commissioner, being a barrister at law, shall receive a farther fee of 20s. for each meeting; and in case the usual place of residence of such commissioner, being a barrister, is distant seven miles or upwards from the place where such meetings are holden, and he shall travel such distance to any such meeting, he may receive a farther sum of 20s. for every such meeting; and every such commissioner, who shall receive from the creditors, or out of the estate of the bankrupt, any farther sum than as aforesaid, or who shall eat or drink at the charge of the creditors, or out of the estate of the bankrupt, or order any such expence to be incurred, shall be disabled for ever from acting in such or any other commission. 6 G. 4.c. 16. § 22. Am.

Barristers, being commissioners under any commission to be executed in the country, entitled to summonses and fees, in priority to any other commissioners named in the commission. 6 G. 4. c. 16. § 23. New.

The above clause is not applicable to the commissioners of the new Bankrupt Court, who we have seen are paid a fixed salary, but think fit to nominate and appoint; and that it seems to apply to country commissioners.

oath, may, by writing under their hands, summon before them any person whom they shall believe capable of giving any information concerning the trading of, or any act or acts of bankruptcy committed by, the person against whom the commission is issued; and also to require any person so summoned to produce any books, papers, deeds, and writings, and other documents in the custody, possession, or power of such person, which may appear to the said commissioners to be necessary to establish such trading, or act or acts of bankruptcy. And commissioners may examine any such person upon oath, by word of mouth, or by interrogatories in writing, concerning the trade of, or any act or acts of bankruptcy committed by, the person against whom the commission shall have issued; and every such person so summoned shall incur such danger and penalty for not coming before the commissioners, or for refusing to sign or subscribe his examination, or for refusing to produce, or for not producing, any such book, paper, deed, writing, or document, as is thereby provided as to persons summoned after the adjudication of bankruptcy. [And the commissioners, upon proof made before them of the petitioning creditors' debt or debts, and of the trading, and act or acts of bankruptcy of the person or persons against whom such commission is issued, shall thereupon adjudge such person or persons bankrupt.] 6 G. 4. c. 16. § 24. (As 3 G. 4. c. 81. § 8. with the addition in brackets.) The commissioners, after they have so adjudged, shall forthwith cause notice of such adjudication to be given in the London Gazette, and shall thereby appoint three public meetings for the bankrupt to surrender and conform; the last of which meetings shall be on the fortysecond day limited for such surrender. § 25. But by the Bankrupt Court act (§ 20.) it shall be lawful for any commissioner, who shall make any adjudication of bankruptcy, to appoint two or more public meetings, instead of the three meetings directed by the act, for the bankrupt to surrender and conform; the last meeting to be on the forty-second day after the publication of his bankruptcy in the Gazette; and the choice of assignees shall take place on the first of such two meetings.

By § 27-32. of the act, extensive powers are given to all messengers, under the commissioners of bankrupt, for breaking open doors and seizing the goods of the bankrupt, in any part of the United Kingdom, and for protecting such messengers in case of any action against them for such proceedings.

When the commission is opened, the commissioners are first to receive proof of the person's being a trader, and having committed of mouth, or interrogatories in writing, touchsome act of bankruptcy. And it shall be ing all matters relating either to his trade, lawful for commissioners (after having taken | dealings, or estate, or which may tend to disthe oath prescribed; see the new Bankrupt close any secret grant, conveyance, or con-

The commissioners, after having taken Court act for the oaths of the judges and commissioners, § 8. 15.) by writing under their hands, to summon any person to give information, or to produce books, papers, deeds, or writings which may appear necessary to them to establish the trading, or any act of bankruptcy, and then to declare him a bankrupt, if proved so; and give notice in the Gazette, and shall appoint three public meetings for the bankrupt to surrender and confirm. See ante. And a notice in writing of his having been declared a bankrupt, must be left for the bankrupt at his usual place of abode, or served upon him personally, in case

he be in prison. § 112.

At the second meeting, or any adjournment thereof, assignees shall be chosen, and all creditors who have proved debts to the amount of 10l. and upwards, shall be entitled to vote in such choice, or any person duly authorized by letter of attorney. But commissioners have power to reject any person to them seeming unfit, and a new choice shall be made. § 61. Am. The bankrupt must surrender himself to the commissioners by 3 o'clock on the forty-second day after notice as aforesaid, § 112. (unless time enlarged by lord chancellor as often as he may think fit, which order must be made six days before the day on which the bankrupt was to surrender himself, § 113), which surrender voluntarily (or involuntarily, § 115) protects him from all arrests during the forty-two days, and during such farther time as shall be by the commissioners (§ 118. New) allowed him for finishing his examination (provided he is not in custody at time of surrender, concerning which there are special directions given, § 119.) must then and thenceforth submit himself to be examined. But if he will not conform to the directions of the statute, or in default of surrender or conformity, every such person shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge; or shall be liable to be imprisoned only, or imprisoned and kept to hard labour in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years. § 112. Commissioners, by writing under their hands, may summon any bankrupt before them, whether he shall have obtained his certificate or not; and in case he shall not come at the time appointed (having no lawful impediment,) the commissioners may authorize any persons to arrest the bankrupt, and bring him before them; and upon the appearance of such bankrupt, or if bankrupt be present at any meeting of commissioners, they may examine bankrupt on oath, either by word

cealment of his lands, tenements, goods, | may appoint any person to attend such bankmoney, or debts, and to reduce his answers into writing, which examination so reduced into writing he shall sign and subscribe. And if such bankrupt shall refuse to answer any questions put to him by commissioners, or shall not fully answer to satisfaction of commissioners, or shall refuse to sign his examination reduced into writing (not having any lawful objection allowed by commissioners), commissioners may, by warrant under their hands and seals, commit him to such prison as they shall think fit, there to remain without bail, until he shall submit himself to the commissioners to be sworn, and full answers to make to their satisfaction to such questions as shall be put to him, and sign and subscribe such examination. 6 G. 4. c. 16. § 36. (As 1 Jac. 1. c. 15. § 7, 8: 21 Jac. 1. c. 19. § 7: 5 G. 2. c. 30. § 16.) But no single commissioner, under the new act, (§ 7.) can commit any bankrupt, or other person, otherwise than to the care of a messenger or officer of the court, to be brought before a subdivision court, or the Court of Review, within three days after such commitment.

Commissioners may summon wife of any bankrupt to examine her, for the finding out and discovery of the estate, goods, and chat-tels of bankrupt, concealed, kept, or disposed of by such wife, in her own person, or by her own act, or by any other person; and she shall incur such danger or penalty for not coming before commissioners, or for refusing to be sworn, &c., as is provided against other persons. 6 G. 4. c. 16. § 37. (As 21 Jac. 1. c. 19. § 5, 6.) If a gaoler, to whose custody any bankrupt, or other person, shall be committed, as aforesaid, shall suffer such bankrupt, or other person, to escape, every such gaoler shall forfeit 500l. 6 G. 4. c. 16. § 38. (As 5 G. 2. c. 30. § 18.) It shall be lawful for commissioners, at time appointed for last examination of bankrupt, or any enlargement or adjournment thereof, to adjourn such examination sine die, and he shall be free from arrest or imprisonment for such time, not exceeding three calendar months, as they shall, by indorsement upon such summons as aforesaid, appoint, with penalty of 500l. upon any officer detaining such bankrupt, after having been shown such summons. 6 G. 4. c. 16. § 118. New. Whenever any bankrupt is in prison, or in custody, under any process, attachment, execution, commitment, or sentence, the commissioners may by warrant under their hands, directed to the person in whose custody such bankrupt is confined, · cause such bankrupt to be brought before them, at any meeting, either public or private. And if any such bankrupt is desirous to surrender, he shall be brought up, and the expence thereof shall be paid out of his estate, and such person shall be indemnified by the warrant of the commissioners for bringing up such bankrupt. Provided that the assignees nor unless the bankrupt make oath in writ-

rupt, from time to time, and to produce to him his books, papers, and writings, in order to prepare an abstract of his accounts, and a statement to show the particulars of his estate and effects previous to his final examination and discovery thereof; a copy of which abstract and statement the said bankrupt shall deliver to them ten days at least before his last examination. 6 G. 4. c. 16. § 119. Am. Any person wilfully concealing any real or personal estate of bankrupt, and who shall not, within forty-two days after the issuing of the commission, discover such estate to one or more of the commissioners or assignees, shall forfeit 100l. and double the value of the estate so concealed. And any person who shall, after the time allowed to the bankrupt to surrender, voluntarily discover to one or more of the commissioners or assignees any part of such bankrupt's estate, not before come to the knowledge of the assignees, shall be allowed five per centum thereupon, and such farther reward as the major part, in in value, of the creditors present, at any meeting called for that purpose, shall think fit; to be paid out of the estate recovered on such discovery. 6 G. 4. c. 16. § 120. (As 5 G. 2. c. 30. § 20, 21.)

As to the bankrupt's certificate.- Every bankrupt, who shall have duly surrendered. and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made payable under the commission, in case he shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as after directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt. 6 G. 4. c. 16. § 121. Am. Such certificate shall be signed by four-fifths in number and value of the creditors of the bankrupt, who shall have proved debts under the commission to the amount of 201. or upwards; or (after six calendar months from the last examination of the bankrupt,) then either by three-fifths in number and value of such creditors, or by nine-tenths in number of such creditors, who shall thereby testify their consent to the bank. And no such certificate rupt's discharge. shall be such discharge unless the commissioners shall, in writing, under their hands and seals, certify to the lord chancellor that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery; and also that the creditors have signed in manner hereby directed;

obtained without fraud; nor unless such certificate and consent shall after such oath be allowed by the lord chancellor, against which allowance any of the creditors of the bank-rupt may be heard before the lord chancellor. 6 G. 4. c. 16. § 122. Am. The commissioners shall not sign any certificate unless they shall have proof by affidavit, in writing, of the signature of the creditors thereto, or of any person thereto authorized by any creditor, and of the authority by which such person shall have so signed the same. And if any creditor reside abroad, the authority of such creditor shall be attested by a notary public, British minister, or consul; and every such affidavit, authority, and attestation, shall be laid before the lord chancellor with the certificate, previous to the allowance thereof. 6 G. 4. c. 16. § 124. (As 5 G. 2. c. 30. § 10., and 24 G. 2. c. 57. § 10.) Any contract or security made or given by any bankrupt, or other person, unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration, or with intent to persuade such creditor to consent to or sign such certificate, shall be void, and the money thereby secured, or agreed to be paid, shall not be recoverable, and the party sued on such contract or security may plead the general issue. 6 G. 4. c. 16. § 125. (As 5 G. 2. c. 30. § 11.)

If a creditor, after proving his debt, die, his executor or administrator may sign certificate. Exparte Saumarez, 1 Atk. 85. But 1 if an executor be also a creditor in his own right he cannot sign twice, once for his testator, and a second time for himself. • Exparte Stracy, 1 Rose, 66. Where the bankrupt became the personal representative of his only creditor, his signing his own certificate was holden good from necessity, for otherwise he never could have obtained his certificate. Cowper's case, Green, 260. A signing by one of two or more partners is sufficient; Exparte Mitchell, 14 Ves. 97; even after a dissolution of partnership. Exparte Hall, 1 Rose, 2: 17 Ves. 62. But one trustee it seems cannot sign for himself and his cotrustee. Exparte Rigby, 2 Rose, 234. But where a single woman proves a debt, and marries, the certificate must be signed by

husband and wife. Cooke, 464.

The certificate must be signed by such of the creditors as have proved their debts, and therefore the mere affidavit of debt made by the petitioning creditor upon the opening of the commission will not entitle him to sign the certificate. Exparte Davis, 2 Cox, 398. And if it be signed by any person who had no legal right to prove under the commission,

ing, that such certificate and consent were (N.) (7th cd.) No bankrupt shall be entitled to his certificate or be paid any allowance, and any certificate if obtained shall be void. if bankrupt shall, by any act of gaming or wagering, have lost in any one day 20%, or shall within one year next preceding his bankruptcy have lost 200l. by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract, or where such bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified any of his books, papers, writings, or securities, or made or been privy to the making of any false or fraudulent entries in any book of account or other document with intent to defraud his creditors, or shall have concealed property to the value of 10l. or upwards; or if any person having proved a false debt under the commission, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignee within one month after such knowledge. 6 G. 4. c. 16. § 130. Am. If the bankrupt or any person for him give money or security for money to a creditor for signing the certificate, it is void, even though it was given without the privity of the bankrupt Holland v. Palmer, 1 Bos. & Pull. 95: Robson v. Calze, 1 Doug. 228: Exparte Butt, 10 Ves. 359: Exparte Hall, 17 Ves. 62. If indeed money were given by an enemy of the bankrupt merely for avoiding the certificate it might be otherwise. 1 Doug. 230. And where it was given by a friend, without the privity of the bankrupt. the court, upon the privity of the bankrupt, the court, upon application, ordered the certificate to be cancelled, to enable the bankrupt to obtain a fresh certificate, omitting the signature of the creditor who had received the money. Exparte Harrison, 4 Montagu, B. L. App. 36. A bill of exchange given to a creditor to induce him to sign his certificate, is void in the hands of an innocent holder. 3 Car. & P. 379. and see Bac. Ab. Bankrupt (N. 1.) (7th ed.) as to the assignment. Commissioners may appoint an assignee or assignees of bankrupt's real and personal estate until others are chosen by the creditors, which assignee or assignees on removal must deliver all the estate so assigned to him or them to the new assignees, upon penalty of 200l. 6 G. 4. c. 16. § 45. (As 5 G.2.c. 30. § 30.) Commissioners may direct any money, part of bankrupt's estate, to be invested in the purchase of Exchequer bills, to be applied for benefit of creditors, subject to control of the lord chancellor. it will be sent back. Exparte Bangley, 17 6 G. 4. c. 16. § 103. (As 49 G. 3. c. 121. § Ves. 117. A creditor who has proved and 7.) If any assignee retain in his hands, or has been fully paid by a surety, cannot aftereshed sign. 6 Madd. 193: and see farther permit any co-assignee so to retain or employ, as to the certificate, Bac. Ab. tit. Bankrupt.

part of the estate of the bankrupt, or shall any persons guilty of any riot or disturbance. neglect to invest any money in the purchase of Exchequer bills when directed, every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest, at the rate of 20l. per cent. on all such money for the time during which he shall have so retained or employed the same, or permitted the same to be done, or during which he shall so have neglected to invest the same in the purchase of Exchequer bills. And commissioners are directed to charge every such assignee in his accounts accordingly. 6 G. 4. c. 16. § 104. Am. If any assignee indebted to the estate of which he is such assignee, in respect of money so retained or employed by him as aforesaid, become bankrupt; if he obtain his certificate, it shall only have the effect of freeing his person from arrest and imprisonment, but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife and children excepted) shall remain liable for so much of his debts, to the estate of which he was assignee, as shall not be paid by dividends under his commission, together with lawful interest for the whole debt. 6 G. 4. c. 16. § 105. (As 49 G. 3. c. 121. § 6.) The commissioner shall at the meeting appointed for the last examination of the bankrupt, appoint a public meeting (not sooner than four calendar months from the issuing of the commission, nor later than six calendar months from the last examination of the bankrupt,) whereof they shall give 21 days' notice in the London Gazette, to audit the accounts of the assignees. And the assignees at such meeting shall deliver upon oath a true statement in writing of all monies received by them respectively, and when and on what account and how the same have been employed. And the commissioners shall examine such statements, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of such assignees respectively, and shall inquire whether any sum appearing to be in their hands ought to be retained. Assignces may be examined on oath touching such accounts, and may retain all money expended in suing out and prosecuting the commission, and all other just allowances. 6 G. 4. c. 16. § 106. New.

All public meetings under commissions of bankrupt in London and all places within the bills of mortality, as well those fixed by the commissioners, as also all meetings of creditors under commissions, which are held in pursuance of public advertisements, shall be holden within the building called The Court of Commissioners of Bankrupt in Basinghallstreet, London, unless otherwise specially directed in writing by the major part of the commissioners. 1 and 2 G. 4. c. 115. § 3. 17.

The commissioners have power to order

or who shall interrupt them in the exercise of their duty, and to have such persons taken before any alderman or magistrate acting in the commission of the peace, to be dealt with according to law; and the warrant of commissioners shall be an indemnity to the messenger. 1 and 2 G. 4. c. 115. § 21. Any commissioners who shall receive from the creditors, or out of the estate of the bankrupt. any farther sum than their stated fees (set forth), or who shall eat or drink at the charge of the creditors, or out of the estate of the bankrupt, or order any such expence to be made, shall be disabled for ever from acting in such or any other commission. 6 G. 4. c. 16. § 22. Am.

As to actions against commissioners, &c .-No writ shall be sued out against, nor copy of any process served on, any commissioner, for any thing done by him as such commis-sioner, unless notice in writing of such in-tended writ or process shall have been delivered to him, or left at his usual place of abode, by the attorney or agent of the party intending to suc or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; and such notice shall set forth the cause of action which such party has, or claims to have, against such commissioner; and on the back of such notice shall be endorsed the name of such attorney or agent, together with the place of his abode, who shall receive no more than 20s. for preparing and serving such notice. 6 G. 4. c. 16. § 41. New. No such plaintiff shall recover any verdict against such commissioner in any case where the action shall be grounded on any act of the desendant as commissioner, unless it be proved upon the trial of the said action that such notice was given; but in default thereof such commissioner shall recover a verdict and costs; and no evidence shall be permitted to be given by the plaintiff on the trial of any cause of action except such as is contained in the said notice. 6 G. 4. c. 16. § 42. New. Every commissioner may at any time within one calendar month after such notice, tender amends to the party complaining, or to his agent or attorney; and if the same is not excepted, may plead such tender in bar to any action brought against him grounded on such writ or process, together with the plea of ' Not Guilty,' and any other plea with leave of the court; and if upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, they shall give a verdict for the defendant; and if the plaintiff shall become nonsuit or shall discontinue his action, or if judgment shall be given for such defendant upon demurrer, such commissioner shall be entitled to the like costs as he would have been entitled to in case he had pleaded the general issue only: and if upon issue so joined, the jury shall find and direct the messenger to take into custody that no amends were tendered, or that the

defendant on such other plea or pleas, they shall give a verdict for the plaintiff, and such damages as they shall think proper, which he shall recover together with costs of suit; provided that if any commissioner shall neglect to tender any amends, or shall have tendered insufficient amends before the action brought, he may, by leave of the court where such action shall depend, at any time before issue joined, pay into court such sum of money as he shall think fit; whereupon such proceedings shall be had in court as in other actions where the defendant is allowed to pay money into court. 6 G. 4. c. 16. § 43. New. The commissioners of the Bankrupt Court are expressly made judges of record (§ 1.), and therefore are not liable to actions for acts done within the scope of their jurisdiction. 7 Barn. & C. 394. But the country commissioners are not within this provision, and are therefore only protected by the above provisions. Every action brought against any person, for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed; and the defendant in such action may plead the general issue, &c. and be entitled to double costs in case of a verdict. 6 G. 4. c. 16. § 44. New. In any action by or against any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for any thing done as such commissioner or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt, or of the trading, or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant at or before pleading, and if plaintiff before issue joined, give notice in writing, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if the matter so disputed shall be proved, or admitted, the judge may, if he thinks fit, grant a certificate of such proof or admission, and such assignee, &c. shall be entitled to the costs of such notice, &c. 6 G. 4. c. 16. § 90. Am.

The commissioners are authorised to commit the bankrupt, as well as any persons who shall be summoned before them, and who shall not answer to their satisfaction, or shall refuse to sign their examination reduced into writing. 6 G. 4.c. 16. § 36. Also to summon and examine bankrupt's wife (§37.) and to summon persons suspected of having bankrupt's property in their hands, and to compel them to produce books, &c. (§ 33.) And to examine all persons present at any meeting. § 34. If any person be committed by the commissioners for refusing to answer, or not fully answering any questions, they shall in their warrant of commitment specify every such question. Provided, if any person committed shall bring any habeas corpus, and there shall appear on the return any such insufficiency in the form of the warrant by reason whereof said official assignces shall in all cases be an

same were not sufficient, and also against the he might be discharged, the judge before whom such party shall be brought shall commit such person to the same prison, there to remain until he shall conform, unless it shall be shown by the party committed that he has fully answered all lawful questions put to him by the commissioners; or (if such person was committed for refusing to be sworn, or for not signing his examination), unless it shall appear that he had a sufficient reason for the same. And the judge shall, if required by the party committed, look at the whole of the examination, and if it shall appear from the whole examination that the answers of the party are satisfactory, such judge shall order the party so committed to be discharged. 6 G. 4. c. 16. § 39. Am. In every action in respect of such commitment brought by any bankrupt or other person committed, the court may inspect and consider the whole examination if thereto required by the defendant; and if upon such inspection and consideration it shall appear to the court or judge that the party was lawfully committed, the defendants in such action shall have the same benefit therefrom as if the whole of such examination had been stated in the warrant of commitment. 6 G. 4. c. 16. § 40. New. We have before seen that by the Bankrupt Court act a single commissioner of that court can only commit the bankrupt or other person to the custody of the officer to be brought before the Subdivision Court or before the Court of Review.

> IV. The Effect of the Fiat (formerly the Commission) on the Property of the Bankrupt. -The Bankrupt Court act has materially altered the mode in which the estate and effects of the bankrupt are to become vested in the assignees. The bargain and sale, and assignments, from the commissioners to the assignees, are done away; and by § 25. when any person hath been adjudged a bankrupt, all his personal estate which by law may be assigned by the commissioner, shall become vested in the assignees by virtue of their appointment, as fully as if assigned by deed to the assignees; and on the death or removal of any assignees the personal estate shall vest in the newly appointed assignce, either alone or jointly with the existing assignces, as the case may require. Sect. 26. makes a similar provision as to the real estate of the bankrupt, whether in the United Kingdom or in the plantations or colonies. The following clause introduces the important alteration appointing official assignees:

> "That a number of persons, not exceeding thirty, being merchants, brokers, or accountants, or persons who are or have been engaged in trade in the cities of London or Westminster, or the parts adjacent, shall be chosen by the lord chancellor to act as official assignees in all bankruptcies prosecuted in the said Court of Bankruptcy; one of which

assignce of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors; such official assignee to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner as the said chief and other judges, with the consent of the lord chancellor, shall from time to time direct; and all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estates and effects real and personal, of the bankrupt, shall in every case be possessed and received by such official assignee alone, save where it shall be otherwise directed by the said Court of Bankruptcy, or any judge or commissioner thereof; and all stock in the public funds or of any public company, and all monies, Exchequer bills, India bonds, or other public securities, and all bills, notes, and other negociable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the Bank of England, to the credit of the accountant-general of the high Court of Chancery, to be subject to such order, rule, and regulation, for the keeping the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the lord chancellor or the said Court of Review, or any judge of the said court of Bankruptcy, if authorised so to do by any general order of the same court, shall direct; and if any such assignee shall neglect to make such transfer, delivery, or payment, every such assignee shall be liable to be charged in the same manner as by the said recited act is provided in cases of neglect by assignees to invest money in the purchase of Exchequer bills, when directed so to do. Provided always, that until assignces chosen by the creditors of each bankrupt, such official assignee so to be appointed to act with the assignees to be chosen by the creditors shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estate and effects. 1 & 2 W. 4. c. 56. § 22.

"Provided always, that nothing herein contained shall extend to authorise any such official assignee to interfere with the assignees chosen by the creditors in the appointment of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bank.

rupt's estate or effects." § 23.

We shall now shortly state the leading principles as to the operation of the fiat (or commission) on property of the bankrupt.

A mere possibility of right will pass to the assignees; for instance, where property is devised to a person for life, remainder to such of his children as shall be living at the time of his death; and one of the children in the life time of the father becomes bankrupt, and obtains his certificate, and then the father dies; the bankrupt's share of the property will ment. Higden v. Williamson, 3 P. Wms. 132. But a possibility that lands will come to the bankrupt by descent, if they do not actually descend to him before he obtains his certificate, will not pass to his assignces. Moth v. Frome, Amb. 394: Carleton v. Leighton.

3 Merivale, App. 667.

Incorporeal hereditaments which may be legally sold are included in the assignment; and all powers vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same. 6 G. 4. c. 16. § 77. (As 3 G. 4. c. 81. § 3.) A policy effected by the bankrupt on his own life is a possibility of benefit to which the assignees are entitled. 1 Camp. 487. And assignees are entitled to recover money lost at play by the bankrupt before his bankruptcy. 1 Barn. & C. 444.

The commissioners shall by deed indented and enrolled make sale for the benefit of the creditors of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof the bankrupt is seised of any estatetail, in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown; and every such deed shall be good against the bankrupt and his issue, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt by fine, common recovery, or any other means, might cut off or bar. 6 G. 4. c. 16. § 65. (As 21 Jac. 1. c. 19. § 12.) But now by the Bankrupt Court act, 1 and 2 W. 4. c. 56. § 26. all the real estate of the bankrupt vests in the assignees by virtue of their appointment.

If any bankrupt shall have any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, standing in his name in his own right, it shall be lawful for the commissioners by writing under their hands to order all persons (whose act or consent is thereto necessary) to transfer the same into the name of the assignees, and to pay all dividends upon the same to such assignees. And all such persons whose act or consent is so necessary are indemnified for all things done or permitted pursuant to such order. 6 G. 4. c. 16. § 80. (As 36 G. 3. c. 90. § 2, 3. with the addition printed in italics.)

Goods and chattels in bankrupt's possession, order, or disposition pass to the assignees by the assignment. If any bankrupt at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and have passed to his assignces under the assign- dispose of the same for the benefit of the

16. § 72. (As in 21 Jac. 1. c. 19. § 11.) Provided, that this shall not invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof made as a security for any debt or debts, either by way of mortgage or assignment duly registered according to the act (6 G. 4. c. 110.) for the registering of vessels. 6 G. 4 c. 16. § 72. New.

It would be impossible in this Dictionary to give even a summary of the numerous cases decided on this clause. For which see Bac. Ab. Bankrupt (G.) (ed. by Gwillim and Dodd;) Mr. Deacon's work on Bankruptcy; Roscoe on Evidence, p. 437. Some of the ostensible partner becomes bankrupt. 2 Barn. leading principles on the subject may be how- & C. 389. 406. ever stated. All personal goods and chattels are within the statute, as ships and utensils of trade, unless such utensils are let, and there is a usage of trade for the utensils to be let: so stock bills of exchange, policies of insurance, shares in a public company, and in a newspaper, have been held to be within the statute. See the cases Roscoe on Evidence, p. 438.

In order to bring the case within the statute the assignees should, in general, give some evidence beyond that of mere possession. Where the bankrupt has once been the owner of the property in question, the more fact of possession may, it is said, raise a presumption that he continues in possession as reputed owner; but where the bankrupt has never been the real owner, possession may not of itself show him to be reputed owner, and it would then be necessary for the assignees to establish that fact by other evidence. Lingard v. Messiter, 1 B. & C. 308. Where it appears in evidence that, in some instances, articles used in collicries belong to the tenants, and that in others they do not; that, though in some cases the landlord, in demising collieries, permits the lessee, on certain conditions, to have the use of the fixtures and other things during the demise, yet, that in other instances they belong absolutely to the lessee; then if the possession of such things is consistent with the fact of a person being absolute owner, the mere possession of such things ought not to raise an inference on the mind of any cautious person acquainted with the usage that the person in possession is the owner. Per Abbot, C. J., Storer v. Hunter, 3 B. & C. 376: see Thackthwaite v. Cock, 3 Taunt. 487. post. In order to prove the bankrupt reputed owner, evidence of reputation is admissible. Oliver v. Bartlett, 1 B. & B. 269. And on the other hand, evidence of a contrary reputation is admissible for the defendant. Guir v. Rutton, Holt, 327. Thus, evidence of the bankrupt being in possession of furniture, &c. under an agreement which was notorious in the neighbourhood, was held to take the case out of the statute. Muller v. Moss, 1 M. & S. 335, Goods which have come to the posses-

creditors under the commission. 6 G. 4. c. sion of the bankrupt after the act of bankruptcy are not within the statute. 2 Bing. 334. The property of infants who cannot consent are not within the statute. 3 Esp. 88. Where the goods were by agreement left in the seller's possession, but the purchaser marked them with his initials, it was held they were within the statute. 5 Barn. & A. 134; 1 Barn. & C. 308: and see 1 Glyn & Ja. 402: 5 Bing. 270. Goods sent upon sale or return to a tradesman are within his possession, order, &c. and pass to his assignees. 2 Camp. 83. The share of a dormant partner seems to be within the statute when the

If bankrupt being at the time insolvent shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children or any other person any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person, any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same; and every such sale shall be valid against bankrupt, and against such children and persons as aforesaid, and against all persons claiming under him. 6 G. 4. c. 16. § 73. (As 1 Jac. 1.

c. 15. § 5.)

The assignces of a bankrupt may take advantage of a condition or power of redemption as fully as the bankrupt might have done. 6 G. 4. c. 16. § 70. (As 21 Jac. 1. c. 19. § 13.)

If any bankrupt shall as trustee be seised, possessed of, or entitled (either alone or jointly) to any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stocks, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, the lord chancellor (on the petition of the persons entitled, in possession, to the receipts of the rents, issues and profits, dividends, interest, or produce thereof, on due notice, given to all persons interested therein), may order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer such estate, interest, stock, funds, or annuities, to such person as the lord chancellor shall think fit upon the same trusts, &c. 6 G. 4 c. 16. § 79. Am. of 36 G. 3. c. 90. § 1. On this section Mr. Eden remarks, "As trust estates do not pass by the assignment of the bankrupt's effects, this provision may appear unnecessary;" observing, however, that there have been cases (as where the bankrupt was inferred to be a trustee for his wife) in which the court has treated the assignee as a trustee, and ordered him to convey. But see '

2 P. Wms. 319. A petition to compel assignees

discharged with costs.

thur's Reports, part 2, p. 258.

Property in bankrupt's possession as executor, or as factor for another, or property which has been placed in his hands for a specific purpose, will not pass to the assignees: nor money received by an overseer of the poor, if kept apart from his general property. Rex

v. Eggington, 1 Term Rep. 370.

The relation to the act of bankruptcy.—All conveyances by, and all contracts and other dealings by and with any bankrupt, bona fide made, and entered into more than two calendar months before the date and issuing of the commission (see 1 Moo. & Malk. Ca. 137. 140.) against him, and all executions and attachments against the lands and tenements, or goods and chattels, of such bankrupt, bona fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed. Provided also (which is a new provision of this act), that where a commission has been superseded, if any other commission shall issue against any person comprised in the first commission, within two calendar months next after it shall have been superseded, no such conveyance, &c. shall be valid, unless made, entered into, executed, or levied, more than two calendar months before the issuing the first commission. 6 G. 4. c. 16. § 81. Am.

All payments, really and bona fide made by any bankrupt, or by an person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference to such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy, by such bankrupt committed, and all payments really and bona fide made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy committed; and such creditor shall not be liable to refund the same to the assignees of the bankrupt, provided the person so dealing with bankrupt had not at the time of such payment by or to such bankrupt, notice of any act of bankruptcy committed. 6 G. 4. c. 16. § 82. Am.

Where A. purchased a library of B. after an act of bankruptcy by B. of which A. was ignorant, it was held the assignees could not recover the value of the books, without at least tendering the price, since the payment of it

to join in a conveyance of trust property was 45: sed vid. 6 Bing. 617. The clause extends Montagu & M'Ar- to payments bona fide made before the act took effect. 5 Bing. 177. A payment made by a partner who has committed an act of bankruptcy, of a partnership debt due from the firm, before the act of bankruptcy, is not good, if the creditor had notice of the partner's act of bankruptcy. 5 Bing. 734. Where the bankrupt, after a secret act of bankruptcy, bought on credit, and sold for ready money at unduly low prices, the purchasers were held not protected under the 82d sect., unless the purchase was in the usual course of business. 1 Moo. & Malk. 497.

The issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing of the commission) in cases where the adjudication of the person or persons against whom such commission has issued, shall have been notified in the Gazette. and the persons to be affected by such notice may reasonably be presumed to have seen the

same. 6 G. 4. c. 16. § 83. New.

No person or corporation having in their possession or custody any money, goods, wares, merchandizes, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order; provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy. 6 G. 4. c. 16. § 84. (As 56

G. 3. c. 137. § 1.)

If any accredited agent of any corporation shall have had notice of the act of bankruptcy, such corporation shall be deemed to have had such notice. § 85. (As 50 G. 3. c. 137. § 2. No purchase from any bankrupt, bona fide and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sucd out within twelve calendar months after such act of bankruptcy. 6 G. 4. c. 16. § 86. Am.

No title to any real or personal estate sold under any commission or any order in bankruptcy shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede, and duly prosecuted the same, within twelve calendar months from the issuing thereof. 6 G. 4. c. 16. § 87. New.

V. Practical Directions as to incidental Proceedings, the Effect of Bankruptcy on all Parties concerned, and Miscellaneous Matters. -Reference to arbitration .- Assignees, with consent of major part in value of creditors who shall have proved under the commission, present at any meeting whereof twenty-one days notice shall have been given in the Gazette, was valid under the 82d sect. 9 Barn. & C. may compound with any debtor to the bank-

rupt's estate, and take any reasonable part of | rupt, and on his finding security for costs (if the debt in discharge of the whole, or may give time and take security for the payment of such debt, or may submit any dispute between such assignees and any persons concerning any matter relating to such bankrupt's estate, to the determination of arbitrators, to be chosen by the assignces and by the major part in value of such creditors, and the party with whom they shall have such dispute, and the award of such arbitrators shall be binding on all the creditors; and the assignees are indemnified for what they shall do accordingly, and no suit in equity shall be commenced by the assignces without such consent. 6 G. 4. c. 16. § 88. (As 5 G. 2. c. 30. § 34, 35.) Provided that if one-third in value, or upwards, of such creditors, shall not attend at any such meeting (whereof such notice shall have been given), the assignces shall have power, with the consent of the commissioners, testified in writing under their hands, to do any such matters. 6 G. 4.c. 16. § 88. New Addition.

By the Bankrupt Court act, § 43. if any assignees refer matters to arbitration, the agreement of reference may be made a rule of the Court of Bankruptcy, and all the same remedies and liabilities shall accrue thereon as accrue on a reference made a rule of any court of record. A general reference to arbitration by assignees, without any protest, is an admission of assets. 2 Rose Ca. 50.

Bankrupt's disputing the commission.—If the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission), within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein, with due diligence, the depositions taken before the commissioners, at the time of or previous to the adjudication of the petitioning creditor's debt, and of the trading and acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained in all actions at law or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any suit. 6 G. 4. c. 16. § 92.

The Bankrupt Court act introduces a most important provision as to the bankrupt's disputing the adjudication of bankruptcy. By § 17. if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the Court of Review within two months from the adjudication, if such trader is residing in the United Kingdom, -or within three calendar months, if residing in any other part of Europe, -or within one year, if residing elsewhere, -or within such other time as the court shall allow (not exceeding one year), such court shall hear and decide mission) appoint a public meeting (whereof

the court think fit), shall direct an issue to try any matter of fact affecting the bankruptcy, by a jury, before the chief or other judge of the court; and if the verdict is not set aside within one month after trial, or if the adjudication shall not be set aside by the court, such verdict or adjudication shall, as against the bankrupt, and also against the petitioning creditor, and any assignee of the bankrupt, and all persons claiming under the assignee, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of the adjudication, any other act, debt, or trading, than the act, debt, or trading proved at the trial notwithstanding. Provided that an appeal shall be to the lord chancellor from the decision of the Court of Review, upon matter of law or equity, or on the refusal or admission of evidence.

If assignees commence action or suit before the time allowed for disputing the commission shall have elapsed, the defendant, after notice given to the assignee, shall be entitled to pay the same or any part thereof into court, and all proceedings shall be stayed; and after the time has elapsed, the assignees shall have the same paid to them out of the court. 6 G. 4. c. 16. § 93. New.

If the commission should be afterwards superseded, all persons from whom assignees shall have recovered are discharged from all demands which may be made in respect of the same by the persons against whom commission issued; and all persons who, without suit, shall bona fide deliver up possession of any real or personal estate, are discharged in like manner; provided such notice to try the validity of the commission had not been given, and been proceeded with within the time and manner aforesaid. 6 G. 4. c. 16. § 94. New.

In any action (of suit in equity) by or against any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for any thing done as such commissioner, no proof shall be required at the trial of the petitioning creditor's debt, or of the trading or acts of bankruptcy, unless notice be given that those matters are to be disputed; and if notice given and matter proved, the judge before whom cause is tried may (if he thinks fit) grant a certificate thereof; and the assignee, commissioner, or other person, shall be entitled to costs of notice, which, if commissioner, &c. obtain a verdict, shall be added to costs; and if the other party obtain a verdict, shall be deducted from the costs they would otherwise be entitled to receive. 6 G. 4. c.

16. § 90. Am. 91. (As 49 G. 3. c. 121. § 11.)

The dividend.—The commissioners shall (not sooner than four nor later than twelve calendar months from the issuing the comon the petition, or at the option of the bank- they shall give twenty-one days' notice in the Gazette), to make a dividend of the bankrupt's, before the bankruptev." See Wymer v. Kemestate, at which meeting all creditors who have not proved their debts shall be entitled to prove the same; and commissioners at such meeting shall order such part of the nett produce of the bankrupt's estate in the hands of the assignees as they shall think fit to be forthwith divided amongst such creditors as have proved debts under the commission, in proportion to their respective debts, and shall make an order for a dividend in writing under their hands, and shall cause one part of such order to be filed among the proceedings under the commission, and shall deliver another part thereof to the assignees, which order shall contain an account of the time and place of making such order, of the amount of the debts proved, of the money remaining in the hands of the assignees to be divided, of how much in the pound is then ordered to be paid to every creditor, and of the money allowed by the commissioners to be retained by the assignees, with their reasons for allowing the same to be retained; and the assignees, in pursuance of such order (and without any deed of distribution made for that purpose), shall forthwith make such dividend, and shall take receipts in a book to be kept for that purpose from each creditor for the dividend received, and such order and receipt shall be a discharge to the assignee for so much as he shall pay pursuant'to such order; and no dividend shall be declared, unless the accounts shall have been first audited. 6 G. 4. c. 16. § 107. (As 5 G. 2. c. 30. § 33.)

The audit mentioned in the preceding sections to be appointed by the commissioners at the last examination of the bankrupt, not sooner than four months from the issuing of the commission, nor later than six months from the last examination; at which meeting the assignees shall deliver a statement upon oath of money received by them, and how employed. 6 G. 4. c. 16. § 106. New.

Creditors having security for their debts shall not receive more than the other creditors, except in respect of any execution or extent, served and levied by seizure upon, or any mortgage or lien upon any part of the property of bankrupt, before the bankruptcy. 6 G. 4. c. 16. § 108. Am. And no such creditor who shall sue out execution on any judgment by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid only rateably with other creditors. In Bac. Ab. Bankrupt (E.) (7th ed.) Mr. Dodd observes, in a note, "The last clause is very obscure; but the construction put upon it is, that a creditor suing out execution on judgment obtained by verdict, is entitled to retain the goods, provided the seizure took place before the act of bankruptcy; but that a creditor suing execution on a judgment by default, &c., will not be entitled to retain the goods unble, 6 Barn. & Cres. 479: Morland v. Pellatt, 8 Barn. & Cres. 722: Notley v. Buck, 8 Barn. & Cres. 169: and in re Washbourn, Id. 444. As the operation of this clause had the effect of checking the settling of actions by giving cognovits, the 1 W. 4. c. 7. § 7. has provided a remedy, and has placed judgments on cognovit in adverse suits on the same footing as judgments after verdict, with respect to bankruptev.

If bankrupt's estate shall not have been wholly divided upon the first dividend, commissioners shall, within eighteen calendar months after the issuing the commission, appoint a public meeting (whereof twenty-one days' notice shall be given in the Gazette), to make a second dividend of bankrupt's estate, when all creditors who have not proved their debts may prove the same. And commissioners at such meeting shall order the balance to be forthwith divided amongst such of the creditors as shall have proved their debts. And such second dividend shall be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees, in which case they shall, as soon as may be, convert such estate and effects into money; and, within two calendar months after the same shall be so converted, divide the same in manner aforesaid. 6 G. 4. c. 16. § 109. (As 5 G. 2. c. 30. § 37.) Assignees shall file in the bankrupt's office an account of all unclaimed dividends in their hands, or be charged with 5 per cent. interest thereon; and under order of lord chancellor, the amount of such unclaimed dividends shall be invested, and, after three years, divided among the other creditors. G. 4. c. 16. § 110. New.

No action shall be brought against the assignees by any creditor who shall have proved under the commission; but if the assignees shall refuse to pay any such dividend, the lord chancellor may, on petition, order payment thereof, with interest for the time that it shall have been withheld, and the costs of the application. 6 G. 4. c. 16. § 111. (As 49 G. 3. c. 121. § 12.)

If London commissions be not prosecuted within fourteen days, or country commissions within twenty-eight days, after the respective dates thereof, the court upon petition will supersede them. Ord. Loughb. 26th June, 1793: see exparte Fletcher, 1 Rose, 454: Harrison's case, B. & C. 174. Unless from circumstances it became impossible to prosecute them within the time. Exparte Freeman, Rose, 380: and see Rex v. Hayes, 1 Glyn & I. 255: Eden, 166.

If a trader, after a docket struck against him, give to the creditor who struck it any money, security, or other satisfaction for his less the sale as well as the seizure is complete | debt, or any part thereof, whereby such person

may receive more in the pound in respect of his debts than other creditors, such payment, &c. shall be an act of bankruptcy; and the lord chancellor in such a case may either declare the commission issued upon the docket struck to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may thereupon issue. 6 G. 4. c. 16. § 8. Am.

The court, however, refused to supersede the commission upon this ground upon the petition of the bankrupt. Exparte Kirk, 15 Ves. 464. If at any meeting of creditors, after the bankrupt shall have passed his last examination (whereof and of the purport whereof twenty-one days' notice shall have been given in the London Gazette), if the bankrupt or his friends shall make an offer of composition, and security for such composition, which nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept, another meeting for the purpose of deciding upon such offer shall be appointed, whereof such notice as aforesaid shall be given; and if, at such second meeting, nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the lord chancellor shall, upon such acceptance being testified by them in writing, superscde the said commission. 6 G. 4. c. 16. § 133. New.

And in deciding upon such order any creditor whose debt is below 201. shall not be reckoned in number, but the debt due to such creditor shall be computed in value; and any creditor to the amount of 50l. and upwards, residing out of England, shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting as that he may have time to vote thereat, and such creditor shall be entitled to vote by letter of attorney, executed and attested in manner required for such creditor's voting in the choice of assignees. And if any creditor shall agree to accept any gratuity or higher composition, for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition, and the bankrupt shall (if thereto required) make oath before the commissioners that there has been no such transaction between him (or any person with his privity), and any of the creditors, and that he has not used any undue means or influence with any of them to attain such consent as aforesaid. 6 G. 4. c. 16. § 134. New.

Creditor not both to sue and prove.—No creditor who has brought any action, or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved under the commission, shall prove a debt under the commission, or have any claim entered upon the proceedings without relinquishing such action or suit; and in case such bankrupt shall be in prison

creditor, he shall not prove or claim as aforesaid without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed; provided that such creditor shall not be liable to the payment to such bankrupt, or his assignees, of the costs of such action or suit so relinquished by him; and that where any such creditor shall have brought any action or suit against any such bankrupt, jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect any action or suit against such other person or persons. Provided also, that any creditor who shall have so elected to prove or claim, if the commission be afterwards superseded, may proceed in any action as if he had not so elected; and in bailable actions shall be at liberty to arrest the defendant de novo, if he has not put in bail below, or perfected bail above; or, if he has put in or perfected such bail, to have recourse against such bail by requiring the bail below to put in and perfect bail above within the first eight days in term, after notice in the London Gazette of the superseding such commission, and by suing the bail upon the recognizance if the condition thereof is broken. 6 G. 4. c. 16. § 59. This section is founded on 49 G. 3. c. 121. § 8. with the addition of the last clause relating to any proceedings if commission should be afterwards superseded.

The proving under a separate commission against one of two partners, or obligors, &c., does not prevent the creditor from suing the other, but he will not be allowed to sue both; Bradley v. Millar, 1 Rose, 273; at least unless he gives an indemnity to the bankrupt against the costs and other consequences of the action. Exparte Read, 1 Rose 460: 1 Ves. & Beams, 346. And proof cannot be retracted in order that the creditor may avail himself of securities which turn out more available than he at first imagined. Exparte Downes, 1 Rose, 96: 18 Ves. 290: and see exparte Solomon, 1 Glyn. & I. 25. And a creditor's proof under a commission does not prevent him from impeaching it. Stewart v. Richman, 1 Esp. 108.

The proof under the commission is only an election to take the benefit of the commission as to that particular debt, and such proof does not preclude the creditor from bringing an action or suit for a distinct debt: but the former part of the section prohibiting a creditor who has brought an action, or instituted a suit, from proving a debt, or having any claim entered on such commission, without relinquishing such action or suit, applies to prevent a creditor from proving any distinct demand

Barn. & A. 121: 5 Barn. & A. 95: Bac. Ab.

Bankrupt. (E.) (7th ed.)

Whenever it shall appear to the assignces, or to two or more creditors, who have each proved debts to the amount of 201. or upwards, that any debt proved under the commission is not justly due in whole or in part, such assignees or creditors may make representation thereof to the commissioners. And commissioners may summon and examine any person who shall have so proved, together with any person whose evidence may appear to the commissioners to be material, either in support of, or opposition to, such debt; and if commissioners, upon evidence given on both sides, or (if the person who shall have so proved, as aforesaid, shall not attend to be examined, having been first duly summoned, or notice having been left at his last place of abode), upon the evidence adduced by such assignces or creditors, as aforesaid, shall be of opinion that such debt is not due, either wholly or in part, the commissioners shall be at liberty to expunge the same either wholly or in part from the proceedings. Provided that such assignees or creditors, requiring such investigation, shall, before it is instituted, sign an undertaking, to be filed with the proceedings, to pay such costs as the commissioners shall adjudge to the creditor, who has proved such debt, such costs to be recovered by peti-Provided also, that such assignees or creditors may apply in the first instance by petition to the lord chancellor, or either party may petition against the determination of the commissioners. 6 G. 4. c. 16. § 60. New.

Mutual credit and set-off .- Where there has been mutual credit given by the bankrupt, and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by bankrupt before the credit given to, or the debt contracted by, him; and what shall appear due on either side, on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand proveable against the estate of the bankrupt may also be set off in like manner, against such estate. Provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptey by such bankrupt committed. 6 G. 4. c. 16. § 50. (As 5 G. 2. c. 30.

§ 28: 46 G. 2. c. 135. § 3.)

Contingent debts not due at the bankrupted could not be set off; but as they are now proveable under $\S 56$ (post), it seems they may. be set off. Bac. Ab. Bankrupt. (K.) (7th ed.)

Under the former acts the holders of cash notes of the bankrupt, payable to bearer, could

whatever without relinquishing his action. I | bankrupt, and sued for by the assignces, unless it be showed that they came to his hands before the bankruptcy. 6 Term. Rep. 57: 2 Marsh. R. 206. Under the present act (§ 50.) the party holding such notes may set them off, though he take them after an act of bankruptcy, provided he had no notice of it; and this, although he had notice of the banker's having stopped payment, for notice of an act of bankruptcy alone prevents the set-off under the new act. 10 Barn. & C. 217. If however, the party receives notes of a firm after he has notice of an act of bankruptcy of any of the partners, this will defeat his right of set-off. 1 Barn. & Adol. 343.

It is now settled that the same mutuality is necessary in case of debts and credits under the bankrupt law as in cases of set-off under the statutes of set-off; and this rule prevails in equity as well as in bankruptcy, and at law. And, therefore, a debt due from the bankrupt, jointly with another, cannot be set off against a debt due to the bankrupt alone, nor vica versa, unless indeed there is an express agreement before the bankruptcy to this effect in cases of fraud. And where A. is indebted to B. & C., and B. & C. to A., and B. by deed takes upon himself solely the debt to A.. he cannot set off the debt due from A. to himself and C. 10 Ves. 105: 11 Ves. 517: 2 Meriv. R. 117: Bac. Ab. Bankrupt (K.) (ed. by Gwillim and Dodd), where see the subject

fully treated.

Proof of contingent debts .- If any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he thinks fit, apply to the commissioners to set a value upon such debt, and the commissioners are required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon: or if such value shall not be so ascertained before the contingency shall have happened, he may prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed. 6 G. 4. c. 16. § 56. New.

A mere claim for unliquidated damages for breach of a contract to accept and pay for goods, which contract was not broken till after the bankruptcy of the vender, is not a contingeut debt proveable under this sect. 9 Barn. & C. 145: and see 4 Bing. 209. The section has been held not to apply to debts payable on a contingency which happened before the act took effect. 1 Mont. & Mac.

Sureties .- Any person who, at the issuing of the commission, shall be surety or liable not set them off against a debt due to the for any debt of the bankrupt, or bail for the

Vol. I.-25

by 49 G. 3. c. 121. § 8.], either to the sheriff or to the action, if he shall have paid the debt or any part thereof in discharge of the whole debt (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed, or would be entitled to in respect of such proofs; or if the creditor shall not have proved under the commission, such surety, or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt: provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed. 6 G. 4. c. 16. § 52. (As 49 G. 3. c. 121. \$ 8.)

It was held that neither bail to the sheriff nor bail above were within the operation of the former acts, and consequently such bail paying the debt and costs subsequently to the commission, were entitled to recover the amount from the bankrupt, notwithstanding his certificate; but they are both expressly included in the above enactment. Bac. Ab.

Bankrupt. (E.) (7th ed.)

A person purchasing the debt of one entitled to prove, may prove in his place under the statute. 1 Rose, 4. The statute applies only to cases of payment of the whole debt, or a part in discharge of the whole, and not to a payment of a part in discharge of the personal liability of the surety. 5 Barn. & A. 852.

A surety in an annuity deed was held not to be within the provision of the 49 G. 3. c. 121; but the 55th sect. of the 6 G. 4. c. 16. has provided for this case. 4 Maule & S.

332: 3 Barn. & A. 186.

Apprentice indentures.—When any person shall be an apprentice to a bankrupt at the time of issuing the commission against him, the issuing of such commission shall be and enure as a complete discharge of the indentures whereby such apprentice was bound to such bankrupt. And if any sum shall have been really and bona fide paid by or on the behalf of such apprentice to the bankrupt as an apprentice fee, it shall be lawful for the commissioners, upon proof thereof, to order any sum to be paid to or for the use of such apprentice which they shall think reasonable, regard being had, in estimating such sum, to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previous

bankrupt, [this case of bail was not remedied to the issuing of the commission. 6 G. 4. c. by 49 G. 3. c. 121. § 8.], either to the sheriff 16. § 49. New.

Interest when proveable.—In all future commissions against persons liable upon any bill of exchange or promissory note whereupon interest is not reserved, and which shall be over due at the issuing of the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of King's Bench in actions upon such bills or notes. 6 G. 4. c. 16. § 57. New.

Distress.—No distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt (whether before or after issuing the commission) shall be available for more than one year's rent, accrued prior to the date of the commission; but the landlord or party to whom the rent shall be due shall be allowed to come in as a creditor under the commission for the overplus of rent due, and for which the distress shall not be available. 6 G. 4. c. 16. § 74.

not be available. 6 G. 4. c. 16. § 74.

Commissions against partners.—Any creditor whose debt is sufficient to entitle him to petition for a commission against all the partners of any firm, may petition for a commission against any one or more partners of such firm; and every commission issued upon such petition shall be valid, although it does not include all the partners of the firm. 6 G. 4. c. 16. § 16. (As 3 G. 4. c. 74.) But before the passing of the 3 G. 4. this could not have been done: it must have included all the ostensible partners; and if a joint commission had been bad as against one partner, it was deemed bad

as against all. If a joint commission is sued out against some of the partners, and any other commission is sued out against the remaining partners, such commission shall be directed to the commissioners to whom such first commission was directed; and immediately after the adjudication under such other commission, the commissioners shall convey and assign all the estate, real and personal, of such bankrupt or bankrupts to the assignees chosen under the first commission; and after such conveyance, all separate proceedings under any such other commission shall be stayed; and every such commission shall, without affecting the validity of the first commission, be annexed to and form part of the same: provided that the lord chancellor may direct any such other commission to be issued to any other commissioners, or that such other commissioners shall proceed separately or in conjunction with the first commission. 6 G. 4. c. 16. § 17. (As 3 G. 4. c. 81. § 9.)

Under a separate commission, not only the separate creditors, but joint creditors also, whose respective debts amount to 10*l*. or upwards, may prove their debts for the purpose of voting in choice of assignees under such

commission, and of assenting to, or dissenting from, the certificate of such bankrupt or bankrupts; but such creditor shall not receive any dividend out of the separate estates of the bankrupt or bankrupts, until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm. 6 G. 4. c. 16. § 62. Am.

Assignees of one or more members of a firm may use the names of the partners in suits, indemnifying them, and allowing them part of the proceeds under order of Chancery. 6 G. 4. c. 16. § 89. (As 3 G. 4. c. 81. § 11.)

The proof of debts by creditors (corporations by their agents) is provided for as by for-

mer acts. 6 G. 4. c. 16. § 46. Am.

Commissioners may pay six months' wages to clerks and servants, and they may prove under the commission for any sum beyond that amount. 6 G. 4. c. 16. § 48. New.

Debts not due at the time of the bankruptcy, but accruing afterwards, may be proved, allowing rebate of interest. 6 G. 4. c. 16. § 51. (As 7 G. 1. c. 31. § 1, 2: 46 G. 3. c. 135. § 2.)

Debts upon bottomry, and respondentia bonds, are provided for, as also policies of insurances. 6 G. 4. c. 16. § 53. (As 49 G. 3.

c. 121. § 16.)

Annuity creditors may prove for the value of the annuity, calculated on the lapse of time since the grant. Sureties for annuitants are also to prove. 6 G. 4. c. 16. § 54, 55. New.—The surety cannot be sued by the annuitant until the latter has proved under the commission for the value of the annuity and the arrears thereof. The word Payment appears to have been printed in the act instead of Arrears. See Eden's note on the section.

A plaintiff having obtained judgment is entitled to prove for his costs. 6 G. 4. c. 16. § 58. New.

Suits shall not be abated by the death or removal of assignees. 6 G. 4. c. 16. § 67. New.

Commissioners may proceed under the commission in cases when, on examination, it appears that an extent issued under an untrue pretence of the bankrupt being the king's debtor. 6 G. 4. c. 16. § 71. (As 21 Jac. 1. c. 19. § 10.)

Leases and assignments, to the benefit of which the bankrupt is entitled, may be accepted or declined by the assignees, under order of the lord chancellor. 6 G. 4. c. 16. § 75. Am.—So a vendor of lands to bankrupt may compel assignees to accept or decline the contract. Id. § 76. New.

Bankrupt's discharge from leases, &c.— Prior to the 49 G. 3. c. 121. § 19. the bankrupt remained liable to the landlord on the covenants in the lease, notwithstanding the as-

ute the bankrupt was discharged from liability in respect of the rents and covenants where the assignees had accepted the lease; but unless they accepted, the bankrupt still remained liable. By the present act the bankrupt may discharge himself from the rents and covenants, whether the assignees accept or decline the lease. Bac. Ab. Bankrupt. (F.) (Ed. by Gwillim and Dodd.) The chancellor's jurisdiction is only where the assignees refuse or neglect either to accept or decline; and where they elect he cannot make an order, and he cannot decide whether they have elected or not; he can only send that question to be tried by a jury. Ibid. The act only applies to eases between the lessor and lessee or assignee, and not to cases between the lessee and the assignee of the lease. 3 Barn. & A. 521. And the lessee is not discharged by the assignce becoming bankrupt, and delivering up the lease to the lessor within fourteen days; for the act does not put an end to the lease, but merely discharges the bankrupt from the rents and covenants. 3 Barn. & Adol. 211.

The lord chancellor may order bankrupt to join in conveyances. § 78. Am. And if such order is not obeyed, the bankrupt's title is

effectually barred by the order.

All commissions, deeds, and instruments relating to effects of bankrupts are exempted from the stamp duties. 6 G. 4. c. 16. § 98. New.

Penalties of perjury, or the bankrupt or others swearing falsely. 6 G. 4. c. 16. § 99. (As 3 G. 4. c. 81. § 6.)

All forfeitures under the act may be sucd for by the assignces for the benefit of the creditors. 6 G. 4. c. 16. \S 100. (As 13 Eliz. c. 7. \S 8: 1 Jac. 1. c. 15.)

Assignces shall keep account of effects of bankrupt, under the superintendance and control of commissioners, who may summon and commit assignces for neglect. 6 G. 4. c. 16. 5 101 4m. (As 5 G. 2 c. 30 5 26)

commit assignees for neglect. 6 G. 4. c. 16. § 101. Am. (As 5 G. 2. c. 30. § 26.)

Creditors, at meeting for choice of assignees, shall direct into what banker's proceeds of bankrupt's effects shall be paid, but not to be paid to the commissioners' solicitor or assignees. 6 G. 4. c. 116. § 102. (As 5 G. 2. c. 20. § 31: 49 G. 3. c. 121. § 3.)

The commissioners, before the choice of assignces, and afterwards the assignces, with the consent of the commissioners, may make the bankrupt an allowance for the maintenance of himself and his family, until he shall have passed his last examination. 6 G. 4. c. 16. § 114. New.—The allowance to the bankrupt, after obtaining his certificate, is reenacted by 6 G. 4. c. 16. § 128. as directed by 5 G. 2. c. 30. § 7, 8. from 3 to 10 per cent., according to the amount of dividend, but not exceeding, at the utmost, 600l.; and by § 129. one partner may receive such allowance, though another may not be entitled to it.

The bankrupt must deliver up all his books

5 G. 2. c. 30. § 36.)

The bankrupt is protected from arrest during his examination, or if arrested or in custody, may be discharged, on producing the summons of the commissioners. 6 G. 4. c.

16. § 117. (As 5 G. 2. c. 30. § 5.)

Certificate.—Bankrupt having obtained his certificate, is freed from all future arrests and execution for claims proveable under commission; and shall be entitled to his discharge on producing his certificate, which shall be taken as evidence of all prior proceedings in the bankruptcy. 6 G. 4. c. 16. § 126. (As 5 G. 2. c. 30. § 7. 13.)

If there is any appearance of fraud on the part of the bankrupt, the court will not interfere in a summary way. 2 H. Black. 1.

And any of the grounds in § 130. may be shown against the discharge; and whenever the validity of the certificate is disputed, the court will not relieve without giving an opportunity to try an issue. And as the case ought to be perfectly clear, on a summary application, the court will not decide on motion the effect of a foreign bankruptcy. Bac. Ab. Bankrupt (N. 2.) (nota by Gwillim and Dodd.) The bankruptcy and certificate cannot be given in evidence on the general issue, but must be pleaded according to the statute. 1 Camp. 362: 12 East, 664: Bac. Ab. ubi supra, where see the cases digested as to the effect of the certificate.

The discharge under § 121. of the 6 G. 4. c. 16. extends to the goods as well as the person of the bankrupt, and where a certificated bankrupt's goods were seized under an execution for a debt due before the bankruptcy, the court set aside the execution. Davis v. Shap-

ley, 1 Barn. & Adol. 54.

Second commission .- On a second commission against a person having been once bankrupt, if the bankrupt does not pay 15s. in the pound, his future effects will be liable, by becoming vested in the assignees, but his person is protected from arrest. 6 G. 4. c. 16. § 127. (As 5 G. 2. c. 30. § 9. Am.) Under this section a third commission of bankrupt, where 15s. in the pound was not paid under the sccond, was declared an absolute nullity. Fowler v. Coster, 10 Barn. & C. 427.

Bankrupt's promise to pay debts.—Bankrupt shall not be liable upon any promise to pay a debt, discharged by his certificate, unless such promise be in writing. 6 G. 4. c. 16. § 131. New. It appears to be now settled after conflicting decisions, that the bankrupt cannot be arrested on any subsequent promise, since the 126th section declares that if arrested for such debt, he shall be discharged on common bail. 1 Barn. & C. 116: Bac. Ab. Bankrupt. (N.) (Ed. by Gwillim and Dodd.)

feets remains, after payment of all debts ment of assignees, or certificate, shall be re-

of account and attend the assignees, in set- | (which in such case are to be paid in full tling all demands, on penalty of being com- with interest), the assignees shall account to mitted for neglect. 6 G. 4. c. 16. § 116. (As the bankrupt for such surplus. 6 G. 4. c. 16. § 132. Am.

ENROLMENT OF PROCEEDINGS IN BANKRUPTCY.

The 2 and 3 W. 4. c. 114. recites that it is expedient that the record of all matters in bankruptcy should be under the same custody, and enacts that the records of all commissions of bankrupt, and of all proceedings under the same, which may have been entered of record under the 6 G. 4. c. 16. or any other act, shall be removed into the Court of Bankruptcy, and shall be kept as records of the said court, in such place as the judges of that court shall direct; and it shall be lawful for the judges to nominate the person heretofore appointed by the lord chancellor, to enter such proceedings of record, or in case of his refusal some other fit person, as the clerk of enrollment of the said court, at such salary, to be paid out of the fees thereafter mentioned, as the chancellor shall direct; and such clerk of enrollment shall have the care and custody of all the records so removed as aforesaid, and shall in like manner enter of record all proceedings in bankruptcy, which by this act or the 6 G. 4. c. 16. or the Bankrupt Court act, or any order, may be directed to be entered, on payment of the fees therein mentioned.

By § 4. any judge of the Bankrupt Court may on application made to him direct the officer to enter on record any commission at any time before issued, and the depositions and proceedings; provided that the officer may without special order enter on record the matters directed by the 6 G. 4. c. 16. and 2 W. 4. c. 56. the Bankrupt Court act to be en-

tered. By § 5. all fiats and adjudications of bankruptcy, and appointments of assignees and certificates, shall be entered of record on the application of any party interested, on the payment of the fees therein mentioned, without any petition. And any judge may on petition direct any deposition or other proceed-

ing to be entered.

By § 7. in the event of the death of any witness deposing to the petitioning creditor's debt, or trading, or act of bankruptcy, the assignees, and all persons claiming under them may read in evidence in support of such commission or fiat, any deposition of such deceased witness, relative to such petitioning creditor's debt, trading, &c., which shall be duly entered of record according to the act, provided that the depositions shall be read in evidence in such cases only where the party using the same shall defend some right, title, interest, or demand, which the bankrupt might have claimed or defended.

By § 8. no fiat in lieu of a commission, nor In case any surplus of the bankrupt's ef- any adjudication of bankruptcy, nor appointceived in evidence in any court of law or equi- 1 gery, except drawing of teeth, &c. 32 H. 8. c. ty, unless the same shall have been first enter-

ed of record.

By § 9. it is provided that on the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the court, the same shall be read as evidence of such documents respectively and of the same having been so entered of record as aforesaid, without farther proof.

By the 3 and 4 W. 4. c. 47. with a view to assist the insolvent commissioners, his Majesty may direct the judges of the Bankruptcy Court other than the chief to act in the Insolvent Court, to go upon circuit, &c.; and such judges shall have the same powers as the in-

solvent commissioners.

By § 7. his Majesty by his warrant under his sign manual may authorise any one or more of the judges of the Bankruptcy Court to exercise the same jurisdiction and powers as by the 1 and 2 W. 4. c. 56. are given to three of such judges. And also by such or like warrant direct at what times the said Court of Review, the judges, or commissioners of the Court of Bankruptcy shall hold their sittings.

For the clauses of the statute abolishing fines and recoveries applicable to bankrupts,

see Tail, IV

BANNERET. Knight Banneret is a knight made in the field, with the ceremony of cutting off the point of the standard and making it as it were a banner; and such are allowed to display their arms on a banner in the king's army as barons do; and were next to barons in dignity. See stat. 5 R. 2. st. 2. c. 4; by which it seems such bannerets were anciently called by summons to parliament.

Terms de Ley. See Parliament, Precedence.

BANNIMUS. The form of and expulsion

of any member from the University of Oxford, by affixing the sentence in some public places, as a denunciation or promulgation of it. And the word banning is taken for an exclamation

against, or cursing of another.
BANNITUS, or Banniatus.] An outlaw, or

banished man. Pat. Ed. 2.

BANNOCK. A thick cake of oatmeal, being a perquisite of the servant of the mill in

Thirlage. See that title.

BANNUM vel BANLEUGA. The utmost bounds of a manor or town; so used 47 H. 3: Rolt. 44, &c. Banleuga de Arundel is taken for all that is comprehended within the limits or lands adjoining, and so belonging to the castle or town. Seld. Hist. of Tythes, p. 75.

The previous proclamation in church necessary to the validity of a marriage, not authorised by licence. See tit. Marriage; and as to bans in Scotland. 10 Ann.

BARBERS, were incorporated with the

42; but separated by 18 G. 2. c. 15. See Sur-

BARBICAN, barbicanum.] A watch-

tower or bulwark.

BARBICANAGE, barbicanagium.] Money given for the maintenance of a barbican, or watch-tower; or a tribute towards the repairing or building a bulwark. Carta 17 Ed. 3: Monasticon. tom. 1. p. 976.

BARCARIUM, barcaria.] A sheep-cote, and sometimes used for a sheep-walk. MS.

de Placit. Ed. 3. See Bercaria.

BARGAIN AND SALE, is an instrument whereby the property of lands and tenements is for valuable consideration granted and transferred from one person to another; it is called a real contract upon a valuable consideration for passing of lands, tenements, and hereditaments, by deed indented and inrolled. 2 Inst.

Since the introduction of uses and trusts, and the stat. 27 H. 8. c. 10. for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments, has been almost wholly superseded and in consequence of it, the conveyance by feoffment is now very little in use. Before the statute of uses, equitable estates of freehold might be created through the medium of trust, without livery; and by the operation of the statute, legal estates of freehold may now be created in the same way. They who framed the statute of uses evidently foresaw that it would render livery unnecessary to the passing of a freehold; and that a freehold of such things as do not lie in grant would become transferrable by parol only, without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture enrolled in one of the courts at Westminster, or in the county where the lands lie; such inrollment to be made within six months after the date of the indenture. Stat. 27 H. 8. c. 16: see 2 Inst. 675: Dy. 229: Poph, 48: Dalt. 63. The objects of this provision evidently were, first, to enforce the contracting parties to ascertain the terms of the conveyance, by reducing it into writing; secondly, to make the proof of it easy, by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrollment, for the more ancient one of livery. But the latter part of this provision, which, if it had not been evaded, would have introduced almost an universal register of conveyances of the freehold, in case of corporeal hereditaments, was soon defeated by the invention of the conveysurgeons of London; but not to practise sur- ance by lease and release, which sprung from

and sales for terms of years. See 8 Co. 93: 2 Roll. Ab. 204: 2 Inst. 671. And the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The inconveniences from this insufficiency of the statute of enrollments are now in some measure prevented by stat. 29 C. 2. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. I Inst. 48. a. n. 3.

This may serve at present to illustrate the doctrine of Bargain and Sale; but to obtain a clear and distinct idea of this part of the law, see farther tit. Conveyance, Deed, Feoffment, Lease and Release, Use, &c. and 1 Inst. by Hargrave and Butler. Bac. Ab. Bargain

and Sale. (7th ed.)

At present it may be fit to consider,

I. What Things may be bargained and

II. 1. By whom, to whom, and

2. By what Words a Bargain and Sale may be made.

III. 1. Of the Consideration, and

2. Enrollment of a Bargain and Sale. IV. Of the Manner of pleading Bargains and Sales.

I. What Things may be bargained and Sold. -All things, for the most part, that are grantable by deed in any other way, are grantable by bargain and sale; and lands, rents, advowsons, tithes, &c. may be granted by it in feesimple fee-tail, for life, &c. 1 Rep. 176: 11 Rep. 25.

Any freehold or inheritance in possession, reversion, or remainder upon an estate for years, or life, or in tail, may be bargained and sold, but the deed shall be enrolled. 2 Co. 54:

Dyer, 309: 2 Inst. 671.

But if tenant for life bargains and sells his land by deed enrolled, it will be a forfeiture of

his estate. 4 Leon. 251.

But a man seised of a freehold, may bargain and sell for years, and this shall be executed by the statute of uses. 27 H. 8. c. 10.

A man possessed of a term cannot bargain and sell it, so as to be executed by the statute.

2 Co. 35, 36: Poph. 76.

A bargain and sale of the profits of land, is a bargain and sale of the land itself; for the profits and the land are the same thing in sub-

stance. Dyer, 71.

A rent in esse may be bargained and sold, because this is a freehold within the statute: and, before the statute, a rent newly created might be bargained and sold, because when money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery supplied them; but it seems that,

the omission to extend the statute to bargains | since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person, to be executed in cestui que use; but here can be no seisin of his rent in the bargainor, because no man can be seised of a rent in his own land, and consequently there can be no estate to be executed in the bargainee. Kelw. 85: 1 Co. 126:1 And. 327:1 Jones, 179. Sed qu. de hoc.

If A., by indenture enrolled, bargains and sells lands to B. and his heirs, with a way over other lands of A., this is void as to the way; for nothing but an use passes by the deed, and there can be no use of a thing not in esse, as a way, common, &c. before they

are created. Cro. Jac. 189.

II. 1. By whom and to whom Bargain and Sale may be made.—The king, and all other persons that cannot be seised to a use, cannot bargain and sell; for at common law, when a man had sold his land for money without giving livery, the use only passed in equity, and this is now executed, and becomes a bargain and sale by the statute; but, antecedent to any such execution, there must be a use well raised, which cannot be without a person capable of being seised to a use, which the king is not, there being no means to compel him to perform the use or trust; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king is the universal judge of property, and ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee. Bro. Feoffment to Uses, 33: Hard. 468: Poph. 72.

If tenant in tail bargains and sells his land in fee, this passes an estate determinable upon the life of the tenant in tail; for, at common law, the use could not be granted of any greater estate than the party had in him; now tenant in tail had an inheritance in him, but he could dispose of it only during his own life; and therefore, when he sells the use in fee, cestui que use has a kind of an inheritance, yet determined within the compass of a life; and the statute executes it in the same manner as he has the use, and consequently he will have some properties of a tenant in fee, and some of a tenant for life only; but if tenant for life bargains and sells in fee, this passes only an estate for life, for he could not pass the use of an estate for life to the bargainee, and the statute executes the possession as the party has the use. 10 Co. 96. 98: 1 Saund. 260. 261: 1 Co. 14. 15: Co. Litt.

A man may bargain and sell to a corporation, for they may take a use, though the money be given by the governors in their natural capacity. 10 Co. 24. 34: 2 Roll. Ab.

A man may bargain and sell to his son; but then the consideration of money ought to

be expressed, and it ought to have all the fraudulent deeds. Dyer, 90. If no considerother circumstances of bargain and sale; but this shall operate as a covenant to stand seised, if there be none but the consideration of natural love and affection expressed. 7 Co. 40: 2 Co. 24: Cro. Eliz. 394: 1 Vent. 137: 1 Lev. 56. But if a son and heir bargains and sells the inheritance of his father, this is void, because he hath no right to transfer; the same law of a release. Keilw. 85: Co. Litt.

If an infant bargains and sells his land by deed indented and enrolled, yet he may plead non-age: for, notwithstanding the statute, the bargainee claims by the deed as at common law, which was, and therefore is, still defeasible by non-age. 2 Inst. 673.

If a husband seised of lands, in right of his wife, or tenant in tail, bargains and sells the trees growing on the lands, and dies before severance, the bargainee cannot afterwards cut them down and take them away. Mo. 41.

See tit. Baron and Feme, IV.

If there be two joint-tenants, and one of them makes a bargain and sale of his own estate in fee, and then the other dies, the other moiety shall survive to the bargainor: for since the freehold is in the bargainor, the in-heritance continues; but if such joint-tenant had bargained and sold totum statum suum in fee, though he died before enrollment; yet if the deed were afterwards enrolled, the moiety would not survive, but would pass to the bargainee. Cro. Jac. 53: Co. Lit. 186: 1 Bulst. 3.

2. By what Words a Bargain and Sale may be made .- The very words bargain and sell are not of absolute necessity in this deed, for other words equivalent will suffice; as if a man, seised of lands, sell the same to another, by the words alien or grant, the deed being made in consideration of money, and indented and enrolled, will be an effectual bargain and sale. In short, whatever words upon valuable consideration would have raised an use of any lands, &c. at common law, the same would amount to a bargain and sale within this act; as if a man by deed, &c. for a valuable consideration, covenants to stand seised to the use of another, &c. 2 Inst. 672: Cro. Jac. 210: Mo. 34: Cro. Eliz.

III. 1. Of the Consideration.—There must be a good consideration given, or, at least, said to be given, for lands in these deeds; and for a competent sum of money is a good consideration; but not the general words for divers considerations, &c. Mod. Ca. 777. Where money is mentioned to be paid in a bargain and sale, and in truth no money is paid, some of our books tell us this may be a good bargain and sale; because no averment will lie against that which is expressly affirmed by the deed, except it comes to be questioned whether fraudulent or no, upon the statute against ation of money is expressed in a deed of bargain and sale, it may be supplied by an averment that it was made for money: and after a verdict on a trial, it shall be intended that evidence was given at the trial of money paid. Ventr. 108. If lands are bargained and sold for money only, the deed is to be enrolled according to the statute; but if it be in consideration of money, and natural affection, &c. the estate will pass without it. 2 Inst. 672: 2 Lev. 56.

If a man, in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently; and after the day the party has an action for the money. for it is a sale, be the money paid presently or

hereafter. Dyer, 337. a.

2. Enrollment of a Bargain and Sale .- If the deed of bargain and sale be not enrolled within the six months (which are to be reckoned after twenty-eight days to the month, the day of the date taken exclusively), it is of no force; so that if a man bargains and sells his land to me, and the trees upon it, although the trees might be sold by deed without enrollment, yet, in this case, if the deed be not enrolled, it will be good neither for the trees nor the land. Dyer, 90: 7 Rep. 40: 2 Bulst. A bargain and sale of a manor, to which an advowson is appendant by indenture not enrolled, will not pass the advowson or the manor, for it was to go as appendant. Bro. Cas. 240.

But in some cases, where a deed will not enure by way of bargain and sale, by reason of some defect therein, it may be good to another purpose. Dyer, 90: and see 5 Barn.

& Cres. 101.

If two bargains and sales are made of the same land, to two several persons, and the last deed is first enrolled; if, afterwards, the first deed is also enrolled within six months, the first buyer shall have the land; for, when the deed is enrolled, the bargainee is seised of the land from the delivery of the deed, and the enrollment shall relate to it. Hob. 165: Wood's Inst. 259. Neither the death of the bargainor or bargainee, before the enrollment of the deed of bargain and sale, will hinder the passing of the estate to the bargainee; but the estate of freehold is in the bargainor until the deed is enrolled; so that the bargainee cannot bring any action of trespass before entry had, though it is said he may surrender, assign, &c. Cro. Jac. 52: Co. Lit. 147.

A bargainee shall have rent which incurs after the bargain and sale, and before the enrollment. Sid. 310. Upon the enrollment of the deed, the estate settles ab initio, by the stat. 27 H. 8. c. 16. which says, that it shall not vest, except the deed be enrolled; and when it is enrolled the estate vests presently by the statute of uses. 1 Danv. Ab. 696.

If several seal a deed of bargain and sale,

the deed is enrolled; this is a good enrollment, they are called barones, quasi robur belli. In within the statute. Style, 462. None can make a bargain and sale of lands that hath not the actual possession thereof at the time of the sale; if he hath not the possession, the deed must be scaled upon the land to make it good. 2 Inst. 672: 1 Lill. 290.

Houses and lands in London, and any city, &c. are exempted out of the statute of enrollments. 2 Inst. 676: 1 Nels. Ab. 342.—See

farther, tit. Enrollment.

IV. Of pleading Bargains and Sale .-- In pleading a bargain and sale the deed itself must be shown under seal. 1 Inst. 225. For though the enrollment being on record is of undoubted veracity, being the transaction of the court, yet the private deed has not the sanction of a record, though publicly acknowledged and enrolled; for it might have been falsely and fraudulently dated, or ill executed. Co. Lit. 225. b. 251. b: 2 Inst. 673: 4 Co. 71: 5 Co. 53: 2 Roll. Rep. 119.

It must likewise be set forth that the enrollment was within six months, or secundum forman statuti, &c. Vide Allen, 19: Carter,

221: Style, 34. S. C.

In pleading a bargain and sale the party ought regularly to aver payment of the mo-

ney. 1 Leon. 170: see Moor, 504.

In replevin the case upon the pleadings was, that the defendant made a title under bargain and sale, enrolled within six months, and the statute of uses, and did not show that it was in consideration of money; but adjudged that, after a verdict, as this case was, it shall be intended that evidence was given at the trial of money paid. 1 Vent. 108.

The party that claims by any bargain and sale must show in what court the deed is enrolled, because he must show all things in certain that make out his title; otherwise his adversary would be put to an infinite search before he could traverse with security. Yelv.

213: Cro. Jac. 291. S. C: Yelv. 313.

BARKARY, barkaria, corticulus.] A tanhouse or place to keep bark in for the use of New Book Entr. tit. Assise, Corp. tanners. Polit. 2.

BARMOTE. A court not of record within the Hundred of the Peak, in Derbyshire, for the regulation of groves, possessions, and trade of the miners and lead. Terms de Ley.

BARN. By stat. 7 and 8 G. 4. c. 30. § 2. persons unlawfully and maliciously setting fire to any barn, &c. are guilty of felony, and shall suffer death. And by § 8. persons riotously and tumultuously assembling, and with force demolishing, pulling down, or destroying, or beginning so to do, any barn, &c. are also guilty of felony, and punishable with death. See tit. Malicious Injuries.

BARON, baro.] Is a French word, and hath divers significations here in England. First, it is taken for a degree of nobility next of scarlet, in respect whereof they are ac-

and but one acknowledge it, and thereupon to a viscount. Bracton, lib. 1. cap. 8. says, which signification it agrees with other nations, where baronia are as much as provinciæ: so that barons are such as have the government of provinces, as their fee holden of the king; some having greater, and others less authority within their territories; it is probable that formerly, in this kingdom, all those were called barons that had such seigniories as we now call courts-baron; as they were called seigneurs in France, who had any manor or lordship: and soon after the conquest, all such came to parliament, and sat as peers in the lord's house. But when, by experience, it appeared that the parliament was too much thronged by these barons, who were very numerous, it was, in the reign of King John, ordained, that none but the barones majores should come to parliament, who, for their extraordinary wisdom, interest, or quality, should be summoned by writ. After this, men observing the estate of nobility to be but casual, and depending merely upon the king's will, they obtained of the king letters patent of this dignity to them and their heirs male, who were called barons by letters patent, or by creation, whose posterity are now, by inheritance, those barons that are called lords of the parliament; of which kind the king may create at his pleasure. Nevertheless, there are still barons by writ, as well as barons by letters patent: and those barons who were first by writ, may now also justly be called barons by prescription, for that they and their ancestors have continued barons beyond the memory of man. 2 Inst. 48. See tit. Peers of the Realm. The original barons by writ Camden refers to King Henry III.; and barons by letters patent or creation commenced 11 R. 2. Camb. Brit. page 109. To these is added a third kind of barons, called barons by tenure, which are some of our ancient barons (see Cruise on Dignities, ch. 2.); and likewise the bishops, who, by virtue of baronies annexed to their bishopricks, always had place in the lords' house of parliament, as barons by succession. Selden Tit. of Honour, lib. 4. cap. 13. See tit. Parliament.

There are also barons by office; as the barons of the Exchequer, barons of the Cinque Ports, &c. In ancient records, the word baron includes all the nobility of England, because regularly, all noblemen were barons, though they had a higher dignity, and therefore the charter of King Edward I., which is an exposition of what relates to barons in Magna Charta, concludes testibus archiepiscopis, episcopis, baronibus, &c. And the great council of the nobility, when they consisted, besides earls and barons, of dukes, marquisses, &c. were all comprehended under the name de la councell de baronage. Glanv. cap. 4. These barons have given them two ensigns to remind them of their duties; first, a long robe

counted de magno concilio regis; and, second- quarter made a tenure per haronium, which ly, they are girt with a sword, that they should amounted to 400 marks per annum. ever be ready to defend their king and cound BARONET, burnnettus.] Is a defended to the state of the stat try. 2 Inst. 5. A baron is vir notabilis et inheritance created by letters patent, and principalis: and the chief burgesses in Lon-don were, in former times, barons, before there was a lord mayor, as appears by the city seal all knights, as knights of the bath, knights, and their ancient charters .- Henricus 3. Rex. bachelors, &c., except Bannerets, made sub Sciatis nos concessisse et hac præsenti charta vexillis regins in exercita regali in aperto nostra confirmasse baronibus nostris de cici- bello et ipso rege personaliter prasente. tate nostra London quod eligant sibi mayor order of baronets was instituted by King de seipsis singulis annis, &c. Spelm. Gloss. James I. in the year 1611, and was then a The earls palatine and marches of England purchased honour for the purpose of raising had anciently their barons under them; but no money to pay troops sent out to quell some barons, but those who held immediately of insurgents in the province of Uster, in Irethe king, were peers of the realm. It is certain the king's tenants were called barons; as red or bloody hand, every baronet has added, we may find in Mat. Paris, and other writers; ; on his creation, to his coat of arms. Their and in days of old, all men were styled barons; number at first was but two hundred; but whence the present law-term baron and now they are without limitation; they are feme for Husband and Wife. See Baron and created by patent with an kalendum seil et

To constitute a baron in Scotland, in the strict sense of the word, his lands must have | Husband and Wife. been ceded by the king in liberam baroniam. both civil and criminal, which jurisdiction was by 20 G. 3. c. 43. reduced to the right of recovering from his vassals and tenants the fou duties and rents of the land, and compelling them to perform the services to which they may be bound, and to the right of deciding in civil questions not exceeding 40s. Their criminal jurisdiction is limited to assaults and minor offences, and so restricted that it has ceased to be exercised. The act also provides that no future charter of erection of a barony shall convey any higher jurisdiction than for recovering rents, rights and civil services. But by 35 G. 3, c. 122, the crown may creet free and independent burghs of barony in those parts of the sea-coast where the fishery is carried on; the magistrates in such burghs having the power of justice concurrently with the justices of the county.

BARONY, baronia.] Is that honour and territory which give title to a baron; see Baron; comprehending not only the fees and lands of temporal barons, but of bishops also, who have two estates; one as they are spiritual persons, by reason of their spiritual revenues and promotions; the other grew from the bounty of our English kings, whereby they have baronies and lands added to their spiritual livings and preferments. The baronies belonging to bishops are by some called regalia, because ex sola liberalitate regum eis olim concessa et a regibus in feudum tenentur. Blount .- Barony, Bracton says, (lib. 2. cap. 34.) is a right indivisible; and therefore, if an inheritance be to be divided, among coparceners, though some capital messuages may be divided, yet si capitale messuagium sit caput comitatus vel caput baronia, they may not be parcelled. In ancient times thirteen knight fees and a

BARONET, baranettus.] Is a dignity of land. The arms of which province being a haredibus musculis, &c.

BARON AND FEME. The law term for

Our law considers marriage in no other A baron in this sense enjoyed a juri-diction light than as a civil contract. The heliness of the matrimonial state is left entirely to the ceclesiastical law, the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, therefore, or annulling of incestuous and unscriptural marriages, is the province of the Spiritual Court. -Taking marriage in a civil light, the law treats it as it does all other contracts; on this part of the subject, therefore, as well as on what relates to marriage promises, marriage settlements, &c. see this Diet. tit. Marriage.

By marriage, the husband and wife are one person in law; 1 Inst. 112; thet is, the very being, or legal existence, of the woman is suspended during the marriage; or, at least, is incorporated and consolidated into that of her husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a femecovert, [famina vivo cooperta;] is said to be covert-baron, or under the protection and influence of her husband, her baron or lerd; and her condition during marriage is called Therefore, if an estate be her coverture. granted or conveyed to an husband and wile, and their heirs, they do not take by moieties, as other joint-tenants, but the entire estate is in both. 2 Lev. 39. And if an estate be granted to an husband and wire, and another person, the husband and wife have but one moiety, and the other person the other moiety. Lit. § 291.—A woman may be attorney for her husband; for that implies no separation from, but is rather a represent tion of her lord. F. N. B. 27. Upon this principle of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage.

We may consider the effect of these rights, duties, and disabilities, according to the following arrangement:

> I. 1. Of Grants and Contracts between Husband and Wife.

2. Of their being Evidence for or against each other.

II. What Acts and Agreements of the Wife before Marriage bind the Husband.

III. 1. Of the Husband's Power over the Person of his Wife, and of her Remedy for any Injury done to her by him.

2. Of Actions by him for criminal

Conversation with her.

IV. Of his Interest in her Estate and Property; and hers in his, as to

her Paraphernalia.

V. Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and therein of a Wife that is Executrix or Administratrix.

VI. Of her Contracts during Marriage, and how far the Husband is bound by such Contracts; and where a Wife shall be considered as a Feme Sole. As to conveyances by, or to, or for, the benefit of a feme covert, see tit. Incapacitated Persons.

VII. Where she alone shall be punished for a criminal Offence, and where the Husband shall be answerable for what she does in a civil Ac-

VIII. What Acts done by the Husband or Wife alone, or jointly with the Wife, will bind the Wife; and therein of her Agreement or Disagreement to such Acts after the Death of the Husband.

IX. Where the Husband and Wife must join in bringing Actions.

X. Where they must be jointly sued.

XI. Of the Effects of Divorce; and of separate Maintenance, Alimony, and Pin Money .- And see tit. Divorce.

I. 1. Of Grants and Contracts between Husband and Wife.—At common law a man could neither in possession, reversion, or remainder, limit an estate to his wife; but by stat. 27 H. 8. c. 10. a man may covenant with other persons to stand seised to the use of his wife; or may make any other conveyance to her use, but he may not covenant with his wife to stand seised to her use. A man may devise lands by will to his wife, because the devise doth not take effect till after his death.

Will.

According to some books, by custom of a particular place, as of York, the wife may take by immediate conveyance from the hus-Fitz. Prescription, 61: Bro. Custom. 56. And it seems that a donatio causa mortis by husband to wife may be good; because that is in the nature of a legacy. 1 P. Wms.

Where the husband or wife act en autre droit, the one may make an estate to the other; as if the wife has an authority by will to sell, she may sell to her husband. 1 Inst. 112.

a. 187. b. and the notes there.

If the feme obligee take the obligor to husband, this is a release in law. The like law is if there be two femes obligees, and the one take the debtor to husband. 1 Inst. 264. b:

Cro. Car. 551.

In the case of Smith v. Stafford, (Hob. 216.) the husband promised the wife before marriage, that he would leave her worth 100l. The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but Hobart were of opinion, that as the action could not arise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of Gage v. Acton; (1 Salk. 325: 12 Mod. 290:) the case there arose upon a bond executed by a husband to the wife before marriage, with a condition, making it void if she survived him, and left her 1000l. Two of the judges were of opinion that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But Lord C. J. Holt differed from them; he admitted that a covenant or promise by the husband to the wife, to leave her so much in case she survives him is good, because it is only a future debt on a contingency, which cannot happen during the marriage, and that it is precedent to the debt; but that a bond debt was a present debt, and the condition was not precedent but subsequent, that made it a present duty; and the marriage was consequently a release of it. The case afterwards went into Chancery; the bond was there taken to be the agreement of the parties, and relief accordingly decreed. 2 Vern. 481. A like decree was made in the case of Carnel v. Buckle, 2 P. Wms. 243: and see 2 Freem. 205. See tit. Bankrupt, IV. 3.

A. before marriage with M. agrees with M. by deed in writing, that she, or such as she should appoint, should, during the coverture, receive and dispose of the rents of her jointure, by a former husband, as she pleased. It was decreed that, this agreement being with the feme herself before marriage, was by the marriage extinguished. Chan. Ca. But where a man before marriage articled with the feme to make a settlement of cero. Litt. 112.

As to devises by femes covert, see tit. Devise, solemnized; they intermarried before the settlement, and then the baron died: on a bill by the widow for an execution of the articles, ley's case is denied to be law; Raym. 1; and it was decreed against the heir at law of the baron, that the articles should be executed. 2 Vent. 343.

In a settlement on an intended marriage, the man covenanted to pay a sum of money at a given time after the marriage; and the real estate of the intended wife was conveyed to certain uses and trusts, limited to arise on the solemnization of the marriage. The marriage proved void, but the parties lived together as husband and wife for a year before the nullity was discovered; upon which a second settlement was made, and the parties remarried. Held, that the parties being of full age, and under no disability, the covenant for the payment of the money was put an end to by the second settlement; and that though the legal estate in the wife's property passed under the first settlement, it was not in equity binding on the parties, but the rights of the wife and her issue were also regulated by the second settlement. Robinson v. Dickinson, 3 Russ. 309.

2. Of their being evidence for or against each other.—In trials of any sort, husband and wife are not allowed to be evidence, for or against each other; partly because it is impossible their testimony should be indifferent; but principally because of the union of person; if they were admitted to be witnesses for each other, they would contradict one maxim of law, "nemo in propria causa testis esse debet;" and if against each other, they would contradict another maxim, "nemo tenetur seipsum accusare." But where the offence is directly against the person of the wife, this rule has been usually dispensed with. State Trials, vol. i. Lord Audley's case, Stra. 633. And therefore by stat. 3 H. 7. c. 2. in case a woman be forcibly taken away and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract; and also there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness to that very fact. 1 Comm. 443, 4. See tit. Marriage.

The husband cannot be a witness against the wife, nor the wife against the husband to prove the first marriage on an indictment, on stat. 1 Jac. 1. c. 11. for a second marriage. But the second wife or husband may be a witness; the second marriage being void. Bull. N. P. 287: 1 Hall P. C. 693.

In Raym. 1. there is an opinion that a husband and wife may be witnesses against one another in treason; but the contrary is herself cannot, without the consent of her adjudged, 1 Brownl. 47: see 2 Keb. 403: husband, determine the lease in either case. and 1 H. P. C. 301. The rule in Lord Aud- 5 Co. 10.

perhaps was admitted on the particular circumstances of the facts, which were detestable in the extreme, the husband having assisted in the rape of his wife. In an information against two, one for perjury, and the other for subornation, in swearing on the trial of an ejectment that a child was suppositious, the husband of one of the defendants was admitted to give evidence of the birth, but refused as to the subornation. Sid. 377: 2 Keb. 403: Mar. 120. And the evidence of n wife has been disallowed even against others, where her husband might be indirectly in danger. Dalt. 540: Leach's Hawk. P. C. ii. 607, 8. A husband and wife may demand surety of the peace against each other, and their evidence must then of necessity be admitted against each other. 1 Hawk. P. C. 253: see Stra. 1231. and the other authorities cited by Hawkins.

The wife of a bankrupt may be examined by the commissioners.—See tit. Bankrupt.

It seems that a wife may be evidence to prove a fraud on the husband, particularly if she were party thereto, as in case of a marriage-brocage agreement. Sid. 431: see post, II. And in cases of seduction, L. E. 55. And in civil actions, where the husband is not concerned in the action, but the evidence is collateral to discharge the defendant by charging the husband. 1 Stra. 504: and see I Stra. 527. A widow cannot be asked to disclose conversations between herself and her late husband. Ry. & Moo. 198: and see 1 Carr. & Pa. 364.

A woman was allowed to give evidence for a man with whom she was cohabiting, passing by his name, and held out to the world as his wife: Batthews v. Galindo, 4 Bing. 610: contrary to the former law on this point. See 1 Price, 81.

II. What Acts of the Wife before Marriage bind the Husband .- As by marriage the husband and wife become one person in law, therefore such an union works an extinguishment or revocation of several acts done by her before the marriage; and this not only for the benefit of the husband, but likewise of the wife, who, if she were allowed at her pleasure to rescind and break through, or confirm several acts, might be so far influenced by her husband as to do things greatly to her disadvantage. 4 Co. 60: 5 Co. 10: Keilw. 162: Co. Lit. 55: Hetl. 72: Cro. Car. 304.

But in things which would be manifestly to the prejudice of both husband and wife, the law does not make her acts void; and therefore if a feme sole makes a lease at will, or is lessee at will, and afterwards marries, the marriage is no determination of her will, so as to make the lease void; but she

So where a warrant of attorney was given | The courts of law, however, still permit a to confess a judgment to a feme sole, the court gave leave, notwithstanding the marriage, to enter up judgment; for that the authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage; like a grant of a reversion to a feme sole, who marries before attornment, yet the tenant may attorn afterwards; otherwise if a feme sole gives a warrant of attorney, and marries, for this is to charge the husband. 1 Salk. 117. 399.

But if a feme sole makes her will, and devises her land to J. S., and afterwards marries him, and then dies, yet J. S. takes nothing by the will, because the marriage was a revocation of it. 4 Co. 60: see tits.

Devise, Will.

Equity will set aside the intended wife's contract, though legally executed, when they appear to have been entered into with an intent to deceive the husband, and are in derogation of the rights of marriage; as where a widow made a deed of settlement of her estate, and married a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent; so where the intended wife, the day before her marriage, entered privately into a recognizance to her brother, it was decreed to be delivered up. See 2 Chan. Rep. 41. 79. 81: 2 Vern. 17: 2 Vez. 264: see ante, 1, 2.

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estates to trustees for children by her former husband; though it was insisted that this was without the privity of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that 8000l. was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money without directing any account. 1 Vern. 408. Marriage is a revocation of a submission to arbitration by the feme. See Bac. Ab. Baron & Feme (E.) (7th ed.): 5 East, 266. Marriage is not a release of a claim which a woman has against her husband in character of executor. 12 Ves. 497.

III. 1. Of the Husband's Power over the Person of his Wife, and of her Remedy for any Injury done to her by him .- By marriage the husband hath power over his wife's person; and by the old law he might give her moderate correction; 1 Hawk. P. C. 258; but his power was confined within reasonable bounds. Moor. 874: F. N. B. 80. In the time of Charles II. this power of correction began to be doubted. 1 Sid. 113: 3 Keb. 433. damages. Bull. N. P. 27: Esp. 343, 4. The

husband to restrain a wife of her liberty in case of any gross misbehaviour. Stra. 478. 875. But if he threaten to kill her, &c., she may make him find surety of the peace, by suing a writ of supplicavit out of Chancery, or by preferring articles of the peace against him in the court of King's Bench, or she may apply to the Spiritual Court for a divorce, propter sævitiam. Crom. 28. § 36: F. N. B. 80: Hetl. 149. cont.: 1 Sid. 113. 116: Dalt. c. 68: Lamb. 7: Crom. 133: 13 East, 171.

So may the husband have security of the peace against his wife. Stra. 1207.

But a wife cannot, either by herself, or her prochein amy, bring a homine replegiando against her husband; for he has by law a right to the custody of her, and may, if he think fit, confine her, but he must not imprison her; if he does, it will be a good cause for her to apply to the Spiritual Court for a divorce propter sævitiam; and the nature and proceedings in the writ de homine replegiando show that it cannot be maintained by the wife against her husband. Prec. in Ch. 492.

The courts of law will grant a habeas corpus to relieve a wife from unjust imprison-

2. Of Actions for Criminal Conversation. -The ground of the action for adultery is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company, and that of her children, and imposing on him a spurious

For this, among other reasons, it has been ruled that no action for crim. con. can be brought for act of adultery after separation between husband and wife. 5 T. R. 357. This doctrine was shaken in a later case. See Chambers v. Caulfield, 6 East, 244.

In this action the plaintiff must bring proof of the actual solemnization of a marriage; nothing shall supply its place: cohabitation or reputation are not sufficient, nor any collateral proof whatever. 4 Burr. 2057: Bull. N. P. 27: Doug. 162: Esp. N. P. 343. But it is not necessary to prove a marriage according to the ceremony of the church of England; if the parties are Jews, Quakers, &c. proof of a marriage according to their rites is sufficient. Bull. N. P. 28: see Bac. Ab. tit. Marriage, and Divorce. (7th ed.) The confession of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved, and the defendant's letters to her; but the wife's letters to the defendant will be no evidence for him.

The injury in case of adultery being great, the damages are generally considerable, but depend on circumstances; such on the one hand as go in aggravation of damages, and to show the circumstances and property of defendant; or on the other hand, such as go in extenuation of the offence, and mitigation of defendant may prove particular acts of crimi- stat. 11 H. 7. c. 20. which makes them void. nality in the wife, previous to her guilt with him, but not her general character, in extenuation. Id. ib.

If a woman is suffered by her husband to live as a common prostitute, and a man is thereby drawn into crim. con. no action at the suit of the husband will lie; but if the husband does not know this, it goes only in mitigation of damages. Id. ib.

It is now determined that if the husband consent to his wife's adultery, this will go in bar of his action. 4 Term Rep. 657, in the case of Duberly v. Gunning. See 12 Mod. 232.

It seems to be in the discretion of the court to grant a new trial in this action on account of excessive damages; but which they will be very cautious in doing. 4 Term Rep. 651.

If adultery be committed with another man's wife without any force, but by her own consent, though the husband may have assault and battery, and lay it vi et armis, yet they shall in that case punish him below for that very offence; for an indictment will not lie for such an assault and battery; neither shall the husband and wife join in an action at common law; and therefore they proceed below, either civilly, that is, to divorce them, or criminally, because they were not criminally prosecuted above. 7 Mod. 81.

IV. Of his Interest in her Estate and Property.—The freehold or right of possession of all her lands of inheritance, vests in the husband immediately upon the marriage, the right of property still being preserved to her. 1 Inst. 351. a. 273. b. 326. b. in note. This estate he may convey to another. An incorrect statement in the book called Cases in Equity, temp. Ld. Talbot, p. 167. of what was delivered by his lordship in the case of Robinson v. Cummins, seems to have given rise to a notion that the husband could not make a tenant to the præcipe of his wife's estate, for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can. See Cruise on Recoveries: and post, tit. Fine and Recovery. By stat. 32 H. 8. c. 28. leases of the wife's inheritance must be made by indenture, to which the husband and wife are both parties, to be sealed by the wife, and the rent to be reserved to the husband and wife, and to the heirs of the wife; and the husband shall not alien the rent longer than during the coverture, except by fine levied by husband and wife. By the same act it is provided, that no fine or other act done by the husband only of the inheritance or freehold of his wife, shall be any discontinuance thereof, or prejudicial to the wife or her heirs, but they may enter according to their rights; fines whereunto the wife is party and privy [and the above-mentioned leases] only excepted. As to alienations of a husband's estate by a woman tenant in dower, &c., see in her lifetime, or survives her, they belong to

See post, Div. VIII. and also tit. Forfeiture.

For the mode of alienation now substituted for passing the interests of married women in real estate in lieu of fines and recoveries, see Feme.

As to chattels real, and things in action of the wife; where the husband survives the

At the common law no person had a right to administer. The ordinary might grant administration to whom he pleased, till the statutes which gave it to the next of kin; and if there were persons of equal kindred, whichever took administration first, was entitled to the surplus. The statute of distribution was made to prevent this. Where the wife was entitled only to the trust of a chattel real, or to any chose in action, or contingent interest in any kind of personalty, it seems to have been doubted, whether, if the husband survived her, he was entitled to the benefit of it or not. See 1 Inst. 351: 4 Inst. 871: Roll. Ab. 346: All. 15: Cro. Eliz. 466: 3 C. R. 37: Gilb. Ca. Eq. 234: see tit. Executor, I.

Upon the construction of the statute of distributions (see tit. Executor, V. 8.) it has been held that the husband may administer to his deceased wife; and that he is entitled, for his own benefit, to all her chattels real, things in action, trusts and every other species of personal property, whether actually vested in her, and reduced into possession or contingent, or recoverable only by action or suit. It was, however, made a question after the stat. 29 C. 2. c. 3. § 25. whether, if the husband having survived his wife, afterwards die, during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative, or his wife's next of kin, were entitled thereto. , But, by a series of cases, it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin of the husband. See Mr. Hargrave's Law Tracts, 475. And that if administration de bonis non of the wife is obtained by any third person, he is a trustee for the representative of the husband. See 1 P. Wms. 378. 382: see Bac. Ab. Baron and Feme (C. 31): and see 2. B. & Adol. 273.

If the wife survive the husband.—As to this point, there is a material difference with respect to chattels real, and goods, cattle, money, and other chattels personal. All chattels personal become the property of the husband immediately on the marriage; he may dispose of them without the consent or concurrence of his wife; and at his death, whether he dies

2 Inst. 510. But although the husband's representative is entitled to the wife's choses in action not reduced into possession by the husband, yet the right of suing for them is in the wife's representative, and the husband's representative cannot sue. Betts v. Kimpton, 2 Barn. & Adol. 273. It now seems settled that if the wife survive her husband she will be entitled to her choses in action, notwithstanding the husband has become bankrupt, or has made a particular assignment of them, unless the assignce in the husband's life reduce them into possession. 9 Ves. 87: 2 Madd. 16: 1 Russell, 1: 3 Russell, 65: Bac. Ab. Baron and Feme. (C.) (ed. Gwillim & Dodd.) Where a married woman lent money to her husband, and took a note for it from him and two sureties, it was held that after his death she might sue the other parties to the note, for it was a chose in action, and survived to her. Richards v. Richards, 2

Barn. & Adol. 447. With respect to her chattels real, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. To explain this fully, it seems proper to mention, that it was formerly held that a disposition of a term of years to a man for his life, was such a total disposition of the term, that no disposition could be made of the possible residue of the term; or at least, that if it was made, the first devisee might dispose of the whole term, notwithstanding the devise of the residue. This is reported (Dy. 47.) to have been determined by all the judges in a case in 6 Ed. 6. The Court of Chancery first broke through this rule and supported such future dispositions when made by way of trust; their example was followed by the courts of law in Mat. Manning's case, 8 Rep. 94. b: and Lampet's case, 10 Rep. 46. b. This disposition of the residue of a term, after a previous disposition of it to one for life, operates by way of executory devise, and the interest of the devisee of the residue is called a possibility. This possible interest in a term of years differs from a contingent interest created by way of remainder. If a person limits a real estate to A. for life, and after the decease of A., and if B. dies in A.'s life time, to C. for a term of years; this operates not as an executory devise, but as a remainder, and therefore is not to be considered as a possibility, but as a contingent interest.

Now if a person marries a woman possessed of, or entitled to, the trust of a present, actual, and vested interest in a term of years, or any other chattel real, it so far becomes his property, that he may dispose of it during her life; and if he survives her, it vests in him absolutely; but if he makes no disposition of it, and she survives him, it belongs to her, and not to his representatives: nor is he

his personal representative. See 10 Co. 42: in this case entitled to dispose of it from her 2 Inst. 510. But although the husband's re- by will. Prec. Ch. 418: 2 Vern. 270.

If a person marries a woman entitled to a possible or contingent interest in a term of years, if it is a legal interest, that is, such an interest, as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife, there the husband may assign it; unless perhaps, in those cases, where the possibility or contingency is of such a nature that it cannot happen during the husband's life-time. 1 Inst. 46. b: 10 Rep. 51. a: Hutt. 17: 1 Salk. 326. But it is an exception to this rule, at least in equity, that if a future or executory interest in a term, or other chattel, is provided for the wife, by or with the consent of the husband, there he cannot dispose of it from the wife, as it would be absurd to allow him to defeat his own agreement. But this supposes the provision to be made before marriage: for, if made subsequent, it is a mere voluntary act, and void against an assignee for a valuable consideration. Ca. 225: 1 Vern. 7. 18: 1 Eq. Ab. 58.

If a wife have a chattel real en autre droit, as executor or administrator, the husband cannot dispose of it. 1 Inst. 351. a. But if the wife had it as executrix to a former husband, the husband may dispose of it. 3 Wils. 277.—And if a woman be joint-tenant of a chattel real, and marries and dies, the husband shall not have it, but it survives to the other joint-tenant. 1 Inst. 185. b.—And the husband hath not power over a chattel real, which the wife hath as guardian. Plovd. 294. As to the husband's interest in the wife's chattels real, see Bac. Ab. Baron and Feme.

(C. 2A

Things in action do not vest in the husband till he reduces them into possession. It has been held that the husband may sue alone for a debt due to the wife upon bond (this means a bond made to the wife during marriage, for if it be made to her before marriage, she must join in suing. 1 Chitt. Plead. 32.) but that if he join her in the action, and recover judgment and die, the judgment will survive to her. 1 Vern. 396: see All. 36: 2 Lev. 107: 2 Vez. 677: see 1 Chitt. on Plead. 35. The principle of this distinction appears to be, that his bringing the action in his own name alone is a disagreement to his wife's interest, and implies it to be his intention that it should not survive to her; but if he brings the action in the joint names of himself and his wife, the judgment is that they both should recover; so that the surviving wife, and not the representative of the husband, is to bring the scire facias on the judgment. In 3 Atk. 21. Lord Hardwicke is reported to say, that at law, if the husband has recovered a judgment, for a debt of the wife, and dies before execution, the surviving wife, not the husband's executors, is entitled.

These appear to be the general principles

of the courts of law, respecting the interest | nature, subject to the same equity as the huswhich the husband takes in, and the power wife; but the courts of equity have admitted many very nice distinctions respecting them.

1. A settlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband, dying in his wife's life-time, to the whole of her things in action; but it has been said that, if it is not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced [into his power] by the husband in his life-time; so, if the settlement is in consideration of a particular part of her fortune, such of the things in action, as are not comprised in that part, it has been said, survive to the wife. Sec Prec. Ch. 63: 2 Vern. 502: Talb. 168. In the case of Blois v. Countess of Hereford, (2 Vern. 501.) a settlement was made for the benefit of the wife, but no mention was made of her personal estate; it was decreed to belong to the representative of the husband; and it was then said, that in all cases where there was a settlement equivalent to the wife's portion, it. should be intended that he is to have the portion, though there is no agreement for that purpose. See Eq. Ab. 69. And it appears that if the settlement is made in consideration of her fortune without saying more, it entitles the husband to all her then personal property, but not to such as afterwards accrues to her; but aliter if it appears it was the agreement between the parties that he should have not only her then present but all subsequently acquired personalty. 6 Ves. 395: 2 Ves. I. 607: 9 Ves. 89: 10 Ves. 574.

2. If the husband cannot recover the things in action of his wife by the assistance of a court of equity, the court, upon the principle that he who seeks equity must do equity, will not give him their assistance to recover the property, unless he either has made a previous provision for her, or agrees to do it out of the property prayed for: or unless the wife appears in court, and consents to the property being made over to him. 2 P. Wms. 641: 3 P. Wms. 12: Toth. 179: 2 Vez. 669. Neither will the court, where no settlement is made for the wife, direct the fortune to be paid to the husband, in all cases where she does appear personally and consent to it. 2 Vez. 579. It appears to be agreed, that the interest is always payable to the husband, if he maintains his wife. 2 Vez. 561, 562. Yet where the husband receives a great part of the wife's fortune, and will not settle the rest, the court will not only stop the payment of the residue of her fortune, but will even prevent his receiving the interest of the residue, that it may accumulate for her benefit.

3. Voluntiers and assignees under a com-

band; and are therefore required by the given him over, the things in action of his court, if they apply for its assistance in recovering the wife's fortune, to make a proper provision for her out of it. 2 Atk. 420: 1 P. Wms. 382. But if the husband actually assigns either a trust term of his wife, or a thing in action, for a valuable consideration, the court does not compel the assignee to make a provision for the wife. 1 Vern. 7: see 1 Vern. 18.—and Cox's P. Wms. i. 459. in note, where Lord Thurlow is reported to have said, in a case before him, "that he did not find it any where decided that, if the husband makes an actual assignment, by contract, for a valuable consideration, the assignee should be bound to make any provision for the wife: but that a court of equity has much greater consideration for an assignment actually made by contract, than for an assignment made by mere operation of law; for in this latter case, the creditor should be exactly in the case of the husband, and subject precisely to the same equity in favour of the wife."

4. But notwithstanding the uniform and earnest solicitude of the courts of equity, to make some provision for the wife out of her fortune, in those cases where the husband, or those claiming under him by act of law, cannot come at it without the assistance of those courts, still it does not appear that they have ever interfered to prevent its being paid the husband, or to inhibit him from recovering it at law. 2 Atk. 420.—In Pre. Ch. 414. it is observed, that if the trustees pay the wife's fortune, it is without remedy.

5. Money due on mortgage is considered as a thing in action. It seems to have been formerly understood, that as the husband could not dispose of lands mortgaged in fee without the wife, the estate remaining in the wife carried the money along with it to her and her representatives; but that us to the trust and the absolute power of a term of years, there was nothing to keep a mortgage debt, secured by a term, from going to the husband's representatives: but this distinction no longer prevails; and it is now held, that though in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt. See 1 P. Wms. 458: 2 Atk. 207.

6. If baron and feme have a decree for money in right of the feme, and then the baron dies, the benefit of the decree belongs to the feme, and not to the executor of the husband. This was certified by Hyde, Ch. J. and his certificate confirmed by Lord Chancellor. 1 Cha. Ca. 27. If the wife has a judgment, and it is extended upon an elegit, the husband may assign it without a consideration. So if a judgment be given in trust for a feme sole, who marries, and, by consent of her trustees, mission of bankruptcy are, in cases of this is in possession of the land extended, the husand, by the same reason, if the feme has a riage, and are liable to his debts, if his perdecree to hold and enjoy lands until a debt sonal estate is not sufficient. 2 Atk. 104. due to her is paid, and she is in possession of the land under this decree, and marries, the quire a property in all the personal sub-husband may assign it without any considera-stance of the wife, so, in one particular tion, for it is in nature of an extent. 3 P. instance, the wife may acquire a property in Wms: 200.

The above summary on this part of the law relative to baron and feme, is principally taken from the ingenious and laborious notes by Mr. Butler, on 1 Inst. 351, a; to which may be added the following miscellaneous observa-

7. If a lease be conveyed by a feme sole, in trust for the use of herself, if she afterwards marries, it cannot be disposed of by the husband; if she dies, he shall not have it, but the executors of the wife. March, 44: see 2 Vern.

If a feme, having a rent for life, takes husband, the baron shall have action of debt for the rent incurred during the coverture, after the death of the feme. 1 Danv. 719. And arrears due in the life-time of the husband, after his death shall survive to the wife, if she outlives him, and her administrators after her death. 2 Lut. 1151. A feme, lessee for life, rendering rent, takes husband and dies, the baron shall be charged in action of debt for the rent which was grown during the coverture, because he took the profits out of which the rent ought to issue. Keilw. 125: Raym. 6.

If a feme covert sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her and costs, the husband may release these costs, for the marriage continues; and whatever accrues to the wife during coverture belongs to the husband; per Holt, Ch. J. on motion for prohibi-

1 Salk. 115.

But if the husband and wife be divorced a mensa et thoro, and the wife has her alimony, and sues for defamation or other injury, and there has costs, and the husband releases them, this shall not bar the wife; for these costs come in lieu of what she hath spent out | § 3. of her alimony, which is a separate maintenance, and not in the power of her husband. 1 Roll. Rep. 426: 3 Bulst. 264: 1 Roll. Ab. 343: 2 Roll. Ab. 293: 1 Salk. 115.

A legacy was given to a feme covert, who ·lived separate from her husband, and the executor paid it to the feme, and took her receipt for it; yet on a bill brought by the husband against the executor, he was decreed to pay it over again, with interest. 1 Vern. 261: but see Bac. Ab. Baron and Feme. (D.) (7th ed.)

If husband is attainted of felony, and pardoned on condition of transportation for life, and afterwards the wife becomes entitled to an orphanage share of personal estate, it shall not belong to the husband, but to the wife. 3

P. Wms. 37.

band may assign over the extended interest; | marriage become the husband's again by mar-

8. And as the husband may generally acsome of her husband's goods, which shall remain to her after his death, and not go to his executors. These are called her paraphernalia; which is a term borrowed from the Civil Law, and is derived from the Greek maga pepun, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife suitable to her rank and degree; and therefore even the jewels of a peeress, usually worn by her, have been held to be paraphernalia. Moor, 213. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives. Cro. Car. 343. 347: 1 Ro. Ab. 911: 2 Leon. 106. Neither can the husband devise by his will such ornaments or jewels of his wife; though during his life perhaps, he hath the power to sell or give them away. Noy's Max. c. 49:2 Comm. 436. But if she continue in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors, where there is a deficiency of assets. 1 P. Wms. 730. And her necessary apparel is protected even against the claim of creditors. Noy's Max. c. 49.

That the widow's paraphernalia are subject to the debts, but preferred to the legacies of the husband; and that the general rules of marshalling assets are applicable in giving effeet to such priority, see not only 1 P. Wms. 730, quoted above, but also 2 P. Wms. 544: 2 Atk. 104. 642: 3 Atk. 369. 393: 2 Vez. 7: see also Cha. Ca. 240: 1 C. R. 27.

In one place Rolle says, the wife shall have a necessary bed and apparel. 1 Roll. 911. 20. See farther, on the subject of paraphernalia, Com. Dig. tit. Baron & Feme (F. 3.): 17 Vez. 273: Roper, Husband and Wife, c. 17.

V. Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and therein of a Wife that is Executrix or Administratrix .- If a feme sole indebted takes husband, her debt becomes that of the husband and wife, and both are to be sued for it; but the husband is not liable after the death of the wife, unless there be a judgment against both during the coverture. 1 Roll. Ab. 351: F. N. B. 120. And if the husband dies before the debt is recovered, the wife surviving is liable. 1 Camp. R. 89. Where there is judgment against a feme sole, who marries and dies, the baron shall not be charged therewith; though, if the judgment be had upon scire facias against baron and feme, and then Trinkets and jewels given to a wife before the feme dies, he shall be charged. 3 Mod. if, pending the action, she marries, this shall not abate the action; but the plaintiff may proceed to judgment and execution against her, according as the action was commenced. 1 Lill, 217: Trin. 12 W. 3. And if habeas corpus be brought to remove the cause, the plaintiff is to move for a procedendo on the return of the habeas corpus: also the court of B. R. may refuse it, where brought to abate a just action. 1 Salk. 8.

In general the husband is liable to the wife's debts contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable; because by the marriage, the husband acquires an absolute interest in the personal estate of the wife, and has the receipt of the rents and profits of her real estate during coverture; also whatever accrues to her by her labour, or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable for those debts with which he took her attached. F. N. B. 265: 20 H. 6. 22. h: Moor, 468: 1 Roll. Ab. 352: 3 Mod. 186.

If baron and feme are sued on the wife's bond, entered into by the feme before mar-riage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment has altered the debt. 1 Sid. 337.

If judgment be against husband and wife, he dies, and she survives, execution may be against her. 1 Roll. Ab. 890. l. 10. 50. See

post, X.

Where a man marries a widow executrix, &c. her evidence shall not be allowed to charge her second husband with more than she can prove to have actually come to her hands. Agreed per cur. Ab. Eq. Ca. 227. Hil. 1719.

D. confessed a judgment to F., who made his wife, the plaintiff, executrix, and died; she administered, and married a second husband, and then, she alone, without her husband, acknowledged satisfaction, though no real satisfaction was made. The court held that this was not good. Sid. 31.

A wife, administratrix, under seventeen, shall join with her husband in an action; per

Twisden, J., Mod. 297.

If a feme executrix takes baron, and he releases all actions, this shall be a bar during the coverture without question; by the jus-

tices. Br. Releases, pl. 29.

If a feme executrix take baron, and the baron puts himself in arbitrament for death of the testator, and award is made, and the baron dies, the feme shall be barred; per tot' cur'. Brooke says, that from hence it seems to him, that the release of the baron without the feme is a good bar against the feme; quod conceditur, anno 39 H. 3; and therefore he excepted Vol. I .- 27

186. In action brought against a feme sole, those debts in his release, otherwise they had been extinct. Br. Releases, pl. 79.

If a man marries an administratrix to a former husband, who, in her widowhood. wasted the assets of her intestate, the husband is liable to the debts of the intestate during the life of the wife; and this shall be deemed a devastavit in him. Cro. Car. 603.

And if an executrix marry, and she and her husband, on being sued in equity, admit assets, the assets become a debt due from the husband, and may be proved under a commission of bankrupt against him. 1 Scho. & Lef. 172.

VI. Of her Contracts during Marriage. and how far the Husband is bound by such Contracts; and where a Wife shall be considered as a Feme Sole .- The general rule of the common law is, that every gift, grant, or disposition of goods, lands, or other things whatsoever, and all obligations and feoffments made by a feme covert, without her husband's consent, are void. 1 H. 5. 125: Fitz. Covert

The husband is obliged to maintain his wife in necessaries; yet they must be according to his degree and estate, to charge him: and necessaries may be suitable to a husband's degree of quality, but not to his estate; also they may be necessaries, but not ex necessitate, to charge the husband. 1 Mod. 129: 1 Nels. Ab. 354: see 5 Bing. 187: 3 Barn. & C. 631. If a woman buys things for her necessary apparel, though without the consent of her husband, yet the husband shall be bound to pay it. Brownl. 47. And if the wife buys any thing for herself, children, or family, and the baron does any act precedent or subsequent, whereby he shows his consent, he may be charged thereupon. 1 Sid. 120. The expences of a feme covert's funeral, paid by her father while her husband had left her and was gone abroad, deemed necessaries. H. Black. Rep. 90. Though a wife is very lewd, if she cohabits with her husband, he is chargeable for all necessaries for her, because he took her for better, for worse: and so he is if he runs away from her, or turns her away; but if she goes away from her husband, then as soon as such separation is notorious, whoever gives her credit doth it at his peril, and the husband is not liable, unless he takes her again. 1 Salk. 119: see 1 Stra. 647. 706: and as to actions against femes covert having cloped, see 2 Black. Rep. 1079.

If a man cohabits with a woman, allows her to assume his name, and passes her for his wife, though in fact he is not married to her, yet he is liable to her contracts for necessaries; and therefore ne unques accouple is a bad plea in an action on the case for the debt of a wife; it is good only in dower or on appeal. Bull. N. P. 136: Esp. N. P. 124: 1

Camp. 245: 3 Camp. 215.

Although a husband be bound to pay his court declared it to be their opinion, that a wife's debts for her reasonable provision, yet feme covert living apart from her husband, if she parts from him, especially by reason of any misbehaviour, and he allows her a maintenance, he shall never after be charged with her debts, till a new cohabitation; but if the husband receive her, or come after her, and lie with her but for a night, that may make him liable to the debts. Pasch. 3 Ann. Mod. Cas. 147. 171. If there be an agreement in writing between husband and wife to live separate, and that she shall have a separate maintenance, it shall bind them both till they both agree to cohabit again; and if the wife is willing to return to her husband, she may; but it has been adjudged, that the husband hath no coercive power over the wife to force her, though he may visit her, and use all lawful means in order to a reconciliation. Mich. G. 1. Mod. Ca. in L. & E. 22.

Where there is a separation by consent, and the wife hath a separate allowance, those who trust her, do it upon her own credit. 1 Salk. 116. If a husband makes his wife an allowance for clothes, &c., which is constantly paid her, it is said he shall not be charged. 1 Sid. 109. And if he forbids particular persons to trust her, he will not be chargeable: but a prohibition in general, by putting her in the newspapers, is no legal notice not to trust

her. 1 Vent. 42.

In assumpsit the defendant proved that she was married, and her husband alive in France, the plaintiff had judgment, upon which, as a verdict against evidence, she moved for a new trial, but it was denied; for it shall be intended that she was divorced; besides, the husband is an alien enemy, and in that case, why is not his wife chargeable as a feme sole? 1 Salk. 116. Deerly v. Duchess of Mazarine.

It was at one time held, that "where the husband and wife part by consent, and she has a separate maintenance from the husband, she shall in all cases be subject to her own debts." In the case of Ringstead v. Lady Lanesborough, M. 23 G. 3. and H. 23 G. 3. in actions against the defendant for goods sold, she pleaded coverture; and the plaintiff's replication "that she lived separate and apart from her husband, from whom she had a separate maintenance; and so was liable to her own debts," was on demurrer helden to be good; and plaintiff had judgment. In the above case the plea also stated that the husband lived in Ireland, which being out of the process of the court, some stress was laid on it in the decision; but in the case of Barwell v. Brooks, H. 24 G. 3. it was decided generally, that the husband was not liable in any case where the wife lived apart, and had a separate maintenance; and this was recognized in Corbett v. Poelnitz, and other cases. See 1 Term Rep. 5: 5 Term Rep. 679: 1 Bos. & Pull. 357.

But subsequently, after two arguments before all the judges of the King's bench, the

having a separate maintenance secured to her by deed, cannot contract and be sued as a feme sole; in fact, that by no agreement between a man and his wife, can she be legally made responsible for the contracts she may enter into, or be liable to the actions of those who may have trusted her engagements, as if she were sole and unmarried. Marshall v. Rutton, 8 Term. Rep. 545. And it is the same though the husband be domiciled in a foreign country. 2 Bos. & Pull. 226: 11 East, 301: 1 New R. 80; unless in case of an alien enemy who has never been in this country. 3 Camp. 123. 1 Bos. & Pull. 357. And so. though the wife be divorced a mensa et thoro, yet she cannot be sued as a feme sole. 3 Barn. & C. 291: 3 Bro. & Bing. 92: 6 Maule & S. 73: Bac. Ab. Baron & Feme. (H.) And where husband and wife were separated by deed, and the husband covenanted with a third person to pay to his wife, or to whom she should appoint, a certain weekly allowance, and the wife lived with such third person (her sister) who found her in necessaries, the Court of Common Pleas held, that the husband having failed to pay the stipulated allowance, an action of indebitatus assumpsit might be maintained against him for such necessaries. Nurse v. Craig, 2 New Rep. 148. If the husband does not assent to the wife leaving his house and living separate, he cannot be sued for her debts. 6 Barn. & C. 200.

It seems that a feme covert, living apart from her husband, under no terms of separation, with alimony allowed pendente lite, may maintain trespass, in the name of her husband, against wrong doers, for breaking and entering her house, and taking her goods. 9 E. R. 470.

A husband who has abjured the realm, or who is banished, is thereby civiliter mortuus; and being disabled to sue or be sued in right of his wife, she must be considered as a feme sole; for it would be unreasonable that she should be remediless on her part, and equally hard on those who had any demands on her, that, not being able to have any redress from the husband, they should not have any against her. Bro. Baron and Feme, 66: Co. Lit. 133: 1 Roll. Rep. 400: Moor, 851: 3 Bulst. 188: 1 Bulst. 140: 2 Vern. 104.

So where a married man was transported for felony, the Court of King's Bench held that the wife might be sued alone, for debt contracted by her after the transportation. 1 Term Rep. 9: and sec 4 Esp. Ca. 27. And so also though he remain during his sentence at the hulks; 7 Bing. 762: but not on the ground of the husband having been bankrupt and absconding without appearing to his commission. 9 Bing. 292. But quære whether she can be sued as a feme sole after the period of transportation is expired and the husband not returned? 2 Bos. & Pull. 233.

A husband is not bound to receive, nor is trades by herself, in a trade with which her he liable to pay for necessaries found to his wife after she has committed adultery, though he has before committed adultery himself, and turned her out of doors without any imputation on her conduct. 6 Term Rep. 608: and see 1 Barn. & Adol. 227.

But the wife's adultery is no bar to an action by her trustee against the husband, on his covenant to pay a separate maintenance.

2 Barn. & C. 547: 8 Bing. 256.

But where the wife having committed adultery, the husband left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; although she continued in a state of adultery, the Court of Common Pleas held that the husband was liable for necessaries furnished to her, unless it appear that the plaintiff knew, or ought to have known, the circumstances under which she was living. 1 Bos. & Pull. 226.

If the wife's situation is rendered dangerous by the husband's cruelty and ill-treatment, it is equivalent to turning her out of doors, and the husband is liable for necessaries supplied to her. 3 Esp. Ca. 251: 1 Sel. N. P. 264. And Lord Ellenborough held that it was the same if the husband rendered his home unfit for his wife by bringing another woman to live in it. 1 Sel. N. P. 363: 2 Stark. 87. s. q. 3 Taunt. 420: and see 3 Bing. 27: 1 Younge

& J. 501.

The baron in an account shall not be charged by the receipt of his wife, except it came to his use. 1 Dany. 707. Yet if she usually receives and pays money, it will bind him in equity. Abr. Cas. Eq. 61. And why not in law, in an action for money had and received? For goods sold to a wife, to the use of the husband, the husband shall be charged, and be obliged to pay for the same. Sid. 425.

If the wife pawn her clothes for money, and and afterwards borrows money to redeem them, the husband is not chargeable, unless he were consenting, or that the first sum came to his use. 2 Show. 283.

If a wife takes up clothes, as silk, &c. and pawns them before made into clothes, the husband shall not pay for them, because they never came to his use; otherwise if made up and worn, and then pawned; per Holt, Ch. J. at Guildhall. I Salk. 118.

A wife may use the goods of her husband, but she may not dispose of them: and if she takes them away, it is not felony, for she cannot by our law steal the goods of her husband; but if she delivers them to an adulterer, and he receives them, it will be felony in him. 3 Inst. 308. 310.

If the baron is beyond sea in any voyage, and during his absence his wife buys necessaries, this is a good evidence for a jury to find that the baron assumpsit. Sid. 127.

By the custom of London, if a feme covert

husband does not intermeddle, she may sue and be sued as a feme sole. 10 Mod. 6.

But in such case she cannot give a bond and warrant of attorney to confess a judgment: and when sued as a feme sole, she must be sued in the courts of the city of London; for if sued in the courts above, the husband must be joined. So the wife alone cannot bring an action in the courts above, but only in the city courts; and this even though her husband be dead, if the cause of action accrued in his life-time. 4 Term Rep. 361, 2. See tit. London.

If a feme covert, without any authority from her husband, contract with a servant by deed, the servant, having performed the service stipulated, may maintain assumpsit against the husband. 6 T. R. 176: and see 1 Bing. R. 199.

VII. Where she alone shall be punished for a criminal Offence, and where the Husband shall be answerable for what she does in a civil Action.- In some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit bare theft or burglary by the coercion of her husband (or even in his company, which the law construes a coercion), she is not guilty of any crime, being considered as acting by compulsion, and not of her own

But for crimes mala in se, not being merely offences against the laws of society, she is answerable; as for murder and the like; not only because these are of a deeper die, but also since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. So if a wife be accessary before the fact to murder, she shall not be acquitted on the presumption of coercion. 1 Hale's P. C. 47. In treason also (the highest crime which a member of society can, as such, be guilty of), no plea of coverture shall excuse the wife: no presumption of the husband's coercion shall extenuate her guilt. 1 Hale's P. C. 47. And this as well because of the odiousness and dangerous consequence of the crime itself, as because the husband having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from a wife which he himself as a subject has forgotten to pay. 4 Comm. 28, 29. (But she shall not be considered criminal for receiving her husband, though guilty of treason, nor for the receiving another offender jointly with her husband. Leach's Huwk. P. C. i. c. 1. § 11. in note.)—See tit. Accessary. And see Blacst. Com. 428. note (16th ed.) as to the origin of the wife's exemption.

If also a feme commit a theft of her own

voluntary act, or by the bare command of her | held by all the judges that she was guilty of husband, or be guilty of treason, murder, or roberry, though in company with or by coercion of her husband, she is punishable. Hawk. P. C. c. 1. § 11.—The distinction between her guilt in burglary or theft and robbery seems to be, that in the former, if committed through the means of her husband, "she cannot know what property her husband may claim in the goods taken;" 10 Mod. 63; but a better reason is that the law considers her as acting by compulsion, and not of her own will. Kel. 31: 1 Hate, 45. But in robbery the wife has an opportunity of judging in what sort of right the goods are taken. Leach's Hawk. P. C. i. c. 1. § 9. in

If the wife receive stolen goods of her own separate act, without the privity of her husband, or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessary. 22 Ass. 40: Dalt.

157: 1 Hale, P. C. 516.

In inferior misdemeanors also, another exception may be remarked; that a wife may be indicted and set in the pillory with her husband, for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex. 1 Hawk. P. C. c. 1. § 12: 10 Mod. 63.

A feme covert generally shall answer, as much as if she were sole, for any offence not capital against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband, by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is no way privy. 9 Co. 71: 1 Hawk. P. C. c. 1. § 9: see Moor, 813: Hob. 93: Noy, 103: Savil. 25: Cro. Jac. 482: 11 Co.

A feme may be indicted alone for a riot. Dalt. 447.—for selling gin against the stat. 9 G. 2. c. 23. Str. 1120.—For recusancy. Id. ib.: Hob. 96: 1 Sid. 410: 11 Co. 64: Sav. 25.—For being a common scold. 6 Mod. 213. 239.—For assault and battery. Salk. 384.— For forestalling. Sid. 410.—For usury. Skin. 348.—For barratry. 1 *Hawk. P. C. c.* 81 § 6. See *c.* 1. § 13.—For a forcible entry. 1 Hawk. P. C. c. 64. § 35.—For keeping a gaming house. 10 Mod. 335.—Keeping a bawdyhouse, if the husband does not live with her. 1 Bac. Abr. See ante.—For trespass or slander. Keilw. 61: Ro. Ab. 251: Leon. 122: Cro. Car. 376: see 1 Hawk, P. C. c. 1. § 13. in note.

Where a woman was indicted for falsely swearing herself to be next of kin, and procuring administration, it appears to have been

the offence, though her husband was present when she took the oath. Rex v. Dicks, Russ. on Cri. 16.

A man must answer for the trespasses of his wife: if a feme covert slander any person, &c. the husband and wife must be sued for it, and execution is to be awarded against him. 11 Rep. 62: see post, X.

Husband and wife may be found guilty of

nuisance, battery, &c. 10 Mod. 63.

If the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same; as he may be generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon. 1 Hawk. P. C. c. 1.

For the punishment of femes covert, see tits. Felony, Treason, Baron and Feme. (G.) Treason, &c. And see Bac. Ab.

VIII. What Acts done by the Husband, or Wife alone, or jointly with the Wife, will bind the Wife: and therein of her Agreement or Disagreement to such Acts after the Death of the Husband.—A wife is sub potestate viri, and therefore her acts shall not bind her, unless she levy a fine, &c. when she is examined in private, whether she doth it freely, or by compulsion of the husband; if baron and feme levy a fine, this will bar the feme; and where the feme is examined by writ, she shall be bound, else not. 1 Danv. Ab. 708: see ante, IV.

If a common recovery be suffered by husband and wife of the wife's lands, this is a bar to the wife: for she ought to be examined upon the recovery. Pl. Com. 414. a: 10 Co.

43. a: 1 Roll. 347. l. 19.

So if a husband and wife are vouchees in a common recovery, the recovery shall be a bar, though the wife be not examined; for though it be proper that she be examined, yet that is not necessary, and is frequently omitted. Sid. 11: Sti. 319, 320.

A recovery, as well as a fine by a feme covert, is good to bar her, because the præcipe in the recovery answers the writ of covenant in the fine, to bring her into court, where the examination of the judges destroys the presumption of the law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 Co. 43: 1 Roll. Ab. 395.

By the custom in some cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the mayor or other officer, binds the wife after the husband's death. 2 Inst. 673. And it seems that by stat. 34 H. 8. c. 22. all such customary conveyances shall be of force notwithstanding the stat. 32 H. S. c. 28. See ante, Div.

So by custom in Denbigh in Wales, a surrender by husband and wife, where the wife is examined in court there, binds the wife 2 Jac. & Walk. 425; and see Bac. Ab. Baron and her heirs as a fine does; and this custom is not taken away by stat. 27 H. 8. c. 26. for it is reasonable and agreeable to some cus-

toms in England. Dyer, 363. b.

So a surrender of a copyhold by husband and wife, the wife being examined by the steward, binds the wife. Com. Dig. tit. Baron and Feme (G. 4.), there cites Litt. 274. but which is to a different purpose.

A wife is disabled to make contracts, &c. 3 Inst. 110. And if a married woman enters into bond as feme sole, if she is sued as feme sole, she may plead non est factum, and the coverture will avoid her bond. 1 Lill. Ab. 217. A feme covert may plead non assumpsit, and give coverture in evidence, which makes it no promise, &c. Raym. 395.

In case money be due to the husband by bill or bond, or for rent or on a lease, and it is paid to the wife; this shall not prejudice him, if after payment he publicly disagrees to it, 19 Jac. 1 B. R. 2 Shep. Ab. 426. Contra, if she is used to receive money for him, or if it can be proved the money paid came to his

If a feme covert levies a fine of her own inheritance without her husband, this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record; but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held jure uxoris, or after her death to restore himself to his tenancy by the curtesy, because no act of a feme covert can transfer that interest which the intermarriage has vested in the husband; and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it. Bro. tit. Fines, 33: 10 Co. 43: Hob. 225: 7 Co. 8: Co. Lit. 46.

Lease made by baron and feme, shall be said to be the lease of them both till the feme disagrees, which she cannot do in the life of

the baron. Br. Agreement, pl. 6.

The examination of a feme covert is not always necessary in levying of fines, because that being provided that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when the husband and wife do not take an estate by the fine, and part with nothing, the feme need not be examined; but where she is to convey or pass any estate or interest, either by herself or jointly with her husband, there she ought to be examined; therefore if A. levies a fine, come ceo to baron and feme, and they render to the conuzor, the feme shall be examined; so it is where she takes an estate by the fine rendering rent. 2 Inst. 515: 2 Roll. Ab. 17. Where husband and wife have a joint power of appointment of the wife's estate by formal deed, and they agree to sell it, the agreement is not binding on the woman. and Feme. (K.) (7th ed.)

If baron and feme by fine sur concessit grant land to J. S. for ninety-nine years, and warrant the said land to J. S. during the said term, and the baron dies, and J. S. is evicted by one that hath a prior title, he may there-upon bring covenant against the feme, notwithstanding she was covert at the time when the fine was levied. 2 Saund. 177: 1 Sid. 466. S. C.: 1 Mod. 290: 2 Keb. 684. 702. See tit. Fines.

If a husband disseise another to the use of his wife, this does not make her a disseisoress, she having no will of her own; nor will any agreement of hers to the disseisin during the coverture make her guilty of the disseisin, for the same reason: but her agreement after her husband's death will make her a disseisoress, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the memedy of the disseisee. 1 Roll. Ab. 660: Bro. Disseisin,

But if a feme covert actually enters and commits a disseisin, either sole or together with her husband, then she is a disseisoress, because thereby gains a wrongful possession; but such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors, because, though by such entry she gains an estate, yet she has no power of transferring it to another. Co. Lit. 357: 1 Roll. Ab. 660: Bro. Disseisin, 15. 67: sec 8 H. 6. 14. cont.

If the husband, seised of lands in right of his wife, makes a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife, by some act after the husband's death, shows her dissent thereto; for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable; the reason whereof is, that the wife, after her intermarriage, being by law disabled to contract for, or make any disposition of, her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law therefore transfers the power of dealing and contracting for her possessions to the husband, because no other can then intermeddle therewith, and without such power in the husband they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both; but to prevent the husband's abusing such power, and lest he should make leases to the prejudice of his wife's inheritance, the law has left her at liberty after his death, either to affirm and make good such lease, or defeat and avoid it, as she finds it subscrvient to her own interest; and this she may do, though she joined in such lease, unless made pursuant to stat. 32 H. S. c. 28. See ante, IV.,

Bro. Acceptance, 10: Bro. Leases, 24: Cro. Jac. 332: 2 And. 42: Co. Lit. 45: Plow. 137: Cro. Jac. 563: Yelv. 1: Cro. Eliz. 769.

Husband and wife make a lease for years, by indenture, of the wife's lands, reserving rent; the lessee enters; the husband before any day of payment, dies; the wife takes a second husband, and he at the day accepts the rents, and dies; and it was held, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own act before such marriage would have done; for he by the marriage succeeded into the power and place of the wife, and what she might have done as to affirming or avoiding such lease before marriage, the same may the husband do after the marriage. Dyer, 159: 1 Roll Ab. 475: 1 Roll. Rep. 132.

A re-deliver by the wife after the death of her husband, of a deed delivered by her during the coverture is a sufficient confirmation of such deed so as to bind her, without its being re-executed or re-attested-and circumstances alone may be equivalent to such re-delivery, though the deed be a joint deed by baron and feme affecting the wife's land; and no fine levied. Cowp. 201.

The husband being seised of copyhold lands in right of his wife in fee, makes thereof a lease for years not warranted by the custom, which is a forfeiture of her estate; yet this shall not bind the wife or her heirs after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture; and the diversity seems between this act, which is at an end when the lease is expired or defeated by the entry of the lord, or the wife after the husband's death, and such acts as are a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor; so of non-payment of rent, denial of suit or service; for such forseitures as these bind the inheritance of the wife after the husband's death; but in the other case the husband cannot forfeit by this lease more than he can grant, which is but for his own life. 2 Roll. Rep. 344. 361. 372: Cro. Car. 7: Cro. Eliz. 149: 4 Co. 27.

A feme covert is capable of purchasing, for such an act does not make the property of the husband liable to any disadvantage, and the husband is supposed to assent to this, as being to his advantage; but the husband may disagree, and that shall avoid the purchase; but if he neither agrees nor disagrees, the pur-chase is good, for his conduct shall be esteemed a facit consent, since it is to turn to his advantage; but in this case, though the husband should agree to purchase, yet after his death she may waive it, for having no will of her own at the time of the purchase,

she is not indispensably bound by the con tract; therefore if she does not, when under her own management and will, by some act, express her agreement to such purchase, her heirs shall have the privilege of departing from it. Co. Lit. 3. a.

Jointress paying off a mortgage was decreed to hold over till she or her executor be satisfied, and interest to be allowed her. Chan.

Cases, 271.

The husband gave a voluntary bond after marriage to make a jointure of a certain value on his wife; the husband accordingly makes a jointure; the wife gives up the bond; the jointure is evicted; the jointure shall be made good out of the husband's personal estate, there being no creditors in the case; and the delivery up of the bond by a feme covert could no ways bind her interest. Vern. 427.

A feme covert agrees to sell her inheritance, so as she might have 200l. of the money secured to her; the land is sold, and the money put out in a trustee's name accordingly; this money shall not be liable to the husband's debts, nor shall any promise by the wife to that purpose, subsequent to the first original agreement, be binding in that behalf. 2 Vern. 64,

65. pl. 58. Trin. 1688.

It is a general rule that a feme covert, acting with respect to her separate property, is competent to act in all respects as if she were a feme sole. 2 Vez. 190: 1 Bro. C. R. 20: and see 1 Vez. 163: see Bac. Ab. Baron and Feme (M.) (7th ed.) and the cases there cited. -Where the wife, being authorised by settlement to dispose of her separate estate, contracted to sell it, the Court of Chancery will bind her to a specific performance. 1 Vez. bind her to a specific performance. 517: 1 Bro. C. B. 20.—So the bond of a feme covert, jointly with her husband, shall bind her separate estate. 1 Bro. C. R. 16: 2 Vez. So where she accepted a bill for a milliner's debt, it was held a charge on her separate estate. 15 Ves. 596: and see 17 Ves. 305: 3 Madd. 387: 2 Roper on Husband and Wife, 242. 306. See also tit. Copyhold.

IX. Where the Husband and Wife must join in bringing Actions.—In those cases where the debt or causes of action will survive to the wife, the husband and wife are regularly to join in action; as in recovering debts due to the wife before marriage; in actions relating to her freehold or inheritance, or injuries done to the person of the wife. 1 Roll. Ab. 347: 2 Mod. 269.

But if a feme sole hath a rent-charge, and rent is in arrear, and she marries, and the baron distrains for this rent, and thereupon a rescous is made, this is a tort to the baron himself, and he may have an action alone. Cro. Eliz. 439. Owen, 82. S. P.: Moor, 584.

So if a feme sole hath right to have com-

mon for life, and she takes husband, and she as executrix, in lieu of the goods. Went. Off. is hindered in taking the common, he may have an action alone without his wife, it being only to recover damages. 2 Bulst. 14.

But if a baron and feme are disseised of the lands of the feme, they must join in action for the recovery of this land. 1 Bulst. 21.

If the husband and wife grant a lease of the wife's lands under seal, and the lessee covenants with the husband and wife, or the heirs and assignees of the wife to pay the rent, the husband cannot, after the death of the wife, sue for the rent on the covenant, for the rent belongs to the wife's heirs. 2 Bing. 112.

The baron may have an action alone upon the stat. 5 R. 2. st. 1. c. 8. for entering into the land of the feme; trespass and taking charters of the inheritance of the feme; quare impedit, &c. But for personal torts they must join, though the baron is to have the damages. 1 Danv. 709: 1 Roll. Rep. 360. The husband is to join in actions for battery to the wife; and a wife may not bring any action for wrong to her without her husband. Co. Lit. 132. 236. An action for a battery on the wife, brought by husband and wife, must be laid to the damage of both. 2 Ld. Raym. 1209. For an injury done to the wife alone, action cannot be maintained by the husband alone, without her; but for assault, and debauching or lying with the wife, or for a loss and injury done to the husband, in depriving him of the conversation and service of his wife, he alone may bring an action; and these last actions are laid for assault, and detaining, &c. the wife, per quod consortium amisit, &c. Cro. Jac. 538: see Yelv. 89. If the wife join in the action, her interest must appear on the face of the declaration, or it will be bad. 2 New R. 409.

For taking any thing from the wife, the husband only is to bring the action, who has the property; for the wife hath not the proper-In all cases where the feme shall not have the thing recovered, but the husband only, he alone is to bring the action, 1 Roll. Rep. 360. except as above, &c. For a personal duty to the wife, the baron only may bring the action; and the husband is entitled to the fruits of his wife's labour, for which he may bring quantum meruit. 1 Lill. Abr.: 1 Salk. 114. In case, before marriage, a feme enters into articles concerning her estate, she is as a separate person; and the husband may be plaintiff in equity against the wife. Prec. in Chan. 24.

Where the feme is administratrix, the suit must be in both their names; for by the in-. termarriage, the husband hath authority to intermeddle with the goods as well as the wife; but in the declaration, the granting the administration to the feme must be set forth. Vide the Books of Entries, and Godb. 40. pl 44. .

In action for goods which the feme hath as executrix, they must join, to the end that the Ex. 207.

In an action upon a trover before marriage, and a conversion after, the baron and feme ought to join; for this action, as a trespass, disaffirms the property; but the baron alone ought to bring a replevin, detinu, &c., for the allegations admit and affirm a property in the feme at the time of the marriage, which, by consequence, must have vested in the baron; 1 Sid. 172: 1 Keb. 641. S. C.: 1 Vent. 261: 2 Lev. 107. S. P.; and that he may join the wife at his election.

If A. declares that the defendant, being indebted to him and his wife, as executrix to to one J. S., in consideration that A. would forbear to sue him for three months, assumed, &c. and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger. Carth. 462: 1 Salk. 117: Yelv. 84: Cro. Jac. 110. S. P.

When a right of action doth accrue to a woman before marriage, as where a bond is made to her and forfeited, there, if she marry, she must be joined with the husband in an action debt against the obligor. Owen, 82; and see 1 Maule & S. 176.

Where the husband and wife joined in suing for money lent by the wife before marriage, and the wife died, it was held that the suit abated. Checchi v. Powell, 6 Barn. & C.

In all actions real for the land of the wife, the husband and wife ought to join. R. 1 Bulst. 21. So, in actions personal for a chose in action, due to the wife before coverture. 1 Roll. 347. l. 53: Cro. El. 537: vide Com. Dig. And the wife may join with the husband in an action on a promissory note made to her during the coverture. 2 Maule & S. 393: S. V. Ry. & Moo. Ca. 102.

In the civil law the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband. 2 Roll. Ab. 298. See tit. Ac-

X. Where they must be jointly sued .- The husband is by law answerable for all actions for which his wife stood attached at the time of the coverture, and also for all torts and trespasses during coverture, in which cases the action must be joint against them both; for if she alone were sued, it might be a means of making the husband's property liable, without giving him an opportunity of defending him-Co. Lit. 133: Doctr. Placit. 3: 2 Hen.

If goods come to a feme covert by trover, the action may be brought against husband and wife, but the conversion may be laid damages thereby recovered may accrue to her only in the husband, because the wife cannot convert goods to her own use; and the action is brought against both, because both were concerned in the trespass of taking them. See Co. Lit. 351: 1 Roll. Ab. 6. pl. 7; Yelv. 166: Noy. 79: 1 Leon. 312: Cro. Car. 254. 494: 1 Roll. Ab. 348. But in debt upon a devastavit against baron and feme executrix, it shall not be laid quod devastaverunt, for a feme covert cannot waste. 2 Lev. 145. It is now held that a declaration stating a joint conveyance by husband and wife is good after verdict. 3 Barn. & A. 684.

An action on the case was brought against baron and feme for retaining and keeping the servant of the plaintiff, and judgment accord-

ingly. 2 Lev. 63.

If a lease for life or years be made to baron, and feme, reserving rent, an action of debt for rent arrear may be brought against both; for this is for the advantage of the wife. 1 Roll. Ab. 348.

If an action be brought against a husband and wife, for the debt of the wife when sole, and the plaintiff recovers judgment, the ca. sa. shall issue to take both the husband and wife in execution. Moor, 704.—But if the action was originally brought against herself when sole, and pending the suit she marries, the ca. sa. shall be awarded against her only, and not against the husband. Cro. Jac. 323. Yet if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour (Cro. Car. 513.) of the wife during her coverture, the ca. sa. shall issue against the husband only: which is (says Mr. J. Blackstone) one of the many great privileges of English wives. 3 Comm. See 3 Wils. 124.—See tits. Arrest, Bail, Execution, Action, &c .- But in an action against husband and wife, for an assault by the wife, it was held that both may be taken in execution. 1 Wils. 149.

Where a woman before marriage becomes bound for the payment of a sum of money, and on her marriage separate property is settled on her, if the obligee can have no remedy against the husband, the wife's separate property is bound. But the obligee must first endeavour to recover against the husband by suing him. 1 Bro. C. R. 17. in note. See Bac. Ab. Baron and Feme. (F.)

XI. Of the Effects of Divorce; and of separate Maintenance, Alimony, and Pin Money.—If baron and feme are divorced causa adulterii, which is a divorce a mensa et thoro, they continue baron and feme; it is otherwise in a divorce a vinculo matrimonii, which dissolves the marriage.

The feme, after divorce, shall re-have the goods which she had before marriage. Br. Coverture, pl. 82. D. 13. pl. 63: per Fitzher-

bert, Keilw. 122. b. pl. 75.

But if the husband had given or sold them without collusion before the divorce, there is no remedy; but if by collusion, she may aver

convert goods to her own use; and the action is brought against both, because both were concerned in the trespass of taking them. See Co. Lit. 351: 1 Roll. Ab. 6. pl. 7; Yelv. 166: she shall sue in the spiritual court. Br. De-Noy. 79: 1 Leon. 312: Cro. Car. 254. 494: 1 raignment and Divorce, pl. cites 26 H. 8. 7.

If a man is bound to a feme sole, and after marries her, and after they are divorced, the obligation is revived. Br. Coverture, pl. 82. Because the divorce being a vinculo matrimonii, by reason of some prior impediment, as pre-contract, &c. makes them never husband and wife ab initio; but if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person had been concerned; but between the parties themselves it will have relation to destroy the husband's title to the goods, and it proves no more than the common rule, viz. that relations will make a nullity between the parties themselves, but not amongst strangers. Ld. Raym. 521. Hil.

If a man gives lands in tail to baron and feme, and they have issue, and after divorce is sued, now they have only frank tenement, and the issue shall not inherit. Br. Tail et

Dones, &c. pl. 9.

If the baron and feme purchase jointly and are disseised, and the baron releases, and after they are divorced, the feme shall have the moiety, though before the divorce there were no moieties; for the divorce converts it into moieties. Br. Deraignment, pl. 18. cites 32 H. 8.

If baron alien the wife's land, and then there is a divorce causa præcontratus, or any other divorce which dissolves the marriage a vinculo matrimonii, the wife during the life of the baron, may enter by statute 32 Hen. 8. c. 28. Dyer, 13. pl. 61. But vide Ld. Raym. 521.

But if after such alienation and divorce the baron dies, she is put to her cui in vita ante divortium; and yet the words of the statute are, that such alienation shall be void, but this shall be intended to toll the cui in vita. Mo. 58. pl. 164: Pasch. 8 Eliz. Broughton v. Comway.

Divorce causa adulterii of the husband; afterwards the wife sues in the spiritual court for a legacy; the executor pleads the release of the baron; the release binds the wife, for the vinculum matrimonii continues. Cro. Eliz. 908: vide 1 Salk. 115.

Holt held, that if a feme covert, after a divorce a mensa et thoro, sues for a legacy, which, if recovered, comes to her husband, there the husband may release it, because there is no alimony: and if he may release the duty, he may release the costs. 1 Salk. 115. pl. S. C. & S. P.: and see 1 Vern. 261.

A divorce was a mensa et thoro, and then the husband dies intestate. The wife, by bill, prayed assistance as to dower and adminis-

tration, (it being granted to another), and live separate, they appear to have cohabited, distribution. The master of the rolls bid her equity will consider the agreement as waived go to law, to try if she was entitled to her dower, there being no impediment, and as to that dismissed the bill; and as to the administration, the granting that is in the ecclesiastical court; but the distribution more properly belongs to this court; but since in that court she is such a wife as is not entitled to administration, he dismissed the bill as to distribution too, and said, if they could repeal that sentence, she then would be entitled to distribution. Ch. Prec. 111.

In case of a divorce a mensa et thoro the law allows alimony to the wife; which is that allowance which is made to a woman for her support out of the husband's estate, being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case.-And the ecclesiastical court is the proper court in which to sue for alimony. Het. 69 .- This is sometimes called her estovers, for which, if the husband refuses payment, there is (besides the ordinary process of excommunication in the ecclesiastical court) a writ at common law de estoveriis habendis, in order to recover it. 1 Lev. 6. It is generally proportioned to the rank and quality of the parties; but in case of an elopement and living with an adulterer, the law allows her no alimony. Cowel, 1 Inst. 235. a: 12 Rep. 30.

A bill may be brought in Chancery for a specific performance of an agreement by the husband with a third person, for a separate maintenance of the wife; notwithstanding that alimony belongs to the spiritual court.

Treat, Eq. 39.

The Court of Chancery has decreed the wife a separate maintenance out of a trust fund on account of the cruelty and ill-beha-viour of the husband, though there was no evidence of a divorce or agreement that the fund in dispute should be so applied. 2 Vern. 752.—And in another case the husband having quitted the kingdom, Lord Hardwicke decreed the wife the interest of a trust fund till he should return and maintain her as he ought. 2 Atk. 96.—Yet in a subsequent case Lord Hardwicke observes, that he could find no decree to compel a husband to pay a scparate maintenance to his wife, except upon an agreement between them, and even then unwillingly. 3 Atk. 547.—And this latter opinion seems most reconcileable with principle; for the case of a divorce propter savitiam (see 2 Vern. 493.) may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt but that courts of equity may, concurrently with the spiritual court, in proceeding upon it, decree a separate maintenance. Wood's Inst. 62: 2 Vern. 386: Guth. v. Guth. MSS.—The spiritual court, however, would be the more proper jurisdiction if it acted in rem. Lit. Rep. 78: 2 Atk. 511: But if after an agreement between husband and wife to to be paid within this trust; and my lord

thereby. Fletcher v. Fletcher, Mich. 1788 .-See Fonblanque's Treat. Eq. 96, 7; and Hindley v. Westmeath, 6 Barn. & C. 200.

Where, on a separation, lands are conveyed by the baron in trust for the feme, chancery will not bar the feme from suing the baron in the trustee's name, and a surrender or release by the baron shall not be made use of against

the feme. 2 Chan. Ca. 102.

A woman living separate from her husband, and having a separate maintenance, contracts debts. The creditors, by a bill in chancery, may follow the separate maintenance whilst it continues; but when that is determined, and the husband dead, they cannot by a bill charge the jointure with the debts: by Lord Keeper North; and the rather, because the executor of the husband, who may have paid

the debt, is no party. Vern. 326. A decree for alimony will not discharge a husband from being liable for necessaries furnished for his wife, unless the sum decreed be paid. Hunt v. De Blaquiere, 5 Bing. 550. And so if they live separate under a deed providing a separate maintenance, the maintenance must be duly paid, or the husband is liable for her debts. Bac. Ab. Baron & Feme. (H.) (7th ed.) If the maintenance is consented to be paid to the wife for life, she is entitled to receive it though she may commit adultery and be divorced a mensa et thoro. Price. 577: 2 Barn. & C. 547: 6 Barn. & C. 200: Bac. Ab. ubi supra.

Where the husband, during his cohabitation with the wife, makes her an allowance of so much a year for her expenses, if she out of her own good housewifery saves any thing out of it, this will be the husband's estate, and he shall reap the benefit of his wife's frugality; because when he agrees to allow her a certain sum yearly, the end of the agreement is, that she may be provided with clothes and other necessaries, and whatsoever is saved out of this, redounds to the husband; per Lord Keeper Finch. Freem. Rep. 304.

A term was created on the marriage of A. with B. for raising 200l. a year for pin-money, and in the settlement A. covenanted for payment of it. There was an arrear of one year at A.'s death, which was decreed, because of the covenant to be charged on a trust-estate, settled for payment of debts, it being in arrear for one year only; secus had it been in arrear

for several years. Chan. Prec. 26.

The plaintiff's relation (to whom he was heir) allowed the wife pin-money; which being in arrear, he gave her a note to this purpose: I am indebted to my wife 100l. which became due to her such a day; after by his will he makes provision out of his lands for payment of all his debts, and all monies which he owed to any person in trust for his wife; and the question was, whether the 100l. was

Vol. I.—28

keeper decreed not; for in point of law it assumpsit in case, is a good bar in debt, &c. was no debt, because a man cannot be indebt-'ed to his wife; and it was not money due to any in trust for her. Hil. 1701, between Cornwall and the Earl of Montague. But quare: for the testator looked on this as a debt, and seems to intend to provide for it by his will. Abr. Eq. Ca. 66.

Where the wife hath a separate allowance made before marriage, and buys jewels with the money arising thereout, they will not be assets liable to the husband's debts.

Prec. 295.

Where there is a provision for the wife's separate use for clothes, if the husband finds her clothes, this will bar the wife's claim: nor is it material whether the allowance be provided out of the estate which was originally the husband's, or out of what was her own estate: for in both cases her not having demunded it for several years together shall be construed a consent from her that he should receive it; per Lord C. Macclesfield. 2 P. W. 82, 83.

So where 50l. a year was reserved for clothes and private expences, secured by a term for years, and ten years after the husband died, and soon after the wife died; the executors in equity demanded 500l. for ten years' arrear of this pin-money; but it appearing that the husband maintained her, and no proof that she ever demanded it, the claim was disallowed. 2 P. Wms. 341.

BARONET. A dignity or degree of hon-

our next after barons, having precedency of all knights excepting knights bannerets, created by the king under the royal standard.

See Precedence.

BAR, or BARR, Lat. barra. Fr. barre.] In a legal sense, is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. And it is divided into bar to common intendment, and bar special: bar temporary, and perpetual; bar to a common intendment is an ordinary or general bar, which usually is a bar to the declaration of the plaintiff; bar special is that which is more than ordinary, and falls out upon some special circumstance of the fact as to the case

in hand. Terms de Ley.

Bar temporary is such a bar that is good for the present, but may afterwards fail; and bar perpetual is that which overthrows the action of the plaintiff for ever. Plowd. 26. But a plea in bar not giving a full answer to all the matter contained in the plaintiff's declaration is not good. 1 Lill. Abr. 211. If one be barred by a plea to the writ or to the action of the writ, he may have the same writ again, or his right action; but if the plea in bar be to the action itself, and the plaintiff is barred by judgment, &c. it is a bar for ever in personal actions. 6 Rep. 7. And a recovery in debt is a good bar to action on the case for the same thing; also a recovery on

Cro. Jac. 110: 4 Rep. 94.

In all actions personal, as debt, account, &c. a bar is perpetual, and in such case the party hath no remedy, but by writ of error or attaint; but if a man is barred in a real action or judgment, yet he may have an action of as high a nature, because it concerns his inheritance; as for instance, if he is barred in a formedon in descender, yet he may have a formedon in the remainder, &c. Rep. 7. It has been resolved, that a bar in any action real or personal by judgment upon demurrer, verdict, or confession, is a bar to that action, or any action of the like nature for ever; but, according to Pemberton, Ch. J. this is to be understood, when it doth appear that the evidence in one action would maintain the other: for otherwise the court shall intend that the party hath mistaken his action. Skin. 57, 58.

Bar to a common intent is good; and if an executor be sued for his testator's debt, and he pleadeth that he had no goods left in his hands at the day the writ was taken out against him, this is a good bar to a common intendment, till it is shown that there are goods: but if the plaintiff can show by way of replication, that more goods have fallen into his hands since that time, then, except the defendant allege a better bar, he shall be condemned in the action. Plowd. 26: Kitch. 215: Bro. tit. Barre.

There is a bar material, and a bar at large: bar material may be also called special bar; as when one, in stay of the plaintiff's action, pleadeth some particular matter, viz. a descent from him that was owner of the land, &c. a feoffment made by the ancestor of the plaintiff, or the like: a bar at large is, when the defendant, by way of exception, doth not traverse the plaintiff's title, by pleading, nor confess, nor avoid it, but only makes to himself a title in his bar. Kitch. 68: 5 H. 7. 29. See tits. Abatement, Action, Judgment; and

especially Pleading.

This word bar is likewise used for the place where serjeants and counsellors at law stand to plead the causes in court; and where prisoners are brought to answer their indictments, &c. whence our lawyers, that are called to the bar, are termed barristers. 24 H.

BARRASTER, BARRISTER, barrasteri-A counsellor learned in the law, admitted to plead at the bar, and there to take upon him the protection and defence of clients. They are termed jurisconsulti; and in other countries called licentiati in jure; and anciently barristers at law were called apprentices of the law (from the French apprendere to learn), in Lat. apprenticii juris nobiliores. Fortesc. The time before they ought to be called to the bar, by the ancient orders, was eight years, now reduced to five; not called ex gratia), were twelve grand moots performed in the inns of Chancery, in the time of the grand readings, and twentyfour petty moots in the term times, before the readers of the respective inns: and a barrister newly called was to attend the six (or four) next long vacations the exercise of the house, viz. in Lent and Summer, and was thereupon for those three (or two) years stiled a vacation barrister. Also they are called utter barristers, i. e. pleaders ouster the bar, to distinguish them from benchers, or those that have been readers, who are sometimes admitted to plead within the bar, as the king,

queen, or prince's counsel are. From the degrees of barristers and serjeants at law, (see tit. Serjeant) some are usually selected to be his majesty's counsel; the two principal of whom are called his attorney and solicitor-general.-The first king's counsel under the degree of serjeant, was Sir Francis Bacon, who was made so honoris causa, without either patent or fee; so the first of the modern order, who are now the sworn servants of the crown, with a standing salary, seems to have been Sir Francis North, afterwards lord keeper to Charles II. These king's counsel must not be employed in any cause against the crown without special licence, but which is never refused, and costs about 9l. A custom now prevails of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and preaudience as are assigned in their respective patents, sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being.-These, as well as the queen's attorney and solicitorgeneral, rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts, but receive no salaries and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the Court of Common Pleas, where serjeants only are admitted in term time) may take upon them the protection and defence of any suitors

A counsel can maintain no action for his fees; Davis Pref. 22: 1 C. R. 38; which are given not as a salary or hire, but as a mere gratuity, which 'a barrister cannot demand without doing wrong to his reputation. Davis, 23.

whether plaintiff or defendant. 3 Comm. 27. 28.

The reason why counsel can maintain no action for their fees is, because their compensation is not made to depend upon the event of the cause; and for the purpose of promoting the honour and integrity of the bar, it is expected that all their fees should be paid when their briefs are delivered; per Bayley, J. in Morris v. Hunt, 1 Chitty, R. 551. Fell v. Brown, and Turner v. Phillips, Peake's

and the exercises done by them (if they were in the lawful defence of their clients, and at the same time to give a check to unseemly licentiousness, it hath been holden, that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured. Cro. Jac. 90. No action can be maintained for words of slander, originating in judicial proceedings, as being used by counsel, if they are pertinent to the subject matter of discussion. Hodgson v. Scarlett, Holt, (N. P.) 621: 1 B. & A. (K. B.) 232: Peake, 122.

Counsel guilty of deceit or collusion are punishable by stat. Westm. 1. 3 E. 1. c. 28. with imprisonment for a year and a day, and perpetual silence in the courts; and the latter punishment is still sometimes inflicted for gross misdemeanors in practice. Raym. 376: 3 Comm. 29.

Barristers, who constantly attend the King's Bench, &c. are to have the privilege of being sued in transitory actions in the county of Middlesex. 1 Wils. 159: 1 W. Blackst. But the court will not change the venue because some of the defendants are barristers. Str. 610. See tit. Privilege. Pleas, before they are filed, must be signed by a barrister or serjeant; and where he is defendant he has no privilege whatsoever respecting the venue. 1 Tidd. Prac. 76. 656. He is privileged from arrest whilst in attendance on the courts, and therefore will be discharged if arrested on the circuit. 1 H. Blackst. 636.

A mandamus does not lie to the benchers of an inn of court to compel them to admit an individual to be a member of that society, in order to his qualifying himself to become a barrister. 7 D. & R. 351: S. C. 1 B. & C. 855. The only mode of relief is to appeal to the twelve judges. Dougl. 353.

An advocate (or attorney) who betrays the cause of his client, or, being retained, neglects to appear at the trial, by which the cause miscarries, is liable to an action on the case, for a reparation to their injured client. 3 Comm. 165. cites Bro. Ab. tit. Parliament, 19: 2 Inst. 382.

The authority cited for this position falls short of maintaining it in its full extent. Finch merely lays down the law in the case of an attorney for the tenant in a real action making default; and F. N. B. 96. which is his authority, goes no farther. As the advocate can maintain no action for his fees, there would be some hardship in exposing him to an action for what his client might consider want of proper zeal, industry, or knowledge, in the conduct of his cause. In two cases, In order to encourage due freedom of speech | N. P. C. 137. 166. Lord Kenyon, at Nisi

Prius, held such actions not to be maintainand unskilfully settling and signing a bill in chancery, which was referred to the master for scandal and impertinence, and the plaintiff obliged to pay the costs of the reference. Upon this case it may be observed, that the plaintiff had a direct and far more proper remedy in chancery; as, by several orders, the counsel who signs such a bill is liable to pay costs for it. Beames' Orders, 167: Mitford's Pleadings, 33. 257. (3d ed.) The second case was an action to recover back from a counsel who had not attended at the trial of a cause the fee given to him for attending; upon this; too it seems obvious that if the counsel could have maintained no action for the fee, if it had been withheld after his attendance, the giving it must have been merely gratuitous, and there could be no legal grounds for an action to recover it back. It does not appear to have been alleged in this case, that the cause had miscarried in consequence of the counsel's non-attendance; indeed the contrary appears probable: at all events, neither case amounted to a direct betraying of the chent; but upon this point Lord Hale cites a strong authority in favour of the position in his notes on F. N. B. 94.

The case is Somerton's case, which was several times before (see Year Book, 11 H. 6. 18. 24. 55.) the courts; and the principle of the judgment seems to have been, that for treachery after a retainer an action might be maintained against a barrister. Lord Hale's summary is, "if one retains counsel, and gives him his fee to assist him in the purchase of such a manor; if he becomes counsel for another or discovers his counsel (advice) case lies." And see Bac. Ab. Action on the Case. (ed. by Gwillim & Dodd.) See titles Abatement, Pleading. See farther titles Counsellor, Inns of Court, Non-conformists, Oaths.

BARRATOR, or BARRETOR, Lat. barractator, Fr. barrateur.] A common mover of suits and quarrels, either in courts or elsewhere in the country, that is himself never quiet, but at variance with one or other. Lambard derives the word barretor from the Lat. balatro, a vile knave: but the proper derivation is from the Fr. barrateur, i. c. a deceiver, and this agrees with the description of a common barretor in Lord Coke's Reports, viz. that he is a common mover and maintainer of suits in disturbance of the peace, and in taking and detaining the possession of houses and lands, or goods by false inventions, &c. 8 Rep. 37.

However, it seems clear that no general indictment, charging the defendant with being a common oppressor, and disturber of the peace, and stirrer up of strife among neighbours is good, without adding the words common barretor, which is a term of art appropriated by law to this purpose. 1 Mod. 288: 1 Sid. 282: Cro. Jac. 526: 1 Hawk. P. C. c. 81. § 9.

A common barretor is said to be the most able. The first was an action for negligently dangerous oppressor in the law; for he oppresseth the innocent by colour of law, which was made to protect them from oppression. 8 Rep. 37. No one can be a barretor in respect of one act only; for every indictment for such crime must charge the defendant with being communis barractator, and conclude contra pacem, &c. And it hath been holden, that a man shall not be adjudged a barretor for bringing any number of suits in his own right, though they are vexatious, especially if there be any colour for them; for if they prove false he shall pay the defendant costs. 1 Roll. Abr. 355: 3 Mod. 98.

A barrister at law entertaining a person in his house, and bringing several actions in his name, where nothing was due, was found guilty of barratry. 3 Mod. 97. An attorney is in no danger of being convicted of barratry, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. Ibid. A common solicitor, who solicits suits, is a common barretor, and may be indicted thereof, because it is no profession in law. 1 Danv. Abr. 725.

The punishment for this offence in a common person is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. See the stat. 12 G. 1. c. 29. under title Attornies at Law. 4 Comm. 134: and see stat. 34 E. 3. c. 1: 1 Hawk. P. C. c. 81.

It seems to be the settled practice not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him; for otherwise it would be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances. 5 Mod. 18: 1 Ld. Raym. 490: 12 Mod. 516: 2 Atk. 340: 1 Hawk. P. C. c. 81. § 13.

To this head may also be referred another offence of equal malignity and audaciousness, that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by stat. 8 Eliz, c. 2. to be punished by six months' imprisonment, and treble damages to the party injured. 4 Comm. 134.

BARRATRY, see Barrator, Insurance, II. This term was applied to the obtaining

benefices at Rome.

In Scotland the crime of a judge who is in-

duced to pronounce a judgment by bribery is termed barratry. See Act, 1540. c. 104.

BARREL. See tit. Weights and Measures. BARRETOR, BARRETRY. See Barretor. BARR-FEE. A fee of 20d. payable by every prisoner acquitted of felony, to the sheriff or gaoler. 21 H. 7.16. b: Terms de Ley.—See Fees.

BARRIERS, Fr. barrieres; jeu de barres, i.e. palæstra.] A martial exercise of men armed and fighting together with short swords, within certain bars or rails which separated them from the spectators; it is now disused here in England. Covel. There are likewise barrier towns, or places of defence on the frontiers of kingdoms.

BARRISTER. See BARRASTER.

BARROW, from the Sax. beerg, a heap of earth.] A large hillock or mount, raised or cut up in many parts of England, which seems to have been a mark of the Roman tumuli, or sepulchres of the dead. The Saxon beera was commonly taken for a grove of trees on the top of a hill. Kennett's Gloss.

To BARTER, from the Fr. barater, or Span. baratar circumvenire] To exchange one commodity for another, or truck wares for wares. Stat. 1 R. 3. c. 9. Because probably they that exchange in this manner do endeavour, for the most part, one to over-reach and circumvent the other.—So bartery, the substantive in stat. 13 Eliz. c. 7. of Bankrupts.

BARTON, or BURTON, a word used in Devonshire for the demesne lands of a manor; sometimes the manor-house itself, and in some places for out-houses and fold-yards. In the stat. 2 and 3 Ed. 6. c. 12. barton lands and demesne lands are used as synonima. Blount says it always signifies a farm distinct from a mansion—and bertonarii were farmers, husbandmen that held bartons at the will of the lord. In the west, they called a great farm a berton or barton; and a small farm, a living. Blountin v. Barton and Berton.

BAS CHEVALIERS, low or inferior knights by tenure of a base military fee; as distinguished from bannerets, the chief or superior knights; hence we call our simple knights, viz. knights bachelors, bas chevaliers. Kennet's Gloss, Parach, Antio.

Kennet's Gloss. Paroch. Antiq.

BASE COURT, Fr. cour basse.] Is an inferior court, that is not of or occurd, as the

court baron, &c. Kitch. fol. 95, 96.

BASE ESTATE, Fr. bas estat.] Or base tenure. That estate which base tenants have in their lands. And base tenants, according to Lambard, are those who perform villainous services to their lords; but there is a difference between a base estate and villenage, for to hold in pure villenage is to do all that the lord will command him; and if a copyholder have but a base estate, he not holding by the performance of every commandment of his lord, cannot be said to hold in villenage. See Kitch. 41.—This Dict. tit. Tenures.

BASE Fee, is a tenure in fee at the will of the lord, distinguished from socage fee tenure; but Lord Coke says, that a base fee, or qualified fee, is what may be defeated by limitation, or on entry, &c. Co. Lit. 118. Bassa tenura, or base tenure, was a holding by villenage, or other customary service, opposed to alta tenura, the higher tenure in capite or by military service, &c.—See tit. Tenure; Tail.

BASE INFEFTMENT, is when the vassal disposes lands to be holden of himself.

Scotch Dict.

BASELS, basselli.] A kind of coin abolished by King Hen. 2. anno 1158. Hollingshed's

Chron. p. 67.

BASELARD, or BASILLARD, in the stat. 12 Rich, 2. c. 6. signifies a weapon, which Mr. Speight, in his exposition upon Chaucer, calls pugionem vel sicam, a poinard. Knighton, lib. 5. p. 2731.

BASE RIGHTS are those by which the grantor creates a subinfeudation in favour of a vassal to be holden of himself. Scotch Dict.

BASILEUS. A word mentioned in several of our historians, signifying King, and seems peculiar to the kings of England. Monasticon, tom. 1. p. 64. Ego Edgar totius Angliæ basileus confirmavi. In many places of the Monasticon this word occurs: and also in Ingulphus, Malmesbury, Mat. Paris, Hoveden, &c.

BASKET-TENURE of lands. See Can-

estellus.

BASNETUM. A basnet, or helmet.

BASSINET. A skin with which the soldiers covered themselves. Blount.

BASTARD, bastardus; fancifully derived from the Greek βασσαρις, meretrix; more truly from the Brit. Bastard nothus, spurius; or, according to Spelman, from the German bastart—bas low, and start risen, Sax. steort; as up-start, homo novus, suddenly risen up-l One whose father and mother were not lawfully married to each other, previous to his birth; or as it has been seemingly more incorrectly phrased, "one born out of lawful wedlock."

I. 1. Who are Bastards, and of their Incapacities.

2. Of the trial of Bastardy.

- II. 1. Of the case of Infant-bastards, their Maintenance and Protection.
 - 2. Of the Murder of infant bastards.
- I. 1. Who are Bastards, and of their Incapacities.—A bastard by our English laws, is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry; [and this is still the law in Scotland;] and here they differ most materially from the English law; which though not so strict as to require that the child shall be begotten, yet makes it

mate, that it shall be born after lawful wed- inspiciendo. lock. 1 Comm. 454: 2 Inst. 96, 7.

Blackstone observes, that the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of the marriage contract taken in a civil light. He then recapitulates several motives, which he concludes we may suppose actuated the peers at the parliament Merton, when they refused to enact that children born before marriage should be esteemed legitimate. 1 Comm. 456: and see 1 Inst. 244. b. and 245. a. in the notes.

If a man marries a woman grossly big with child by another, and within three days after she is delivered, the issue is no bastard. I Danv. Ab. 729. If a child is born within a day after marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is no bastard, but supposed to be the child of the husband. 1 Roll. Ab. 358.

All the children born before matrimony are bastards; so are all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days. Cro. Jac. 451: see 1 Inst. 123. b. in note 1 and 2; where the time of gestation as connected with this question is inquired into at great length, and with exquisite nicety and accuracy. On the whole it appears that what is commonly considered as the usual period is forty weeks, or 280 days. though the child is born some time after, it only affords presumption, not proof of illegitimacy. The information of the late celebrated anatomist, Dr. Hunter, is also given, from which we learn, 1. That the usual period is nine calendar months; (from 270 to 280 days;) but there is very commonly a difference of onc, two, or three weeks .- 2. A child may be born alive at any time, from three months, but we see none born with powers of coming to manhood, or of being reared before seven calendar months, or near that time; at six months it cannot be. -3. The doctor said he had known a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months; and he believed two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception. It has been suggested in a very interesting article on Medical Jurisprudence (Law Magazine, No. IX. July, 1830), that this period might safely and consistently with the best experience be extended to 310 days, 30 days beyond the usual period. See the case of the Gardner Peerage, 1824, reported by Mr. Le Mar-

The case of birth of children after the death of the husband gives occasion to the

an indispensable condition to make it legiti- writ de ventre inspiciendo. See tit. Ventre

But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband, in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases. 1 Inst. 8. For this reason by the ancient Saxon laws, in imitation of the civil law, a widow was forbidden to marry for twelve months. Ll. Ethel. A. D. 1008. Ll. Canut. c. 71: 1 Comm. 456, 7. See 1 Inst. 8. a. in note 7. where it is said, "Brook questions this doctrine, from which it seems as if he thought it reasonable that the circumstances of the case, instead of the choice of the issne, should determine who is the father." See Bro. Ab. Bastardy, p. 18: Palm. 10. See farther, 1 Inst. 123. b. in note 1. where additional authorities are cited, to show that in this case a jury ought to decide on the question, according to the proof of the woman's condition.

Children born during wedlock may also in some circumstances be bastards. As if the husband be out of the kingdom of England, or as the law somewhat loosely phrases it, extra quatuor maria, for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. 1 Inst. 244. But generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shown; Salk. 123: 3 P. Wms. 276: Stra. 925; which is such a negative as can only be proved by showing him to be elsewhere; for the general rule is præsumitur pro legitimatione. 5 Rep. 98. See also 1 Inst. 126. a. in note 2; and as to these phrases infra (or more classically intra) et extra quatuor maria, see some incomplete notes in 1 Inst. 180. a. note 6; and 261. a. note 1. Although a feme covert may on a question of bastardy give evidence of the fact of criminal conversation, yet she shall not be admitted to prove the non-access of her husband. Annal. 79.

There are determinations by which it appears that the child of a married woman may be proved a bastard by other circumstantial evidence than that of the husband's non-access. 4 Term Rep. 251. 356: Banbury Peerage, 2 Selwin, Nisi Prius, 746. (6th ed.) Upon this case, which was finally determined by the House of Lords in 1813, on the claim of an alleged descendant of the first Earl of Banbury (Knollys), who was created such in 1627, and the legitimacy of whose wife's child was disputed, it appears that the ancient laws of legitimacy may be considered as in some measure altered, the rule having formerly stood thus: "That presumption of legitimacy might be rebutted by physical evidence proving the contrary;" but that the

rule may now be stated thus: "Presumption | bastardized by the rules of the civil or comof legitimacy may be rebutted by physical evidence proving, or by moral evidence rendering probable, the contrary; and Phillipps therefore is justified in laying down as a doctrine to be extracted from this case, "that a jury may not only take into consideration proofs tending to show the physical impossibility of the child born in wedlock being legitimate, but they may decide the question of paternity, by attending to the relative situation of the parties, their habits of life, the evidence of conduct, and of declarations connected with conduct, and to every induction which reason suggests for determining upon the probabilities of the case." Law of Evidence, ii. p. 288. edit. 1829; and see Bac. Ab. Bastardy. (Ed. by Gwillim and Dodd.)

In a divorce a mensa et thoro, if the wife has children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but in a voluntary separation by agreement, the law will suppose access unless the negative be shown; and the children, prima facie shall not be esteemed bastards. Salk. 123 .- In case of divorce in the spiritual court a vinculo matrimonii, all the issue born during the coverture are bastards; because such divorce is always upon some cause, that rendered the marriage unlawful

and null from the beginning. 1 Inst. 235.

If a man or woman marry a second wife or husband, the first being living, and have issue by such second wife or husband, the issue is a bastard. See Bott. (ed. 1793 by Const.) 397. pl. 521. Before the stat. 2 and 3 Ed. 6. c. 21. one was adjudged a bastard,

quia filius sacerdotis.

A man hath issue a son by a woman before marriage, and afterwards marries the same woman, and hath issue a second son born after the marriage; the first of these is termed in law a bastard eigne, and the second a mulier, or mulier puisne; by the common law, as hath been said, such bastard eigne is as incapable of inheriting as if the father and mother had never married; but yet there is one case in which his issue was let into the succession, and that was by the consent of the lord and person legitimate; as if upon the death of the father the bastard eigne enters, and the mulier during his whole life never disturbs him, he cannot upon the death of the bastard eigne enter upon his issue. Lit. sect. 399: Co. Lit. 245.

To exclude the mulier from the inheritance, there must not only be an uninterrupted possession of the bastard eigne during his life, but a descent to his issue. Co. Lit. 244: 1 Roll. Ab. 624: see 2 Comm. c. 2. § 5.

No man can bastardize another after his death, that was a mulier by the laws of holy church, and who carried the reputation of legitimate during his life; for a man must be mon law: by the rules of the civil law, this person is by supposition legitimate; and if the common law be made the judge he cannot be bastardized; for it is a rule of common law, that a personal defect dies with the person, and cannot after his death be objected to his successor that represents him; and this rule of law was taken from the humanity of the ancients, which would not allow the calumny of the dead: as also from an important reason of convenience, for pedigrees are often derived through several persons, concerning whom there remains little knowledge or remembrance of any thing, but only of their being; and therefore it were an easy matter to throw on them the aspersion of bastardy by any forged evidence, which cannot be confronted by opposite proof; and so it is fit to limit a time in which all proofs of bastardy are to be disallowed. 7 Co. 44: Jenk. Rep. 268: 1 Brownl. 42: Co. Lit. 33. a.: Lit. sect. 399 : Co. Lit. 245.

In the case of Pride v. The Earls of Bath and Montague, it was held that the rule that a person shall not be bastardized after his death, is only good in the case of bastard eigne and mulier puisne. 1 Salk. 120: 3

Lev. 410.

If there be an apparent impossibility of procreation on the part of the husband, natural, or accidental, as in case of the husband being only eight years old, or disabled by disease, there the issue of the wife shall be a bastard. 1 Inst. 244.

The rights of a bastard are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called filius nullius, sometimes filius populi. Fortesc. de Ll. c. 40. Yet he may gain a surname by reputation, though he has none by inheritance. 1 Inst. 3. 123: 6 Co. 65.

Where a remainder is limited to the eldest son of Jane S., whether legitimate or illegitimate, and she hath issue, a bastard shall take this remainder, because he acquires the denomination of her issue by being born of her body: and so it was never uncertain who was designed by this remainder. Noy. 35.

If parents are married and afterwards divorced, this gives the issue the reputation of children; and so doth a subsequent marriage of the parents. 6 Co. 65:, Hugh's Ab.

If a man, in consideration of natural affection and love, covenants to stand seised to the use of a bastard, this is not good; for he is not de sanguine patris; but it is said that a woman may give lands in frank marriage with her bastard, because he is of the blood of the mother; but he hath no father, but from reputation only. Dyer, 347: and 79: 6 Co. 77: Noy. 35.

A court of equity will not supply the want

of a bastard, as it will for a legitimate child. Preced. Chan. 475.

The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs but of his own body; for being as was before said nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. But though bastards are not looked upon as children to any civil purposes, yet the ties of nature hold as to maintenance, and many other purposes; as particularly that a man shall not marry his bastard sister or daughter. 3 Salk. 66, 7: Ld. Raym. 68: Comb. 356. And see post, II.

A bastard was, in strictness of law, incapable of holy orders, and though that were dispensed, yet he was utterly disqualified from holding any dignity in the church. Fortesc. c. 40: 5 Rep. 58. But this doctrine seems now obsolete; and there is a very ancient decision that a felon should have the benefit of clergy though he were a bastard. Bro. Clergy, 20. In all other respects therefore, except those mentioned, there is no distinction between a bastard and another man. 1 Comm.

459.

A bastard may be made legitimate, and capable of inheriting by the transcendant power of an act of parliament, and not otherwise; 4 Inst. 36; as was done in the case of John of Gaunt's bastard children, by a stat. of R. 2. 1 Comm. 459.

2. Of the Trial of Bastardy .- Bastardy, in relation to the several manners of its trial, is distinguished into general and special bas-

Till the stat. of Merton, 20 H. 3. the question, whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king's court either abided by it or rejected it at pleasure. But after the solemn protest made by the barons at Merton, against the introduction of the doctrine of the civil and canon law in this respect, special bastardy has been always triable at common law; and general bastardy alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2 Inst. 99: Reeve's Hist. Eng. Law. 85. 201: and see 1 Inst. 126. a. note 2; and 245. a. note 1.

General bastardy, tried by the bishop, in its notion contains two things. 1st. It should not be a bastard made legitimate by a subsequent marriage. 2ndly. That it should be a point collateral to the original cause of action. 1 Roll. Ab. 361.

Formerly bastards had a way in such issues to trick themselves into legitimation; for they used to bring feigned actions, and get suborned witnesses before the bishop to prove their legitimation, and then got the certificate returned of record; and after that their legiti-

of a surrender of a copyhold estate, in favour | mation could never be contested; for being returned of record as a point adjudged by its proper judges, and remaining among the memorials of the court, all persons were concluded by it; but this created great inconveniences, as is taken notice of in the preamble of stat. 9 H. 6. c. 11. in the case of several persons of quality; for the evidence of the contrary parties concerned was never heard at the trial, and yet their interest was concluded: to remedy this inconvenience without altering the rules of law, it was enacted, that before any writ to the bishop, there should be a proclamation made in the court where the plea depends, and after that the issue should be certified into Chancery, where proclamation should be made once in every month for three months, and then the chancellor should certify to the court where the plea depends, and afterwards it shall be again proclaimed in the same court, that all that are concerned may go to the ordinary to make their allegations; and without these circumstances, any writ granted to the ordinary, and all proceedings thereupon, shall be utterly void. 1 Roll. Ab. 361.

If the ordinary certify or try bastardy without a writ from the king's temporal courts, it is void; for the spiritual jurisdiction within these kingdoms is derived from the king, and therefore it must be exercised in the manner the king hath appointed; for it would be injurious if they should declare legitimation where the rights of inheritance are so nearly concerned, without any apparent necessity. 1 Roll. Ab. 361.

The certificate must be under the seal of the ordinary, and not under the seal of the commissary only: for the command is to the bishop himself to certify, and therefore the execution of the command must appear to be by the bishop in proper person. Ab. 362.

If a man be certified bastard, this binds perpetually, though the person so adjudged a bastard is not party to the action, for all persons are estopped to speak against the memorial of any judicatory; because the act of the public judicatory under which any person lives is his own act; and were he not thus bound, there might be contradiction in certificates. 1 Roll. Ab. 362.

If a man be certified bastard, that doth not bind a stranger till returned of record, because it is no judicial act till recorded in the place appointed to record such transactions; nor doth it bind the party to the action till judgment thereon, because if he avoid the action he avoids all consequences of the action; and therefore if the defendant be certified bastard by the ordinary, yet if the plaintiff be nonsuit, they cannot go on to trial, and so the bishop's certificate never appears of record, and therefore is not binding. 1 Roll. Ab.

If a man be certified mulier, no man is

estopped to bastardize him, for though he sessions: but if the woman die or marry may be a mulier by the spiritual law, yet he any man, notwithstanding the certificate, may plead the issue of special bastardy. 1 Roll. Ab.

Special bastardy is two-fold: 1. Where the bastardy is the gist of the action, and the material part of the issue. 2dly. Where those are bastards by the common law that are muliers by the spiritual law. 1 New. Ab. 314: Co. Lit. 134: 1 Roll. 367: Hob. 117.

If a man receives any temporal damage by being called a bastard, and brings his action in the temporal courts, and the defendant justifies that the plaintiff is a bastard, this must be tried at common law, and not by writ to the bishop; for otherwise you suppose an action brought in a court which hath not a capacity to try the cause of action. 1 Brownl. 1: Hob. 179: Godol. 479: Co. Ent. 29.

If it be found by an assise taken at large that a man is a bastard, the temporal courts are judges of it; for the jury cannot be estopped to speak truth which may fall within their own knowledge; and what they find becomes the record of the temporal courts, and so within their conuzance. Bastardy, 97.

II. 1. Of the case of Infant-Bastards their Maintenance and Protection .- By stat. 18 Eliz. c. 3. two justices of peace may make an order on the mother or reputed father of a bastard to maintain the infant by weekly payments or otherwise; and if the party disobey such order, he or she may be committed to gaol, until they give security to perform it, or to appear at the sessions. By stat. 7 Jac. 1. c. 4. § 7. the justices may commit the mother of a bastard, likely to become chargeable, to the house of correction for a year; or for a second offence till she gives security for her good behaviour. This part of the stat. of 7 Jac. 1. is now repealed by 50 G. 3. c. 51, which enables two magistrates to punish such woman by committing her to the House of Correction, for any time not exceeding twelve calendar months nor less than six weeks, and the magistrates may at their discretion order her to be discharged after she has been confined for any space not less than six weeks. Such woman not to be committed until one month after her delivery .- By stat. 13 and 14 Car. 2. c. 12. § 19. if the putative father or lewd mother run away from the parish, the overseers may by authority of two justices, seize, and by order of the sessions sell the effects of the father, or mother to maintain the child. By stat. 6 G. 2. c. 31. the mother of a bastard may before or after it is born, swear it to any person; and the putative father shall then on application by the overseer of the parish be apprehended and committed; unless he give security to Act, 4 G. 4. c. 76. Bac. Ab. tit. Marriage, indemnify the parish; or to appear at the next (7th ed.)

before the delivery, or miscarry, or prove not may be a bastard by our law; and therefore to be with child, the reputed father shall be discharged. [So much of 6 G. 2. c. 31. as authorises the commitment of reputed fathers before the birth of the bastard is repealed by 49 G. 3. c. 68. § 6.] Any justice near the parish, on application of the reputed father in custody, shall summon the overseer to show cause against his being discharged; and if no order be made in pursuance of stat. 43 Eliz. c. 2. (for the maintenance of the child) within six weeks after the woman's delivery, he shall be discharged .- By the said stat. 6 G.2. c. 31. § 4. it is expressly provided that "It shall not be lawful for the justice to send for any woman before she shall be delivered, or for a month after, in order to be examined concerning her pregnancy; or to compel any woman before her delivery to answer any question relating to her pregnancy. -By stat. 13 G. 3. c. 82. § 5. bastards born in any licensed hospital for pregnant women, are settled in the parishes to which their mothers belong. And the like provision is made by stat. 20 G. 3. c. 36. § 2. as to bastards born in houses of industry.

By stat. 49 G. 3. c. 68. the reputed father of a bastard is chargeable with the expences incident to the birth, and of his own apprehension, and of the order of filiation. Reputed fathers may be apprehended and committed unless they give security to indemnify the parish, or enter into recognizance to appear at the next sessions, unless it shall be certified by one magistrate that the woman had not then been delivered, or been delivered only one month previous to such sessions. § 2. Upon nonpayment of sums ordered for maintenance of bastards, the mother or reputed father may be apprehended and committed for a month or till payment. § 3. Costs thereof to be subject to the discretion of justices in session, as under 18 Eliz. c. 3.

The putative father of a bastard, although no legal relationship subsists between them. is so far considered as its natural guardian, as to be entitled to the custody of it, for its maintenance and education. 2 Stra. 1162; 1 Bott. P. L. 466. And therefore, while under his care and protection, and not likely to become chargeable to the parish, the parish officers have no concern with it. 1 Mod. 43: 1 Sid. 444. Under the marriage act, which requires the consent of the father, mother, or guardian, a bastard being a minor cannot be married without the consent of a guardian named by the Court of Chancery. See 1 Term. Rep. K. B. 96. and the case of Horner v. Liddiard, determined in Doctors' Commons in 1799, and reported by Dr. Croke, 8vo pamph. 1800, and this Dict. title Marriage, Guardian. But see the new Marriage,

natural parents, a bastard is settled in the parish in which it is born; (Salk. 427: 3 Burn. J. Paul's P. O. 81;) [unless such birth] be procured by fraud, Sel. Ca. 66; or happen under an order of removal, 1 Sess. Ca. 33: Salk. 121. 474. 532; or in the house of correction, 2 Bulst. 358; or under a certificate, Stra. 186; and the parish of consequence becomes charged with its maintenance, then and not before, the authority of the churchwardens and overseers begins, Say, 93; and they may act without an order from the justices. 3 Term. Rep. C. P. 253. It seems however that until a bastard attain the age of seven years, it cannot be separated from its mother; Cald. 6; but may be removed to the place of her settlement, while the age of nurture continues; Carth. 279; and must under these circumstances be maintained by the parish where it was born. Doug. 7.

The court of King's Bench granted a habeas corpus, to bring up a bastard child within the age of nurture, and restored it to the custody of the mother from whose quiet possession it had been taken. R. v. Hopkins & Ux. 7 East, 579; see 5 T. R. 178: 5 E. R. 224: and 1 N. R. 148. And if a putative father obtain the possession of a child from the mother by fraud, the Court of K. B. will order it to be restored to the mother. 5 T. R. 278: S. P. 5 East, 224. n: 4 Taunt. 498: 1 Bott.

P. L. 465.

Bastards are within the meaning of the marriage act, which requires the consent of the father, guardian, or mother to the marriage of persons under age, who are not married by banns. R. v. Hodnet, 1 T. R. 96. See

An order of bastardy must be made by two justices; 2 Salk. 478: 1 Stra. 475; on complaint, 1 Barn. K. B. 261; and the examination of the woman must be taken in the presence of both the justices; 6 Mod. 180: 2 Black. Rep. 1027: but it is not necessary that the putative father should be present to hear what she deposes; Cald. 808; although he must be summoned before an order of filiation can be made; 8 Mod. 3: 1 Sett. Co. 179; for he cannot be compelled to give security, or be committed until he has made default; Ld. Raym. 853. 8: 3 Salk. 66; but if an order of filiation is once made, the fact of bastardy is established until the order is reversed. Cro. Jac. 535. The justice may commit if the putative father neglect to pay the maintenance therein ordered for the support of the child, unless he give a bond to bear the parish harmless, or to appear at the sessions. 363: 1 Vent. 41: Ld. Raym. 858. 1157. The order can only be reversed by an appeal to the sessions, which must be to the next sessions after notice of the order; 2 Salk. 480.2; and if the sessions reverse the order of the two justices, yet they may on summons make another on the same or on any other person; land) by the subsequent marriage of the pa-

As, however, without the protection of its | for in this respect they have an original jurisdiction. 2 Bulst. 355: 1 Stra. 475: Doug. 632. The order, however, may before appeal to the sessions, be removed by certiorari into King's Bench, and there quashed for errors on the face of it. Cald. 172 .- But no order of bastardy made at sessions can be quashed in King's Bench, unless the putative father is present in court; 2 Salk. 475; for on its being quashed, he shall enter into a recognizance to abide the order of the sessions below. 1 Bl. Rep. 198.

A feme covert may be committed to the house of correction for disobeying an order of justices made on her for not maintaining a bastard born previous to her marriage. Barr.

Rep. 1680.

On this part of the subject see farther Bott's Poor Laws, Const. Edit. 1793.

The law with respect to the maintenance of illegitimate children has been greatly altered by the recent Poor Law Act; see its provisions, Poor, VII. 9.

In an ancient MS. temp. Ed. 3. it is said that he who gets a bastard in the hundred of Middleton in Kent, shall forfeit all his goods

and chattels to the king.

2. Of the Murder of Infant-Bastards .- The offence of murdering or concealing the birth of bastards was provided for by 21 Jac. 1. c. 27. which was repealed by 43 G. 3. c. 58; and this latter act is repealed by 9 G. 4 c. 31. (which extends to England only) by § 14. of which is enacted, that if any woman shall be delivered of a child, and shall by secret burying or otherwise disposing of the body, endeavour to conceal the birth thereof, she shall be guilty of a misdemeanor, punishable by two years' imprisonment with hard labour; and it shall not be necessary to prove whether the child died before, at, or after, its birth; and a jury may find a verdict for such offence on trial of the woman for murder. Like provision is made as to Ireland by 10 G. 4. c. 34. § 97. See farther, tit. Children, Murder.

The Scotch act W. and M. Sess. 2. Part. 1. providing that a woman concealing her pregnancy during the whole space, and not calling for help at the birth, the child being found dead or missing, shall be held as the murderer of the child, repealed 49 G. 3. c. 14.

Any woman in Scotland concealing her pregnancy during the whole period, and not calling for help at the birth, if the child be found dead or missing, she shall be imprisoned not exceeding two years in the common

gaol. § 2.

In Scotland a bastard is legitimated by the subsequent matrimony of the parents, founded on a fiction that the parents had been married by compact at the period of conception, such consent being deemed a valid marriage by the law of Scotland. But this fiction will not extend to legitimate a bastard conceived and born in England (or elsewhere out of Scotrents after the birth. See Doe, d. Birtwhistle, shall be no wager of battel; and by stat. 6 v. Vardill, 8 D. & R. 135; and the cases of Sheddan v. Patrick; Bowes v. Ld. Strathmore; and Morison v. Saunders, determined at various periods in the House of Lords.

BASTARDY, bastardia.] The defect of birth objected to one born out of wedlock. Bract. lib. 5. c. 19. See Bastard.

BASTARD EIGNE. See Bastard.

BASTON, Fr.] A staff or club. In the statutes it signifies one of the wardens of the Fleet's servants or officers who attend the king's courts with a red staff for taking such into custody who are committed by the court. Stats. 1 R. 2. c. 12: 5 Eliz. c. 23. See Tip. staff.

BAS-VILLE. The suburbs of a town, Fr. BASUS, per basum tolnetum capere, to take toll by strike; and not by heap; per basum being opposed to in cumulo vel cantello. See Consuetud. Domus de Farendon, MS. f. 42.

BATABLE GROUND. Land that lay between England and Scotland, heretofore in question, when they were distinct kingdoms, to which it belonged; litigious or debateable ground, i. e. land about which there is debate; and by that name Skene calls ground that is in controversy. Camb. Britain, tit. Cumberland.

BATH, Lat. Bathon, called by the Britons Badiza, has been termed the city of sick men, Sax. Acemannes Cæster.] It is a place of resort in Somersetshire, famous for its medicinal waters. The chairmen are there to be licensed by the mayor and aldermen, by stat. 7 G. 1. c. 19. And a public hospital or infirmary for poor is established in the city of Bath, the governors whereof have power to hold all charitable gifts, &c. and appoint physicians, surgeons, and other officers: any persons not able to have the benefit of the Bath waters may be admitted into this hospital, their case being attested by some physician, and the poverty of the patients certitified by the minister and churchwardens of the place where they live, &c. Every person so admitted shall have use of the old hot bath, and be entertained and relieved in the hospital; and when cured or discharged, such persons shall be supplied with 3l. each, to defray the expense of removing them back to their parishes, &c. Stat. 12 G. 2. c. 31.

BATHING. The public have no common law right of bathing in the sea, nor as incident thereto, of crossing the sea-shore on foot, or with bathing machines for that purpose. 5

B. V. A. 268.

BATTEL, Fr. battaile.] A trial by combat, anciently allowed of in our laws, (among other cases,) where the defendant in appeal of murder or felony might fight with the appellant, and make proof thereby whether he be culpable or innocent of the crime.

The citizens of London were privileged by charter, that in appeals by any of them, there R. 2. c. 6. defendant could not be received to wage battle in an appeal of rape. 2 Hawk. P. C. c. 45.

The species of trial by wager of battel (says Blackstone) was introduced into England, among other Norman customs, by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil.-The first in the martial court, or court of chivalry and honour: Co. Litt. 261; the second in appeals of felony; and the third, upon issue joined in a writ of right, the last and most solemn decision of real property, in which latter it appears to have been admitted for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence, be unable to prove it to a jury.

The last trial by battle that was waged in the Court of Common Pleas at Westminster; [though there was afterwards one in the court of chivalry, in 1631, 6 Car. 1. between Donald Lord Ray, appellant, and David Ramsey, Esquire, defendant, which was compromised; see Orig. Jurid. 65; 19 Raym. 322; and another in the county palatine of Durham in 1638; Cro. Car. 512;] was in 13 Eliz. A. D. 1571, as reported by Dyer, and held in Tothill-fields, Westminster, See Dy. 301. and Spelm. in v. Campus; the latter of whom was

present at the ceremony.

In 1819, an appeal having been brought against one Thornton by Ashby, the intant brother of a young woman, whom he was accused of having murdered (after violation), all the judges of the Court of King's Bench narrowly escaped the necessity of being compelled to sit from sunrise to sunset to see the defendant prove his innocence against the infant's champion. A slip in the proceedings fortunately relieved the judges from this method of doing justice, and the recurrence of such an emergency was prevented by stat. 59 G. 3. c. 46. which declares, "that the trial by battle in any suit is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished," and it is abolished accordingly. See tit. Appeal.

BATERSEGA. Battersey. BATTERY. See tit. Assault.

BATTERY, PENDENTE LITE. The offence of attacking an adversary in a law-suit, while the suit is depending. By two Scotch acts, 1584, c. 138. and 1594, c. 219. the plaintiff of fending is to lose the sum sued for, and the defendant is condemned without farther proof. in terms of the conclusion of the libel or declaration. These acts have been held in force as late as 1789.

BATUS, Lat. from the Sax. bat.] A boat, and battellus a little boat. Chart. Ed. 1: 20 Julii, 18 regni. Hence we have an old word batswain, for such as we now call boatswain of a ship.

BAUBELLA, baubles.] A word mentioned, ble shall go with them before a justice of the in Hoveden in R. 1. and signifies jewels or

precious stones.

BAUDEKIN, baldicum, and baldekinum.] Cloth of baudekin, or gold; it is said to be the richest cloth, now called brokade, made with gold and silk, or tissue, upon which figures in silk, &c. were embroidered.

BAWDY-HOUSE, Lupanar fornix.] A house of ill-fame, kept for the resort and commerce of lewd people of both sexes. keeping of a bawdy-house comes under the cognizance of the temporal law as a common nuisance, not only in respect of its endangering the public peace by drawing together dissolute and debauched persons, and promoting quarrels, but also in respect of its tendency to corrupt the manners of the people, by an open profession of lewdness. 3 Inst. 205: 1 Hawk. P. C. c. 74. Those who keep bawdyhouses are punishable with fine and imprisonment; and all such infamous punishment, as pillory, &c. as the court in discretion shall inflict; and a lodger who keeps only a single room for the use of bawdry, is indictable for keeping a bawdy-house. 1 Salk. 382. Persons resorting to a bawdy-house are punishable, and they may be bound to their good behaviour, &c. But if one be indicted for keeping or frequenting a bawdy-house, it must be expressly alleged to be such a house, and that the party knew it, and not by suspicion only. Poph. 208. A man may be indicted for keeping bad women in his house. 1 Hawk. P. C. c. 61. § 2. A constable upon information, that a man and woman are gone to a lewd house, or about to commit fornication or adultery, may, if he finds them together, carry them before a justice of the peace without any warrant, and the justice may bind them over to the sessions. Dalt. 214.

Constables in these cases may call others to their assistance, enter bawdy-houses, and arrest the offenders for a breach of the peace; in London they may carry them to prison; and by the custom of the city, whores and bawds may be carted. 3 Inst. 206.

As to a married woman's being indicted for keeping a house of ill-fame, see tit. Baron

and Feme, VII.

But it is said a woman cannot be indicted for being a bawd generally; for that the bare solicitation of chastity is not indictable. Pawk. P. C. c. 74. § 1: 1 Salk. 352.

It was always held infamous to keep a bawdy-house; yet some of our historians mention bawdy-houses, brothel-houses, or stews, publicly allowed here in former times, till the reign of Hen. 8. by whom they were suppressed about A. D. 1546; and writers assign the number to be eighteen thus allowed on the bank-side in Southwark. See Brothel-houses.

By stat. 25 G. 2. c. 36. made perpetual by stat. 28 G. 2. c. 19. if two inhabitants, paying scot and lot, shall give notice to a constable of any person keeping a bawdy-house, the constapeace, and shall (upon such inhabitants making oath, that they believe the contents of such notice to be true, and entering into a recognizance of 20l. each, to give material evidence of the offence,) enter into a recognizance of 30l. to prosecute with effect such person for such offence at the next sessions: the constable shall be paid his reasonable expences by the overseers of the poor, to be ascertained by two justices; and if the offender be convicted, the overseers shall pay to the two inhabitants 10l. each. On the constable's entering into such recognizance as aforesaid, the justice shall bind over the person accused to the next sessions, and if he shall think proper, demand security for such person's good behaviour in the mean time. A constable neglecting his duty forfeits 201. Any person appearing as master or mistress. or as having the care or management of any bawdy-house, shall be deemed the keeper thereof, and liable to be punished as such. The same act also directs the licensing by magistrates of all public places within twenty miles of the metropolis. See also 58 G. 3. c. 70. § 7, 8. as to notice to overseers of the poor, who are to be the prosecutors in such cases; and the payment of costs to witnesses.

BAY, or pen, is a pond-head made up of a great height, to keep in water for the supply of a mill, &c. so that the wheel of the mill may be driven by the water coming thence, through a passage or flood-gate. Stat. 27 Eliz. c. 19. A harbour where ships ride at sea, near some port, is also called a bay.

BEACON, from the Sax. beacn, signum, whence the English beckon to nod or to make a sign.] A signal well known; being a fire maintained on some eminence near the coasts of the sea. 4 Inst. 148. Hence beaconage (beaconagium), money paid towards the maintenance of beacons. See stat. 5 Hen. 4. c. 3. as to keeping watch on the sea coast.

Barrington, in his observations on this statute, introduces the copy of an order of ancient date cited by Prynne in his remarks on Coke's 4 Inst. showing the stations fixed on for beacons in Kent and Essex, viz. at the Isle of Sheppy in Kent; at Shorebury in Essex; at Hoo in Kent; at Tolbing in Essex; at Cleve in Kent; at Tilbury in Essex; at Gravesend in Kent; and at Famedon in Essex.

See Barr. 5 edit. p. 369.

The erection of beacons, light-houses, and sea-marks, is a branch of the royal prerogative; whereof the first was anciently used in order to alarm the country, in the case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal (3 Inst. 204: 4 Inst. 148.) to cause them to be erected in fit and convenient places (4 Inst. 136.), as well upon the lands of the subject as

upon the demesnes of the crown: which fair pleading, viz. for not pleading fairly or power is usually vested by letters patent in the office of lord high admiral Nid. 158: 4 Inst. 149.) or the Admiralty board. And by stat. 8 Eliz. c. 13. the corporation of the Trinity House are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100% or in case of inability to pay it, he shall be ipse facto outlawed. I Comm. 265.—See the stats. 4 Ann. c. 20. and 8 Ann. c. 17. for building the Eddystone light-house near Plymouth, and raising the duties payable by ships for its support; and stat. 3 G. 2. c. 36, as to the lighthouse on the rock Skerries, near Holyhead, in the county of Anglesea.

BEAD, or bede, Sax. bead, oratio. A prayer; so that to say over beads, is to say over one's prayers. They were most in use before printing, when poor persons could not go to the charge of a manuscript book: though they are still used in many parts of the world, where the Roman Catholic religion prevails. They are not allowed to be brought into England, or any superstitious things, to be used here, under the penalty of a pramunire,

by stat. 13 Eliz. c. 2.

BEAM. That part of the head of a stag where the horns grow, from the Sax. beam, i. e. arbor; because they grow out of the head as branches out of a tree. Beam is likewise used for a common balance of weights in cities and towns.

BEAMS and BALANCE, for weighing goods and merchandize in the city of London.

See tit. Weights and Measures.

BEARERS. Such as bear down or oppress others, and is said to be all one with maintainors.—Justices of assise shall inquire of, hear and determine maintainors, bearers, and conspirators, &c. Stat. 4. Ed. 3. c. 11.

BEARROCSIRA, Berkshire,

BEAST, ordinarily kept in a state of confinement, not being the subject of larceny at common law; persons stealing or having in possession, or the skin thereof punishable summarily before one or two justices, by 7, 8 G. 4. c. 20. § 32.

BEASTS of chase, fera campestres.] Are five, viz. the buck, doc, fox, marten, and rec. Manw. part 1. p. 342. Beasts of the forest (feræ silvestres) otherwise called beasts of venary, are the hart, hind, boar, and wolf. Ibid. part 2. c. 4. Beasts and fowls of the warren are the hare, coney, pheasant, and partridge. Ibid. Reg. Orig. 95, 96. Sc. Co. Lit. 233.—

BEAU-PLEADER, pulchre placitando, Fr. beauplaider, i. e. to plead fairly.] Is a writ upon the statute of Marlbridge, 52 H. 3. c. 11. whereby it is enacted, that neither in the circuit of justices nor in counties, hundreds, or courts-baron, any fines shall be taken for

aptly to the purpose; upon which statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand such fine, and it is a prohibition not to do it: whereupon an alias and pluries and attachment may be had, &c. New. Nat. Br. 596, 597. And beaupleader is as well in respect of vicious pleadings, as of the fair pleading, by way of amendment. 2 Inst. 122.

BEBBA. Bamburgh, in Northamptonshire. BEDEL, bedellus, Sax. bydel, Fr. bedeau.] A crier or messenger of a court, that cites men to appear and answer; and is an interior officer of a parish or liberty, very well known in London, and the suburbs. There are likewise university bedels, and church bedels, now called summoners and apparitors; and Manwood in his Forest Laws, saith there are forest bedels, that make all manner of garnishments for the courts of the forest, and all proclamations, and also execute the process of the forest, like unto bailiffs errant of a sheriff in his county. Cowel.

BEDELARY, bedelaria.] The same to a hedel, as bailiwick to a bailiff. Lit. lib. 3. cap.

5: Blount: Cowel.

BEDEREPE, alias biderepe, Sax.] A service which certain tenants were anciently bound to perform, viz. to reap their landlord's corn at harvest; as some yet are fied to give them one, two, or three day's work, when commanded. This customary service of inferior tenants was called in the Latin pracaria bedreprum, Sc. See Magna Pracaria.

BEDEWERI. Those which we now call landitti; profligate and excommunicated perwills. The word is mentioned in Mat. Paris,

anno 1258.

By 11 G. 4. and 1 W. 4. c. 64, reciting that it is expedient for the better supplying the public with beer, to give greater facilities for the sale thereof, than are at pres at afford d by licences to keepers of inns, al-houses, and victualling-houses, it is enacted that any person obtaining a licence under the act may sell small beer, ale, and porter by retail, in any house or premises specified in the heener; and any householder may obtain an excise licence for that purpose, giving sureties, and also paying two guineas for the licence, which is to be valid for twelve calendar months; no such licence to entitle the party to receive a licence to sell wine, or spirits; nor to be granted to a sheriff's efficer, or officer executing the process of any court of justice; nor to any person not being a householder assessed to the poor rates in the parish where he is licensed; and a list of the persons licensed, and the sureties, and the name and description of the house, shall be kept at the Excise-office, or at the office of the collector or supervisor of excise, and open to the inspection of any magistrate of the county or place where such house shall be situate. The licence duty is to be under the management

of the commissioners of excise, and the pro- | any day appointed for a public fast or thanks-The parties licensed are to put up boards with the words "Licensed to sell Beer by retail," under a penalty of 10l.; and a party selling beer without licence is liable to a penalty of 20l.

By § 11. it is lawful for any one justice for any county or place where any riot shall happen, or for any two or more justices where any riot may be expected, to order any licensed house to be closed at such time as they shall direct. By § 13. any person selling beer, or under such licence, who shall permit any drunkenness or disorderly conduct in such house, and every person who shall transgress the conditions specified in the licence, or allow them to be transgressed, shall be deemed guilty of disorderly conduct, and for the first offence forfeit not less than 40s. nor more than 51.; for the second offence not less than 51. nor more than 10l; and for the third offence not less than 201. nor more than 501. By § 14. the licensed houses are not to be opened before four in the morning, nor after ten at night; nor between the hours of ten and one, and of three and five on Sunday, Good Friday, Christmas-day, or any fast, or thanksgivingday, under a penalty of 40s. for every offence; and every separate sale of beer, &c. to be a separate offence. By § 29, the act is not to affect any privileges or authorities of the two universities, or of the master, wardens, &c. of the vintners in London, nor to prohibit persons selling beer in booths at lawful fairs. As to the exporting, selling, measuring, &c., see tits. Alchouses, Brewers, Navigation Acts, Weights and Measures.

By the 4 and 5 W. 4. c. 85. the provisions of the 1 W. 4. c. 64. allowing the sale of beer to be drunk on the premises, are repealed. Licenses henceforth to be granted for the sale of beer are not to authorise its consumption on the premises, unless granted upon a certificate of good character, signed by six rated inhabitants of the parish, &c., and certified by one of the overseers, which is to be deposited

with the commissioners of excise.

§ 3. Penalty of 5l. on overseers refusing to

certify as required.

§ 4. Permitting drinking beer in a neighbouring house or in any shed, &c., with intent to evade the provisions of the act, to be deemed drinking on the premises.

§ 5. Provisions for billetting soldiers under mutiny act shall extend only to persons licensed to sell beer or cider on the premises.

§ 6. Justices of the peace at their petty sessions are, once a year, to regulate the times of opening and closing houses; any one aggrieved may appeal to the sessions, giving the justices fourteen days' notice. Provided that the hour so to be fixed for opening any such house shall not be earlier than five in the morning, or for closing later than eleven at night, or before one o'clock in the afternoon on Sunday, Good Friday, Christmas-day, or

§ 7. Constables and officers of police may visit licensed houses when they shall think proper, and owners of such houses, or any other person in their employment, or by their direction, refusing constable, &c. admittance, shall forfeit 51. and costs, and for a second offence may be disqualified for selling beer, &c. by retail for two years.

§ 8. Imposes a penalty of 201. for making or using false certificates, and licences obtained

on false certificates are to be void.

§ 10. Retailers are compellable to produce their licenses on the requisition of two magistrates, under a penalty of 5l.

§ 11. The powers, provisions, and penalties of 1 W. 4. c. 64. are to apply to persons licensed under this act, and to their sureties, &c.

§ 13. Repeals the duties on beer licenses under the 1 W. 4. c. 64. repealed, and grants new duties in lieu thereof; viz. for a licence to sell beer not to be drunk on the premises, the annual sum of 1l. 1s.; where consumed upon the premises, 3l. 3s.

§ 17. Penalty on unlicensed persons selling beer and cider by retail to be drunk off the premises, 10t.; to be drunk on the premises,

§ 18. The board over the door is to state "Not to be drunk on the premises," or "To be drunk on the premises."

§ 19. Every sale of beer, cider, or perry, in any less quantity than four gallons and a half,

shall be deemed a selling by retail. § 20. Persons licensed to sell beer or cider under this act are liable to penalties for selling

spirits or wine without licence.

§ 21. Such certificate shall not be required as to any house within the cities of London and Westminster, or the bills of mortality, or or within any city, or within the distance of one mile from the place used at the last elec-tion as the place of election or polling place of any town returning a member or members to parliament; provided the population, according to the last parliamentary census taken in such city, &c., shall exceed 5,000; provided always, that no licence for the sale of beer, ale, porter, cider, or perry, by retail on the premises, in London and Westminster, or within the bills of mortality, or in any such city, &c. hereinbefore mentioned, shall be granted after the 5th of April, 1836, unless the house in which beer or cider is intended to be sold shall be of the value of 10l. per annum.

BEGGARS. See Vagrants.
BEHAVING AS HEIR, is the same as Gestio pro harede in the civil law. Scotch Dict.

BELGÆ. The inhabitants of Somersetshire, Wiltshire, and Hampshire. Also the city of Wells, in Somersetshire. Blount.

BELISAMA. Rhibelmouth, in Lancashire. DE BELLA AQUA. Bellew and Bellaeu. DE BELLA FIDE. Beaufoy.

BELLINUS SINUS. Bellinsgate, at London.

DE BELLO CAMPO. Beauchamp.

DE BELLO FAGO. Beaufo.

DE BELLO FOCO. Beaufeu. DE BELLO LOCO. Beaulieu.

DE BELLO MARISCO. Beaumarsh.

BELLOMARISCUS. Beaumaris, a town in Wales

DE BELLO MONTE. Beaumont.

DE BELLO PRATO. Beaupre.

DE BELLO SITU. Bellasise.

BELLO CLIVUM, BELLO DESERTUM, BELLUS LOCUS. Beaudesert, in Stafford-

DE BENFACTIS. Benfield.

BENEFICE, beneficium.] Is generally taken for any ecclesiastical living or promotion; and benefices are by stat. 13 R. 2. st. 2. c. 2. divided into elective and donative : so also it is used in the canon law. 3 Inst. 155. Duarenus de beneficiis, lib. 2. c. 3. All church preferments and dignities are benefices; but they must be given for life, not for years, or at will. Deaneries, prebendaries, &c. are benefices with cure of souls, though not comprehended as such within the stat. 21 H. 8. c. 13. of residence: but, according to a more strict and proper acceptation, benefices are only rectories and vicarages.—The word benefice was formerly applied to portions of land, &c. given by lords to their followers for their maintenance; but afterwards, as these tenures became perpetual and hereditary, they left their name of beneficia to the livings of the clergy, and retained to themselves the name of feuds.-And beneficium was an estate in land at first granted for life only, so called, because it was held ex mero beneficio of the donor; and the tenants were bound to swear fealty to the lord, and to serve him in the wars, those estates being commonly given to military men: but at length, by consent of the donor, or his heirs, they were continued for the lives of the sons of the possessors, and by degrees past into an inheritance: and sometimes such benefices were given to bishops, and abbots, subject to the like services, viz. to provide men to serve in the wars; and when they as well as the laity had otbained a property in those lands, they were called regalia when given by the king; and on the death of a bishop, &c. returned to the king till another was chosen. Spelm of Feuds, c. 21; Blount. verb. Beneficium. See tit. Tenure. For matter relating to Ecclesiastical Benefices, and the requisites of the clergy admitted thereto, &c., see titles Advowson, Parson, Tithes.

BENEFICIO PRIMO ECCLESIASTICO

HABENDO. A writ directed from the king to the chancellor, to bestow the benefice that shall first fall in the king's gift, above or under such value, upon such a particular person. Reg. Orig 307

BENEFIT OF CLERGY. (Now abolish-

ed, see Clergy.)

BENEFIT SOCIETIES. See Friendly Societies.

BENEFIT OF DISCUSSION, is that whereby the antecedent heir, such as the heir of line, in a pursuit against the heir of tailzie, &c. must be first pursued to fulfil the defunct's deeds, and pay his debts: this benefit is likewise competent in many cases to cautioners. Scotch Dict.

BENER'TH. An ancient service which the tenant rendered to his lord with his plough and cart. Lamb. Itin. p. 222: Co. Lit. 86.
BENEVOLENCE, benevolentia.] Is used

in the chronicles and statutes of this realm for a voluntary gratuity given by the subjects to the king, Stow's Annals, p. 701. And Stow saith that it grew from Edward the Fourth's days; you may find it also anno 11 H. 7. c. 10. yielded to that prince in regard of his great expences in wars, and otherwise. 12 Rep. 19. And by act of parliament, 13 Car. 2. c. 4. it was given to his majesty King Charles II., but with a proviso that it should not be drawn into future example, as those benevolences were frequently extorted without a real and voluntary consent, so that all supplies of this nature are now by way of taxes, by grant of parliament; any other way of raising money for the crown is illegal. Stat. 1 Wm. & M. st. 2. c. 2. In other nations benevolences are sometimes given to lords of the fee by their tenants, &c. Cassan. de Consuet. Burg. p. 134. 136 .- See tit. Taxes.

BENEVOLENTIA REGIS HABENDA. The form of purchasing the king's pardon and favour, in ancient fines and submissions, to be restored to estate, title, or place. Paroch. Antiq. p. 172.

BERBIAGE, herbiagium.] Nativi tenentes manerii de Calistocke reddunt per ann. de certo redditu vocat. berbiagg. ad le Hokeday, xix. s. MS. Survey of the Duchy of Cornwall. Blount.

BERBICARIA. A sheep down, or ground to feed sheep. Leg Alfredi, c. 9: Monasticon.

tom. 1. p. 308. See next article.

BERCARIA, berchery, from the Fr. bergerie.) A sheepfold, or other inclosure, for the keeping of sheep; in Domesday it is written berquarium. 2 Inst. 476: Mon. Angl. tom. 2. p. 590. Bercarius is taken for a shepherd: and bercaria, is said to be abbreviated from berbicaria, and berbex; hence come berbicus, a ram, berbica, an ewe, caro berbicina, mutton. Cowl.

BERCEIA BERCHERIA. Berkshire. BERECHINGUM. Barking, in Essex.

BEREFELLARII. There were seven churchmen so called, anciently belonging to the church of St. John of Beverley. Cowel:

BERGHMASTER, from the Sax. berg, a hill, quasi, master of the mountains.] Is a bailiff or chief officer among the Derbyshire miners, who also executes the office of a coroner. Esc. de An. 16 Ed. 1 num. 34. in Turre

or miner, a bergman. Blount.

BERGMOTH, or BERGHMOTE. Comes from the Sax. berg, a hill, and gemote, an assembly: and is as much as to say, an assembly or court upon a hill, which is held in Derbyshire, for deciding pleas and controversies among the miners. And on this court of berghmote, Mr. Manlove, in his Treatise of the Customs of the Miners, hath a copy of verses, with references to statutes, &c. Vide Squire

on the Anglo-Saxon Government.

BERIA, berie, berry, a large open field.] Those cities and towns in England which end with that word, are built in plain and open places, and do not derive their names from boroughs, as Sir Henry Spelman imagines. Most of our glossographers, in the names of places, have confounded the word beri with that of bury and borough, as the appellatives of ancient towns; whereas the true sense of the word berie is a flat wide campaign, as is proved from sufficient authorities by the learned Du Fresne, who observes, that Beria Sancti Edmundi, mentioned by Mat. Paris. sub anno 1174, is not to be taken for the town, but for the adjoining plain. To this may be added, that many flat and wide meads and other open grounds are called by the name of beries, and berry-fields; the spacious meadow between Oxford and Isley was, in the reign of king Athelstan, called Bery. As is now the largest pasture ground in Quarendon, in the county of Buckingham, known by the name And though these meads of Bery field. have been interpreted demesne or manor meadows, yet they were truly any flat or open meadows that lay adjoining to any vill or farm.

BERMUNDI INSULA. Bermondsey, in

BERRA. A plain open heath. Berras assartare, to grub up such barren heaths.

Cowel.

BERNET, Incendium, comes from the Sax. byran, to burn.] It is one of those crimes which, by the laws of H. 1. cap. 15. emendari non possunt. Sometimes it is used to signify any capital offence. Leges Canuti apud Brompt. c. 90: Leg. H. 1. c. 12. 47.

BERSA, Fr. bers.] A limit or bound. A

park pale. Blount.

BERSARE, Germ. bersn, to shoot.] Bersare in foresta mea ad tres arcus. Chart. Ranulf. Comit. Cestr. anno 1218, viz. to hunt or shoot with three arrows in my forest. Bersarii were properly those that hunted the wolf. Blount.

BERTON. See Barton.

BEREWICHA, or BERWICA. Villages or hamlets belonging to some town or manor. This word often occurs in Domesday: ista sunt berewichæ ejusdem manerii.

BERWICK. The town of Berwick-upon-Tweed was originally part of the kingdom of

The Germans call a mountaineer, | Scotland; and as such was, for a time, reduced by king Edward I. into the possession of the crown of England: and, during such its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Baliol, to be for ever united to the crown and realm of England) was confirmed by king Edward III. with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its reduction by Edward I. Its constitution was new modelled, and put upon an English footing, by a charter of king James I., and all its liberties, franchises, and customs, were confirmed in parliament by stats. 22 E. 4. c. 8. and 3 Jac. 1. c. 28. Though, therefore, it hath some local peculiarities, derived from the ancient laws of Scotland; (see Hale Hist. C. L. 183: 1 Sid. 382. 462: 2 Show. 365;) yet it is clearly part of the realm of England, being represented by burgesses in the House of Commons, and bound by all acts of the British parliament, whether specially named or otherwise. And, therefore, it was, perhaps, superfluously declared by stat. 20 G. 2. c. 42. that where England only is mentioned in any act of parliament, the same, notwithstanding, hath been, and shall be, deemed to comprehend the dominion of Wales and town of Berwickupon-Tweed. And though certain of the king's writs or processes of the courts of Westminister do not usually run into Berwick, any more than the principality of Walcs, yet it hath been solemnly adjudged, that all prerogative writs (as those of mandamus, prohibition, habeas corpus, certiorari, &c.) may issue to Berwick, as well as to every other of the dominions of the crown of England; and that indictments and other local matters arising in the town of Berwick, may be tried by a jury of the county of Northumberland. Cro. Jac. 543: 2 Ro. Ab. 292: stat. 11 G. 1. c. 4: 2 Burr. 834: 1 Comm. 99.

The case quoted from 2 Burr. 834. is that of the King v. Cowle; and lays down the great principles which determine the prerogative of the Court of King's Bench over the dominions of the crown part of the realm of

England, but not in England proper.
BERY, or BURY. The vill or seat of habitation of a nobleman, a dwelling or man-sion-house, being the chief of a manor; from the Sax. beorg, which signifies a hill or castle; for, heretofore, noblemen's seats were castles, situate on hills, of which we have still some As in Herefordshire, there are the beries of Stockton, Hope, &c. It was anciently taken for a sanctuary. See Beria.
BESAILE, or BESAYLE, Fr. besayeul,

proavus.] The father of the grandfather; and in the common law it signifies a writ that lies where the great grandfather was seised, the day that he died, of any lands or tenements in fee-simple; and, after his death, a stranger entered the same day upon him, and keeps out married: but is now used by an almost unithe heir. F. N. B. 222. See tit. Mort d'Ancestor.

This writ is now abolished. See Limitation

of Actions, II. 1.

BESCHA, from the Fr. bercher, fodere, to dig.] A spade or shovel. Hence perhaps, una bescata terra inclusa (Mon. Ang. tom. 2. fol. 642), may signify a piece of land usually turned up with a spade, as gardeners fit and prepare their grounds; or may be taken for as much land as one man can dig with a spade

BESTIAL, bestiales.] Beasts or cattle of any sort; stat. 4 Ed. 3. c. 3. it is written bestayle; and is generally used for all kinds of cattle, though it has been restrained to those anciently purveyed for the king's provi-

BETACHES. Laymen using glebe lands.

Parl. 14. Ed. 2.

BEBERCHES. Bid-works, or customary services done at the bidding of the lord by his inferior tenants. Cowel.

BEWARED. An old Saxon word signifying expended; for, before the Britons and Saxons had plenty of money, they traded wholly in exchange of wares. Blount.

BIBROCI, -ORUM. People of Berkshire.

BIDALE, or BIDALL, precaria potaria, from the Saxon biddan, to pray or supplicate.] Is the invitation of friends to drink ale at the house of some poor man, who thereby hopes a charitable contribution for his relief: it is still in use in the West of England: and is mentioned stat. 26 H. S. c. 6. And something like this seems to be what we commonly call house-warming, when persons are invited and visited in this manner, on their first beginning house-keeping.
BIDDING OF THE BEADE, bidding,

from the Saxon biddan.] Was anciently a charge or warning given by the parish priest to his parishioners at some special times to come to prayers, either for the soul of some friend departed, or upon some other particular occasion. And at this day our ministers, on the Sunday preceding any festival or holiday in the following week, give notice of them, and desire and exhort their parishioners to observe them as they ought, which is required

by our canons.

BIDENTES. Two yearlings, tags, or sheep of the second year. Paroch. Antiq. p. 216.

BIDUANA. A fasting for the space of

two days. Matt. West. p. 135.

BIGA, bigata.] A cart or chariot drawn with two horses coupled side to side; but it is said to be properly a cart with two wheels, sometimes drawn by one horse; and in our ancient records it is used for any cart, wain, or wagon. Mon. Angl. tom. 2. fol. 256.

BIGAMUS. One guilty of bigamy.

this word properly signifies the being twice marriage, the effect may be avoided by evi-

versal corruption, to signify the offence of polygamy, or the having a plurality of wives or husbands at once. 3 Inst. 88.

Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of holy orders; probably on the ground of St. Paul's words, 1 Tim. c. 5. v. 2. "That a bishop should be the husband of one wife," and they were by a canon of the council of Lyons, A. D. 1274, denied all clerical pri-

A second marriage, the former husband or wife living, is, by the ecclesiastical law of England, simply void, and a mere nullity; but the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well ordered state. By stat. 9 G. 4. c. 31. \S 22. and 10 G. 4. c. 34. \S 26. for Ireland), it is enacted, that if any person being married, shall marry another person during the life of the former husband or wife, whether the second marriage has taken place in England or Ireland, or elsewhere, such offender, and persons counselling, aiding, or abetting, shall be guilty of felony, and liable to be transported for seven years, or imprisoned not exceeding two years; and the offence may be tried in the county where the offender is apprehended or be in custody. A proviso in the act, however, contains these four exceptions: 1. When the second marriage is contracted out of England by one not a subject of his majesty. 2. When either of the parties have been continually absent from each other for seven years, and not know the other to be living. 3. Where there is a divorce. 4. Where the first marriage has been declared

On an indictment for bigamy, if the first marriage was in Ireland, by licence, but without consent of parents, one of the parties being under age, such marriage will support the indictment, not having been vacated within the year, as required by the Irish Marriage Act, 9 G. 2. c. 11. Rex v. Jacobs, 1 Ry. & M. 140.

Under the former stat. of Jac. 1. (now repealed) if the first marriage were beyond sea, and the latter in England, the party might have been indicted for it here; because the latter marriage was the offence; but not vice versa. See 1 Hawk. P. C. 174, 175: 1 Hale's P. C. 692: 1 Sid. 171: Kel. 80. Lord Hale seems most precise on the question. The other writers make a query. See also 3 Inst. 88: Cro. Eliz. 94.

A sentence in the ecclesiastical coart against a marriage, in a suit for jactitation, does not preclude the proof of a marriage on an indictment on the statute. And admitting BIGAMY, bigamia.] A double marriage; such sentence were conclusive as to the fact of

dence of fraud and collusion in obtaining the bill, upon the scaling and delivery is debitum sentence. 11 St. Tr. 262. Duchess of King- in præsenti, though solvendum in futuro. On ston's case.

As to husband and wife being evidence against each other on trial for this offence, see tit. Baron and Feme, 1, 2.

BILAGINES, Lat.] Bye-laws of corpora-

tion, &c. See Bye-Laws.

BILANCIIS DEFERENDIS, an obsolete writ directed to a corporation, for the carrying of weights to such a haven, there to weigh the wool that persons by our ancient laws were licensed to transport. Reg. Orig. 270.

BILL, billa.] Is diversely used in law proceedings: it is a declaration in writing, expressing either the wrong the complainant hath suffered by the party complained of, or else some fault committed against some law or statute of the realm; and this bill is sometimes addressed to the lord chancellor of England, especially for unconscionable wrongs done to the complainant; and sometimes to others having jurisdiction, according as the law directs. It contains the fact complained of, the damage thereby sustained, and petitions of process against the defendant for redress; and it is made use of as well in criminal as civil matters. See tits. Chancery: Equity.

In criminal cases, where a grand jury upon a presentment or indictment find the same to be true, they indorse on it billa vera; and thereupon the offender is said to stand indicted of the crime, and is bound to make answer unto it; and if the crime touch the life of the person indicted, it is then referred to the jury of life and death, viz. the petty jury, by whom, if he be found guilty, then he shall stand convicted of the crime, and is by the judge condemned to death. Terms de Ley, 86: 3 Inst. 30. See Ignoramus and Indict-

ment.

Many of the proceedings in the King's Bench are by bill; but now by the act for uniformity of process, the proceedings in all the courts are commenced by a writ of summons where not bailable, or by a capias where bailable. See tits. Amendment, Original, Process, &cc.

Proceedings by bill in the Court of King's Bench are now abolished, except in ejectment.

See Original, Process, &c.

Bill is also a common engagement for money given by one man to another; being sometimes with a penalty, called penal bill, and sometimes without a penalty, then called a single bill, though the latter is most frequently used. By a bill we ordinarily understand a single bond without a condition; and it was formerly all one with an obligation, save only its being called a bill when in English, and an obligation when in Latin. West. Symbol, lib. 2. sect. 146. Where there is a bill of 1001. to be paid on demand, it is a duty presently, and there needs no actual demand. Dyer, 231. pl. 3: Raym. 486. Cra. Eliz. 548. And a single obligation or

a collateral promise to pay money on demand, there must be a special demand: but between the parties it is a debt, and said to be sufficiently demanded by the action: it is otherwise where the money is to be paid to a third person; or where there is a penalty. 3 Keb. 176. If a person acknowledge himself by bill obligatory to be indebted to another in the sum of 50l., and by the same bill binds him and his heirs in 100l, and says not to whom he is bound, it shall be intended he is bound to the person to whom the bill is made. Roll. Ab. 148. A bill obligatory written in a book with the party's hand and seal to it is good. Cro. Eliz. 613: see 2 Roll. Ab. 146.
These kinds of bills are now superseded in

use, the single bills by the more modern traffic of Bills of Exchange, and the penal bills by Bonds or Obligations. See those titles.

BILL IN CHANCERY. See tits. Chan-

cery, Equity.

BILL OF EXCEPTIONS TO EVI-DENCE. At common law a writ of error lay, for an error in law apparent in the record, or for error in fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record; and therefore, where the plaintiff or demandant, tenant or defendant, alleged any thing ore tenus, which was overruled by the judge, this could not be assigned for error, not appearing within the record, not being an error in fact, but in law, and so the party grieved was without remedy. 2 Inst. 426. And therefore by the stat. of Westm. 2. 13 Ed. 1. c. 31. "when one impleaded before any of the justices, alleges an exception, praying they will allow it, and if they will not, if he that alleges the exception writes the same, and requires that the justices will put to their seals, the justices shall so do, and if one will not, another shall; and if, upon complaint made of the justice, the King cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception, with the seal of the justice thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his scal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disal-

This statute extends to the plaintiff as well as defendant, also to him who comes in loco tenentis, as one that prays to be received, or the vouchee; and in all actions whether real, personal, or mixed. 2 Inst. 427.

This statute extends not only to all pleas dilatory and peremptory, but to prayers to be received, oyer of records and deeds, &c.; also to challenges of jurors, and any material evidence offered and over-ruled. 2 Inst. 427:

The exceptions ought to be put in writing

sedente curia, in the presence of the judge | Nores, being implicated together, are here who tried the cause, and signed by the counconsidered under one head, and thus arranged: sel on each side; and then the bill must be drawn up and tendered to the judge that tried the cause to be sealed by him; and when signed, there goes out a scire facias to the same judge ad cognoscendum scriptum, and that is made part of the record, and the return of the judge, with the bill itself, must be entered on the issue-roll; and if a writ of error be brought, it is to be returned as part of the record. 1 Nels. Ab. 373. If a bill of exceptions is drawn up, and tendered to the judge for sealing, and he refuses to do it, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. 3 Comm. 372: Reg. Br. 182: 2 Inst. 427.

If one of the justices sets his seal to the bill, it is sufficient; but if they all refuse, it is a contempt in them all. 2 Inst. 427: Raym.

162. S. P.: 2 Lev. 327. S. P.

When a bill of exceptions is allowed, the court will not suffer the party to move any thing in arrest of judgment on the point on which the bill of exceptions was allowed. Vent. 366, 367: 2 Lev. 237: 2 Jones, 117.

A bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at Nisi Prius, but in the next immediate superior court, upon a writ of error after judgment given in the court below. 3 Comm. 372.

If a party who, at the trial of a cause, has tendered a bill of exceptions, bring a writ of error before he has procured the judge's signature to the bill of exceptions, he thereby waives the bill of exceptions, and will not be permitted by the court of error afterwards to append the bill of exceptions to the writ of error; and it seemes that if there had been no waiver, a court of error cannot order a party to settle a bill of exceptions, in order that it might be sealed and appended to the transcript of the record. Dillon v. Doe, d. Parker, 11 Price, 100: 1 Bingh. 17: and see Carr. & Pay. 239.

These bills of exceptions are to be tendered before a verdict given; 2 Inst. 427; and extend only to civil actions, not to criminal.

Sid. 85: 1 Salk. 288: 1 Lev. 68.

But in 1 Leon. 5. it was allowed in an indietment for trespass; and in 1 Vent. 366. in an information in nature of a Quo warranto. For a precedent of a bill of exceptions, see

Bull. N. P. 317.

Bills of exceptions are now seldom used, since the liberality practised by the courts in granting new trials. See Tidd. 862. (9th ed.) BILL OF EXCHANGE. A negotiable

security for money, well known among merchants. The laws relating to this subject, and that of Promissory (and negotiable)

I. Of the Nature of, 1. Bills of Exchange; 2. Inland and Foreign; 3. Promissory Notes .- 4. The Parties to them .- 5. The Distinction and Resemblance between the several Kinds of Bills and Notes .- 6. Bank and Bankers' Notes .- 7. The essential Qualities of Bills and Notes.

II. Of the Acceptance of Bills; how, when, by and to whom made.

III. Of the Transfer of Bills and Notes by Indorsement, &c.

IV. Of the Engagements of the several

Parties.

V. Of 1. The Action and Remedy on Bills and Notes; 2. Manner of declaring and pleading; 3. the Evidence; and 4. the Defence.

VI. Of Bills lost, stolen, or forged; and

see III.

I. 1. Of the Nature of Bills .- A BILL OF Exchange is an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid: or it may be made payable to bearer.

The person who makes the bill is called the drawer; he to whom it is addressed, the drawee; and when he undertakes to pay the amount, he is then called the acceptor. The person to whom it is ordered to be paid is called the payee; and if he appoint enother to receive the money, that other is called the indorsee, as the payee is, with respect to him, the indorser; any one who happens, for the time, to be in possession of the bill, is called the holder of it.

The time at which the payment is limited to be made is various, according to the circumstances of the parties, and the distance of their respective residences. Sometimes the amount is made payable at sight; sometimes at so many days after sight; at other times at a certain distance from the date. Usance is the time of one, two, or three months after the date of the bill, according to the custom of the places between which the exchanges run; and the nature of which must therefore be shown and averred in a declaration on such a bill.-Double or treble usance is double or treble the usual time; and half usance is half the time.-Where the time of payment is limited by months, it must be computed by calendar, not lunar months: and where one month is longer than the succeeding one, it is a rule not to go in the computation into a third. Thus, on a bill dated the 28th, 29th, 30th, or 31st of January, and payable one month after date, the times expires on the 28th of February in common years, and in the three latter cases in leap- | place the same to account, as per advice for year, on the 29th. [To which are to be added the days of grace. See post.]-Where a bill is payable at so many days after sight, or from the date, the day of presentment, or of the date, is excluded. Thus, where a bill, payable 10 days after sight, is presented on the first day of a month, the 10 days expire on the 11th; where it is dated the 1st, and payable 20 days after date, these expire on the 21st. Ld. Raym. 281: Stra. 829.

A custom has obtained among merchants, that a person to whom a bill is addressed, shall be allowed a few days for payment beyond the term mentioned in the bill, ealled days of grace.—In Great Britain and Ireland three days are given; in other places more. If the last of these three days happen to be Sunday, the bill is to be paid on Saturday. These days of grace are allowed to promissory notes; but not to bills payable at sight.

2. Inland and Foreign Bills.—Bills of exchange are distinguished by the appellation of Foreign and Inland bills; the first being those which pass from one country to another, and the latter such as pass between parties residing in the same country. A bill drawn in Ireland on England is not an inland bill. Mahoney v. Ashlin, 2 Barn. & Adol. 480. Nor a bill drawn in Scotland on Eng-1 Bell's Comm. 330. (4th ed.): and see 1 Barn. & Cres. 192: 1 Moo. & Malk. 66. And the universal consent of merchants has long since established a system of customs relative to foreign bills, which is adopted as part of the law in every commercial estate.

It does not appear that inland bills of exchange were very frequent in England before the reign of Charles II. (see 6 Mod. 29.) And when they were introduced, they were not regarded with the same favour as foreign bills. At length the legislature, by two different statutes, 9 and 10 W. 3. c. 17. and 3 and 4 Ann. c. 9. set both on nearly the same footing; so that what was the law and custom of merchants with respect to the one, is now, in most respects, the established law of the country with respect to the other.

The following are the most general forms of inland and foreign bills of exchange; but which are varied according to circumstances.

London, January 1, 1793.

One month [&c.] after date please to pay to A. B. or order [or to me or my order] -the sum of One Hundred pounds, and place the same to the account of

To Mr. C. D. T. T. [Place of abode and business.] Acc. C. D.

London, Jan. 1, 1793.

Exchange for £50, sterling. At sight for at sight of this my only bill of exchange] pay to Mr. A. B. or order, Fifty

To Mr. C. D. &c. V. S.

London, Jan. 1, 1793.

Exchange for 10,000 liv. Tournoises. At fifteen days after date [or at one, two, &c. usances] pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. A. B. and Co. or order, Ten thousand livres Tournoises, value received of them, and place the same to account. as per advice from

To Mr. E. F. C. D.

Banker in Paris.

The two other bills of the foreign set are varied thus, "first and third," and "first and second not paid."

2. Promissory Notes .- A promissory note is a less complicated kind of security, and may be defined to be an engagement in writing to pay a certain sum of money, mentioned in it, to a person named, or to his order, or to the bearer at large. At first these notes were considered only as written evidence of a debt; for it was held that a promissory note was not assignable or indorsible over, within the custom of merchants; and that if, in fact, such a note had been indorsed or assigned over, the person to whom it was so indorsed or assigned could not maintain an action within the custom against the drawer of the note: nor could even the person to whom it was in the first instance made payable bring such action. Salk. 129: 2 Ld. Raym. 757. 759. But at length they were recognised by the legislature, and put on the same footing with inland bills of exchange, by stat. 3 and 4 Ann. c. 9. (made perpetual by stat. 7 Ann. c. 25. § 3.) which enacts that promissory notes, payable to order or bearer, may be assigned and indorsed, and action maintained thereon, as on

FORM OF PROMISSORY NOTES. £20. London, Jan. 1, 1793.

On demand [or two months, &c. after date] I promise to pay A. B. or bearer on demand, Twenty pounds for value received.

London, Jan. 1, 1793.

Two months, [&c.] after date, we and each of us promise to pay to Mr. C. B. or order, Twenty pounds value received.

A. B. C. D.

4. The Parties .- By the stats. 15 G. 3. c. 51. and 17 G. 3. c. 30. made perpetual by stat. 27 G. 3. c. 16. all negotiable notes and bills for less than 20s. are declared void; and notes or bills between that sum and 5l. must be made payable within 21 days after date; must particularize the names and descriptions of pounds sterling value received of him, and the payees; must bear date at the time and place they are made; must be attested by a ! subscribing witness, and the indorsement of them must be attended with the same strictness in all respects, and made before the notes or bills become due. See new statutes 1 and 2 G. 4. c. 78: 7 and 8 G. 4. c. 15. as to England: and 9 G. 4. c. 24. as to Irelend.

By stat. 9 G. 4. c. 65, no corporation or person shall utter, in England, notes or bills under 51. made or issued in Scotland or Ire-

Bills of exchange and promissory notes must now be drawn on stamped paper. The stamp is proportioned, under the various acts, to the amount of the bill.—If foreign bills are drawn here, the whole set must be stamped. But bills drawn abroad, of necessity, are not

liable to any stamp duty.

Bills of exchange having been first introduced for the convenience of commerce, it was formerly thought that no person could draw one, or be concerned in the negotiation of it, who was not an actual merchant; but it soon being found necessary for others, not at all engaged in trade, to adopt the same mode of remittance and security, it has been since decided that any person capable of binding himself by a contract, may draw or accept a bill of exchange, or be in any way engaged in the negotiation of it (and, since the stat. 3 and 4 Ann. c. 9. be a party to a promissory note), and shall be considered as a merchant for that purpose. Carth. 82: 2 Vent. 292: Comb. 152: 1 Show. 125: 2 Show. 501: Lutw. 891. 1585: 12 Mod. 36. 380: Salk. 126.

But an infant cannot be sued on a bill of exchange. Carth. 160.—Nor a feme covert; except in such cases as she is allowed to act as a feme sole. 1 Ld. Raym. 147: Salk. 116.

See tit. Baron and Feme.

Where there are two joint-traders, and a bill is drawn on both of them, the acceptance of one binds the other, if it concern the jointtrade; but it is otherwise if it concern the acceptor only, in a distinct interest and respect. 1 Salk. 126: 1 Ld. Raym. 175. See 7 Term Rep. 207: 1 Barn & C. 146: 13 East, 175: Bac. Ab. vol. 5, p. 402 (ed. by Gwillim and Dodd.

Sometimes exchange is made in the name, and for the account, of a third person, by virtue of full power and authority given by him, and this is commonly termed procuration; and such bills may be drawn, subscribed, indorsed, accepted, and negotiated, not in the name or for the account of the manager or transactor of any or all of these branches of remittances, but in the name and for the account of the person who authorised him. Lex. Merc. 1 Barn. & C. 146.

5. The several kinds of Bills and Notes .-A promissory note, in its original form of a promise from one man to pay a sum of money to another, bears no resemblance to a bill of exchange. When it is indorsed, the re-

the indorser to the maker of the note, who, by his promise, is his debtor, to pay the money to the indorsee .- The indorser of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorsee to the payee .-- When this point of resemblance is once fixed, the law is fully settled to be exactly the same in bills of exchange and promissory notes; and whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered as applicable to the maker of a note; when with respect to the drawer of a bill, then to the first indorser of a note; the subsequent indorsers and indorsees bear an exact resemblance to one ather. 2 Burr. 676.

Both bills and notes are in two different forms, being sometimes made payable to such a man or his order, or to the order of such a man; sometimes to such a man or bearer, or

simply to bearer.

The first kind have always been held to be negotiable; but where they were made payable to the order of such a man, exception has been taken to an action brought by that man himself, on the ground that he had only an authority to indorse; but the exception was not allowed. 10 Mod. 286: 2 Show. 8: Comb. 401: Carth. 403.-And it is now decided law, that bills and notes payable to bearer, are equally transferable as those payable to order; and the transfer in both cases equally confers the right of action on the bona fide holder. 1 Black. Rep. 485: 3 Burr. 1516: Stat. 3 and 4 Ann. c. 9. § 5: 1 Burr. 452. 9. The mode of transfer, however, is different; bills and notes payable to bearer are transferred by mere delivery, the others by in-

6. Bank Notes .- The bills and notes mentioned above are considered merely as securities for money; but there is a species of each which is considered as money itself. These are bank notes, bankers' cash notes, and drafts

on bankers payable on demand.

Bank notes are treated as money or cash in the ordinary course of transactions of business by common consent, which gives them the credit and currency of money to every effectual purpose; they are as much considered to be money as guineas themselves; 1 Burr. 457: and it seems are as lawful a tender. See stat. 5 W. & M. c. 20. § 28: 3 Term Rep. 554: and Tidd. Pract. (9th ed.)

Banker's cash notes and drafts on bankers are so far considered as money among merchants, that they receive them in payment as ready cash; and if the party receiving them do not within a reasonable time demand the money, he must bear the loss in case of the What shall be construed to be a reasonable time has been subject to much doubt; it was formerly considered as a question of fact depending on the circumstances of the case, to be determined by a jury; but it semblance begins, for then it is an order by is now established to be a question of law to be decided by the court, though the precise | principle there seems to be a material distince is necessarily undetermined. 1 Black. tinction between bills and notes. As to the Rep. 1: see 1 Ld. Raym. 744: 1 Stra. 415, 6. former, where the fund is supposed to be in 550: 2 Stra. 910. 1175. 1248. And on the the hands of the drawee, the objection holds in whole, the best rule in these cases seems to its full force; not only because it may be unbe, that drafts on bankers, payable on decertain whether the fund will be productive, mand, ought to be carried for payment on but because the credit is not given to the person the very day on which they are received, if of the drawer; but where the fund on account from the distance and situation of the parties of which the money is payable, either is in the that may conveniently be done.

A draft on a banker, post-dated, and delivered before the day of the date, though not intended to be used till that day, must be stamped, by the stat. 31 G. 3. c. 25. Allen v. Keeves, 1 East, 435.—See 55 G. 3. c. 184. §

12, 13.

Bills of exchange and promissory notes, spect regarded as specialities, and on the same, being an acknowledgment that he has money footing with bonds; for unless the contrary be shown by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff either to show a consideration in his declaration, or to prove it at the trial. 1 Black. Rep. 445: Peckham v. Wood, K. B. East, 18 G. 3.—However, though foreign bills were always entitled to this privilege, it was not without some difficulty that it was extended to inland bills: and notes are indebted for it to the statute. 2 Ld. Raym. 758: 1 Black. Rep. 487.

7. Qualities of Bills and Notes.—Bills of exchange, contrary to the general nature of choses in action, are by the custom of merchants assignable or negotiable without any fiction, and every person to whom they are transferred may maintain an action in his own name against any one who has before him, in the course of their negotiation, rendered himself responsible for their payment. The same privilege is conferred on notes by the statute. But the instrument or writing which constitutes a good bill of exchange according to the custom, or a good note under the stutute must have certain essential qualities. 3 Wils. 213.

One of these qualities is, that the bill or note should be for the payment of money only; and not for the payment of money and the doing some other act; 2 Stra. 1271; for these instruments being originally adopted for the convenience of remittance, and now considered only as securities for the future payment of money, must undertake only for that; and it must be money in specie, not in good East India bonds, or any thing else which can itself be only considered as a security. Bull. N. P. 273.

Another requisite quality is, that the instrument must carry with it a personal and words of engagement make the debt; and it certain credit, given to the drawer or maker, is no direction to any other person; the former not confined to credit on any particular fund. part of the note is a promise to pay the mo3 Wils. 213. But in the application of this ney, and the rest is only fixing the particular

hands of the drawer, or he is accountable for it, the objection will not hold, because the credit is personal to him, and the fund is only the consideration of his giving the bill.-With respect to a note, if the drawer promise to pay out of a particular fund then within his power, the note will be good under the statute: the payment does not depend on the cirthough, according to the general principles of cumstance of the fund's proving unproduclaw, they are to be considered only as evi-tive or not, but there is an obligation on his dences of a simple contract, are yet in one re- personal credit; the bare making of the note in his hands. See Joscelyne v. Lassere, Fort. 281. 1361: 10 Mod. 294. 316: Jenny v. Herle, 1 Stra. 591: 2 Ld. Raym. 1361: 8 Mod. 265: Dawkes & Ux. v. Deloraine, 3 Wils. 207: 2 Black. Rep. 782 .- On the principle which governed these cases an order from an owner of a ship to the freighter to pay money on account of freight, was held to be no bill of exchange. 2 Str. 1211.-But such a bill from the freighters of a ship to any other person, if good in other respects, would certainly not be bad, though made payable on account of freight; because indisputably there is a personal credit given to the drawer, the words "on account of freight" only expressing the consideration for which the bill was given. See Pierson v. Dunlop, Doug. 571.-And there may be cases where the instrument may appear at first sight to be payable out of a particular fund, but in reality be only a distinction how the drawee is to reimburse himself, or a recital of the particular species of value received by the maker of a note; in which case their validity rests on the personal credit given to the acceptor of the bill, or drawer of the note. 2 Ld. Raym. 1481. 1545: 2 Stra. 762: Barn. K. B. 12.

Another essential quality to make a good bill or note is, that it must be absolutely payable at all events; and not depend on any particular circumstances which may or may not happen in the common course of things. 3 Wils. 213: 1 Burr. 325: see 2 Ld. Raym. 1362. 1396. 1563: 8 Mod. 363: 4 Vin. 240. pl. 16: 2 Stra. 1151: 4 Mod. 242: 1 Burr. 323. In the case of notes, however, it is not necessary that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing, the time must certainly arrive, on which their payment is to depend; 2 Stra. 1217: 1 Burr. 227; for here the

time when it is to be paid. It is sufficient if receive a direct judicial decision. There were it be certainly and at all events payable at that time, whether the maker live till then, or die in the interim.-And it has been decided that a promise to pay "within two months after such a ship shall be paid off" will make a good note; for the paying off the ship is a thing of a public nature and morally certain. See I Stra. 24: 1 Wils. 262, 3. But this indulgence seems to have been carried almost too far; and such a latitude seems incompatible with the nature and original intention of a bill of exchange; its allowance in favour of promissory notes arising entirely from a liberal construction of the statute on which the negotiability of those notes depends.

In most of the cases where the several instruments have been denied the privilege of bills and notes, it is not for that reason to be concluded that they are of no force: when the fund from which they are to be paid can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract according to the circumstances of the case, or according to the relation in which the parties stand to one another. See 2 Black. Rep.

1072.

No precise form of words is necessary to make a bill of exchange or a note under the statute; any order which cannot be complied with, or promise which cannot be performed, without the payment of money, will make a good bill or note. Thus an order to deliver money, or a promise that such a one shall receive it. 10 Mod. 287: 2 Ld. Raym. 1396: 1 Stra. 629. 706: 1 Wils. 263: 3 Wils. 213: 8 Mod. 364: All. 1.

The words value received being in general inserted in bills and notes, there seems to have been some doubt, whether they were essential; in one case, (Banbury v. Lisset, 2 Stra. 1212,) where the want of these words was objected, a verdict was given on that account against the instrument; but that case seems a very doubtful authority .- On several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary. Fort. 282: Barn. K. B. 88: 8 Mod. 267: 1 Show. 5. 497: Lord Raym. 1556. 1481: Lutw. 889: 1 Mod. Ent. 310.—And the point is now fully settled that these words are not necessary; for as these instruments are always presumed to have been made on a valuable consideration, words which import no more cannot be essential. White v. Ledwick, K. B. Hil. 25 G. 3: Bayl. Bills, 34. If the bill contain those words an action of debt may be maintained by the drawer against the acceptor. 1 Barn. & C. 674. In a note the words value received import value received

from the payee. 5 Barn. & C. 360.

Whether it be essential to the constitution of a bill of exchange, that it should contain words which render it negotiable, as to order or to bearer, did not for a considerable time

two cases in which the want of such words was taken as an exception; but as there were two exceptions, the point was not decided. 2 Stra. 1212: 3 Wils. 212. And in another case, the same exception was taken and overruled, but under such circumstances that the point was not generally determined. 2 Wils. 353 .- But in Smith v. Kendall, 6 T. R. 123. 1 Esp. 231. S. C. it was decided, that a promissory note, or bill of exchange, was valid, although it did not contain the words to order, or to bearer. If in a doubtful point, however, it may be allowed to reason on general principles, it should seem, that it being the original intention and the actual use of bills of exchange that they should be negotiable, such drafts as want these operative words are not entitled to be declared on as specialities, however they may be sufficient as evidence to maintain an action of another kind. Kyd. 42.—But it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the statute against the maker. Moor v. Paine. Hardw. 288.

II. Acceptances .- An acceptance is an engagement to pay a bill of exchange according to the tenor of the acceptance.-The circumstances which generally concur in an acceptance are, that the party to whom it is addressed binds himself to the payment, after the bill has issued, before it has become due, and according to its tenor; by either subscribing his name or writing the word accepts, or accepted, or accepted A. B. But a man may be bound as acceptor without any of these cir-

An acceptance may be either written or verbal; if the former, it may be either on the bill itself, or in some collateral writing, as a letter, &c. 1 Stru. 648. In foreign bills it has always been understood that a collateral or parol acceptance was sufficient. 1 Stra. 649: 3 Burr. 1674: Hardw. 75. And it is now settled that such acceptance is also good in cases of inland bills; as by word, Lumley v. Palmer, 2 Stra. 1000; or by letter, 1 Atk. 717. (613.) But now by the 1 and 2 G. 4. c. 78. § 2. no acceptance of inland bill shall be sufficient to charge any person unless in writing.

The acceptance is usually made between the time of issuing the bill and the time of payment; but it may also be made before the bill has issued, or after it has become due; when it is made before the bill is issued, it is rather an agreement to accept, than an actual acceptance; but such agreement is equally binding as an acceptance itself. 3 Burr. 1663: Doug. 284: 1 Atk. 715. (611.)—When the acceptance is made after the time of payment is elapsed, it is considered as a general promise to pay the money; and if it be to

shall not invalidate the acceptance, though, the time being past, it be impossible to pay according to the tenor; but these words shall be rejected as surplusage. 4 Salk. 127. 9: 1 Ld. Raym. 364. 574: 12 Mod. 214. 410: Carth.

Acceptance is usually made by the drawee, and when before the issuing of the bill, is hardly ever made by any other person; but after the issuing the bill, it often happens either, that the drawee cannot be found, or refuses to accept, or that his credit is suspected; or that he cannot by reason of some disability render himself responsible: in any of these cases an acceptance by another person, in order either to prevent the return of the bill, to promote the negotiation of it, or to save the reputation of, and prevent an action against, the drawer, or some of the other parties, is not uncommon; such an acceptance is called an acceptance for the honour of the person on whose account it is made.

That engagement which constitutes an acceptance is usually made to the holder of the bill, or to some person who has it in contemplation to receive it; and then the acceptor must answer to him, and to every one who either has had the bill before, or shall afterwards have it by indorsement; but it is frequently made to the drawer himself; and then it may be binding on the party making the engagement or not, according to the circum-

stances of the case.

The mere answer of a merchant to the drawer "that he will duly honour his bill," is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer. Cowp. 572. 4: 1 Atk. 715. (611.) An agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one, meaning to give credit to another, make an absolute promise to accept his bill, the drawer or any other person may show such promise on the exchange to procure credit, and a third person advancing his money on it has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor. Dougl. 286.

A. in consideration of having commissioned B. to receive certain African bills payable to him, drew a bill upon B. for the amount, payable to his own order; B. acknowledged by letter the receipt of the list of the African bills, and that A. had drawn for the amount and assured him that it would meet due honour from him. This is an acceptance of the bill by B., and the purport of such letter having been communicated by A. to third persons, who, on the credit of it, advanced

pay according to the tener of the bill, this money on the bill to A., who indersed it to them; held that B. was liable as acceptor in an action by such indorsees, although, after the indorsement, in consequence of the African bills having been attached in B.'s hands, who was ignerant of his letter having been shown, A. wrote to B. advising him not to accept the bill when tendered to him; which as between A. and B. would have been a discharge of B.'s acceptance if the bill had still remained in A.'s hands. Clarke and others v. Cock, 4 East, 57.

An acceptance is generally according to the tenor of the bill; and then it is called a general and absolute acceptance; but it may differ from the tenor in some material circumstances, and yet, as far as it goes, be binding on the acceptor.—Thus it may be for a less sum than that mentioned in the bill; or it may be for an enlarged period. 1 Stra. 214: Marius, 21.—So the drawee may accept a bill which has no time mentioned for payment, and which is held to be payable at sight, to pay, at a distant period; which acceptance will bind him. 11 Mod. 190.

A bill was payable the 1st of January; the drawce accepted to pay the 1st of March: the holder struck out the 1st of March, and inserted the first of January, and when it was payable according to that date, presented it for payment which the acceptor refused; on which the holder restored the acceptance to the original form; and the court held that it continued binding. Price v. Shute, East, 33 Car. 2.—So the acceptance may direct the payment to be made at a different place from that mentioned in the bill, as at the house of a banker. See 2 Stra. 1195 .- So also the acceptance may differ from the tenor of the bill in its mode of payment, as to pay half in money, half in bills. Bull. N. P. 270.—An acceptance may also be conditional, as "to pay when certain goods consigned to the acceptor, and for which the bill is drawn, shall be sold." 2 Stra. 1152.

What shall be considered as an absolute or conditional acceptance is a question of law to be determined by the court, and is not to be left to the jury. 1 Term. Rep. 182: see 1 Stra. 648: 1 Atk. 717. (612.)—If the acceptance be in writing, and the drawee intend that it should be only conditional, he must be careful to express the condition in writing as well as the acceptance; for if the acceptance should on the face of it appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negotiated and come to the hands of a person unacquainted with the condition; and even against the person to whom the verbal condition was expressed, the burthen of proof will be on the acceptor. Dougl. 286 .- A conditional acceptance, when the conditions on which it depends are performed, becomes absolute. Cowp. 571. But if the conditions

on which the agreement to accept a bill is a motion for a new trial, that it was not ne-

will be discharged. Doug. 297.

If the drawee says the bill " will not be accepted until a ship arrives," this amounts to an acceptance on the arrival of the ship. Camp. 393.—So if he say he cannot accept " till stores are paid for," it is an undertaking to accept when the stores are paid for. Camp.

If a person to whom a bill is directed generally accept it, payable at a particular place, the holder need not receive such a qualified acceptance, but may resort to the drawer, as for non-acceptance. C. 1 March, 80. The place of payment writ- W. 4. c. 98. was passed, enacting that all bills ten at the foot of a note is to be considered as of exchange, wherein the drawer shall have a memorandum merely, and need not be men- expressed that such bills are to be payable in tioned in the declaration whether it be in the any place other than the residence of the Williams v. same hand-writing or not.

Waring, 1 L. & W. 48.

A bill of exchange payable 30 days after sight, was presented for acceptance, and refused, and duly protested eight days afterwards; it was then accepted by a third person for the honour of the drawer; at the expiration of 30 days from such acceptance, together with the days of grace, it was presented for payment, as well to the original drawees, as to the acceptor for honour; held that these presentments for payment were made at a proper time. An acceptance for honour is not an absolute but a conditional acceptance, and therefore it was held that an averment of presentment to the drawer was necessary in proceedings on such acceptance. Williams v. Germaine, 7 B. & C. 468.

A bill was drawn in America, on C. & Co. of Liverpool, directed to them at Liverpool, requesting them to pay 500l. to L. & Co. or order, in London, and indorsed by L. & Co. to plaintiffs. The bill on presentment to the drawees at Liverpool was refused acceptance, whereupon the defendants accepted it for honour of L. & Co., the payees, in this form: "Accepted under protest, for honour of L. & Co., and will be paid for their account, if regularly protested, and refused when due."
The bill when it became due was presented at the house of the drawees for payment, and refused; whereupon it was protested at Liverpool, and by the next post it was forwarded to London, and two days after it became due, it was presented to the defendants, who refused to pay it, on the ground that it should have been presented and protested in London on the day when due. At the trial at Guildhall, several merchants of eminence, and also notaries, proved that it was usual to protest such a bill in London, where it was made payable, and not at the residence of the drawees; and two notaries for the plaintiff also proved, that such bills were sometimes protested at Liverpool, where the drawce resided. Held by Lord Tenterden, Ch. J. and

made, be not complied with, that agreement cessary to decide whether the protest at Liverpool would have been sufficient, if the defendant's acceptance had been general, though they seemed to think it would. But, at all events, the defendants, by stipulating in the acceptance, that the bill must be duly " protested, and refused when due," had rendered it necessary that the bill should be presented on the day when due to the drawees at Liverpool; since it could only be refused when there was some person to whom to present it, and in London there was no such person. Mitchell v. Baring, 10 Barn. & C. 5 Taunt. 344. S. 4. In consequence of this case the 2 and 3 drawee, and which shall not on the presentment for acceptance be accepted, may, without farther presentment to the drawee, be protested for non-payment in the place where such bills are expressed by the drawer to be payable, unless the amount of such bills shall have been paid to the holder, on the day on which such bills would have been payable had the same been duly accepted.

It seems that there must be either a trading partnership, or an express proveable authority, to bind two parties by a bill drawn for a debt, due from both, but accepted only by one in the name of both. Greenslade v.

Dower, 7 B. & C. 635.

A conditional acceptance must be declared on as such, with an averment that the conditions are performed. Langton v. Corney, 4

Camp. 176.

An acceptance by the custom of merchants as effectually binds the acceptor, as if he had been the original drawer; and, having once accepted it, he cannot afterwards revoke it. Cro. Jac. 308: Hard. 487.

A very small matter will amount to an acceptance; and any words will be sufficient for that purpose which show the party's assent or agreement to pay the bill; as if upon the tender thereof to him, he subscribes, accepted, or accepted by me A. B. or, I accept the bill, &c. these clearly amount to an acceptance. Molloy, book 2. c. 10. § 15.

If the party under-writes the bill, presented such a day, or only the day of the month; this is such an acknowledgment of bill as amounts to an acceptance. Comb. 401. So if he ordered a direction to another person to

pay it. Bull. N. P. 270.

If the party says, Leave your bill with me and I will accept it, or call for it to-morrow and it shall be accepted; these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to the usual manner.

But if a man says, Leave your bill with me; I will look over my accounts and books between afterwards by the Court of King's Bench, on the drawer and me, and call to-morrow, and

Vol. I .- 31

does not amount to a complete acceptance: the bill became due. Wynne v. Raikes, 5 for the mention of his books and accounts shows plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands. And so it was ruled by the Lord Chief Justice Hale, at Guildhall. Molloy, book 2. c. 10. § 20.

An answer received at the house of drawce, that the bill would be taken up when due, does not amount to an acceptance, unless it can be shown that the answer was given by the drawee or by his authority. 1 Esp. 209.

A bare promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date, for the amount of his demand, he should then have the money, and would pay it, does not amount in law to an acceptance when drawn. 1 E. R. 98.

But a promise to give notice to a party when he might draw a bill, amounts to an undertaking to accept the bill when drawn in pursuance thereof. 2 Marsh, 41: S. C. 6 Taunt.

Except the communication is to another than the party who is to receive the bill, and who is thereby induced to take it. Holt, 181:

4 Camp. 393.

A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that if the bill came back again he would pay it; this was ruled a good

acceptance.

If a merchant be desired to accept a bill, on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person, the bare act of drawing this bill will not amount to an acceptance of the other. 1 Term Rep. 269: and see 4 Maule & S. 303: 2 Barn. & Ald. 113: Bac. Ab. Merchant,

Bills, &c. (M.) (7th ed.)

An agreement to accept or honour a bill will in many cases be equivalent to an acceptance, and whether that agreement be merely verbal, or in writing, is immaterial. If A. having given or intending to give a credit to B., write to C. to know whether he will accept such bills as shall be drawn on him on B.'s account, and C. return for answer, that he will accept them; this is equivalent to an acceptance; and a subsequent prohibition to draw on him on B.'s account will be of no avail, if in fact, previous to that prohibition, the credit has been given. 3 Burr. 1663.

A letter from the drawees of a bill in England to the drawer in America, stating that "their prospect of security being so much improved, they shall accept or certainly pay the bill," is an acceptance in law; although the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in England, and again after the writing such letter refused payment of it when presented for payment; and although such letter written before were not

accordingly the bill shall be accepted; this received by the drawer in America, till after East, 514.

If a book-keeper or servant, or other person having authority, or who usually transacts business of this nature for the master, accept a bill of exchange, this shall bind such mas-

If a bill be drawn on a servant (as a clerk of a corporation, &cc.) with a direction to place the money to the account of his employer, and the servant accept it generally, this renders him liable to answer personally to an indorsee. 2 Stra. 355: Hard. 1.

If a bill be accepted, and the person who accepted the same happens to die before the time of payment, there must be a demand made of his executors or administrators; and on non-payment, a protest is to be made, although the money becomes due before there can be administration, &c.

If the drawee of a bill goes abroad, leaving an agent in England with power to accept bills, who accepts a bill for him, when due it must be presented to the agent for payment if the drawee continues absent. 2 Taunt.

206.

In those cases in which the stat. 1 and 2 G. 4. c. 78. does not apply, the drawee's keeping a bill, which is presented to him for acceptance, may amount to such. Bayl. Bills,

149: see 1 Camp. 425. n.

A mere acceptance, without delivery to the holder, is not sufficient to make the contract binding. 1 D. & R. 533: S. C. 5 B. & A. 474. Acceptances in Ireland are now regulated by stat. 9 G. 4. c. 24. which defines general and qualified acceptances, and declares that no acceptance shall be good unless in writing. And so also in England, no acceptance of any bill shall be good, unless in writing. 1 and 2 Geo. 4. c. 78.

Forging the acceptance of any bill of exchange, or the number or principal sum of any accountable receipt, is felony. See tit.

Forgery.

III. Transfer of Bills and Notes .- According to the difference in the style of negotiability of bills and notes, the modes of their transfer also differ. Bills and notes payable to bearer are transferred by delivery: if payable to A. B. or bearer, they are payable to bearer, as if A. B. were not mentioned. 1 Burr. 453: 3 Burr. 1516: 1 Black. Rep. 485. But to the transfer of those payable to order, it is necessary, in addition to delivery, that there should be something by which the payee may appear to express his order. This additional circumstance is an indorsement; so called from being usually (though not necessarily) written on the back of the note or bill. It may be on the face of the bill. 16 East, 12. And it may be in pencil. 5 Barn. & C.

Where no regulation is made by act of par-

liament (see ante, I. 4.) relative to the negoti- | ceipt which shows he is only the agent of the ation of bills or notes, no particular form of words is necessary to make an indorsement; only the name of the indorsor must appear upon it, and it must be written or signed by him, or by some person authorized by him for

that purpose.

Indorsements are either in full or in blank; a full indorsement is that by which the indorsor orders the money to be paid to some particular person, by name: a blank indorsement consists only of the name of the indorsor. Blank indorsements are most frequent, indeed almost universal in business. A blank indorsement renders the bill or note afterwards transferable by delivery only, as if it were payable to bearer; for by only writing his name, the indorsor shows his intention that the instrument sohuld have a general currency, and be transferred by every possessor. Doug. 617. (639.) 611. (633.)

Except where restrained by statute (see ante, I. 4.), the transfer of a bill or note may be made at any time after it has issued, even after the day of payment; and in case of bills, where the acceptor resides at a distance from the drawer, is frequently made before acceptance. 1 Ld. Raym. 575: see 3 Term. Rep. 80: 3 Burr. 1516: 1 Black Rep. 485: Doug.

611. (633.)

An indorsement may be made on a blank note, before the insertion of any date or sum of money, in which case the indorsor is liable for any sum which the stamp will cover, at any time of payment that may be afterwards inserted; and it is immaterial whether the person taking the note on the credit of the indorsement knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum. Doug. 496. (514.)

On a transfer by delivery, it is said that the person making it ceases to be a party to, or security for, the payment of a bill or note (1 Ld. Raym. 442: 12 Mod. 241: 1 Salk. 128.); yet it seems there can be little doubt that he is liable in another sort of action; as for money had and received, &c. See 3 Term Rep. 757:

4 Term Rep. 177.

Though a blank indorsement be a sufficient transfer, and may enable the person, in whose favour it is made, to negotiate the instrument, yet it is in his option to take it either as indorsee, or as servent or agent to the indorsor; and the latter may, notwithstanding his indorsement, declare as holder in an action against the drawer or acceptor. Nothing is more usual than for the holder of a bill or note to indorse it in blank, and send it to some friend for the purpose of procuring the acceptance or the payment; in this case it is in the power of the friend, either to fill up the blank space over the indorsor's name, with an order to pay the money to himself, which shows his election to take an indorsee; or to write a reindorsor. 1 Salk. 125. 128. 130: 1 Shaw. 163: 2 Ld. Raym. 871. And, on this principle, one to whom a bill was delivered with a blank indorsement, and who carriad it for acceptance, was admitted in an action of trover for the bill against the drawee, to prove the delivery of it to the latter. 1 Salk. 130: 2 Ld. Raym. 871.

The original contract on negotiable bills and notes is to pay to such person or persons, as the payee, or his indorsces, or their in-dorsces, shall direct; and there is as much privity between the last indorsor and the last indorsee, as between the drawer and the original payee. When the payee assigns it over, he does it by the law of merchants; for, as a thing in action, it is not assignable by the general law. The indorsement is part of the original contract, is incidental to it in the nature of the thing, and must be understood to be made in the same manner as the instrument was drawn; the indorsee holds it in the same manner and with the same privileges. qualities, and advantages as the original payee, as a transferable negotiable instrument, which he may indorse over to another, and that other to a third, and so on at pleasure; for these reasons an indorsor for a valuable consideration cannot limit his indorsement by any restriction on the indorsee, so as to preclude him from transferring it to another as a thing negotiable. 2 Burr. 1222, 3. 6, 7: see also Com. 311: 1 Stra. 457: 2 Burr. 1216: 1 Black. Rep. 295: and as to the effect of restrictive indorsement, see Doug. 615. (637.) 617. (639, 640.)

Where the transfer may be by delivery only, that transfer may be made by any person who by any means, whether accident or theft, has obtained the possession; and any holder may recover against the drawer, acceptor, or indorsor, in blank, if such holder gave a valuable consideration without knowledge of the accident. 1 Burr. 452: 3 Burr. 1516: 1 Black. Rep. 485. The same principle applies also to the case of a bill negotiated with a blank indorsement; Peacock v. Rhodes & al. Doug. 611. (613); where the court held, that there was no difference between a bill or note indorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. However, it has been recently held, that if a party take a bill or note which has been stolen or lost, he cannot recover on it if he took it under such circumstances as ought to have excited the suspicions of a prudent man. Down v. Holling, 4 Barn. & C. 330: Snow v. Peacock, 3 Bing. 406.

But a transfer by indorsement where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his indorsees have transferred it, or some one claiming in the right of some of these parties. Bills and notes in favour of partners must be indorsed by them all, or at least by one in the firm of the house; and a bill drawn by two 9 G. 4, c. 24. (Ireland), promissory notes are persons payable to them or order, must be in- declared to be assignable, and the amount redorsed by both. Doug. 630. (653.) in note.

If a bill or note be made or indersed to a woman while single, and she afterwards marry, the right to indorse it over belongs to her | By the very act of drawing a bill, the drawer husband; for by the marriage he is entitled to comes under an implied engagement to the all her personal property. 1 Stra. 516.

If a man become bankrupt, the property of [bills and notes of which he is the payee or indorsee, vests in his assignees, and the right to transfer is in them only. If the holder of a bill or note die, it devolves to his executors or that description be mentioged in the bill; that administrators, and they may indorse it, and, if the bill be duly presented to him, he will their indorsee maintain an action, in the same accept it in writing on the bill itself, accordmanner as if the indorsement had been made ing to its tenor; and that he will pay it when by the testator or intestate. But on their in- it becomes due, if presented in proper time dorsement they are liable personally to the subsequent parties, for they cannot charge the effects of the testator. They may also be the drawer is liable to an action at the suit of any indorsees of a bill or note in their quality of executors or administrators; as where they receive one from their testator or intestate; and in that character they may bring an action on it against the acceptor, or any of the other parties. 3 Wils. 1: 2 Stra. 1260: 2 ly answerable whether the bill was drawn on Barnes, 137: 2 Burr. 1225: 1 Term Rep. his own account, or on that of a third person; 487: 10 Mod. 315.

has delivered it over for a valuable consideration, and forgot to indorse it, may indorse the bill after he had become a bankrupt. Peake,

When a bill payable to order is expressed to be for the use of another person than the payee, yet the right of transfer is in the payee, and his indorsee may recover against the drawer or acceptor. Carth. 5: 2 Vent. 309: 2 Show.

It has been adjudged, that a bill of exchange cannot be indorsed for part, so as to subject the party to several actions. Carth. 466: 1 Salk. 65.

An indorsement written on a note with a black-lead pencil instead of ink, is a writing in law, and gives the indorsee a right to recover upon the note in a court of law. 7 D. & R. 653: S. C. 3 B. & C. 234.

A bill was indorsed by the payee in these words: "Pay to S. W., or his order, for my use." Defendants discounted it for S. W., and applied the money to his use, instead of the indorsers. S. W. became a bankrupt. Defendants were held liable to the payee for the amount of the bill, this being a restrictive indorsement. Sigourney v. Lloyd, 8 B. & C. 622; affirmed in Cam. Scac. 5 Bing. 525.

A promissory note, given as a security for a debt, passes to the crown by act and opera-tion of law, upon an inquisition before a coroner, and a verdict of felo-de-se upon the body of the payee and holder. 6 D. & R. 188: S. C. 4 B. & C. 158. So it passes by grant from the crown, under the sign manual, to the grantee, without endorsement.

By stat. 7 and 8 G. 4. c. 15. (England), and coverable as bills of exchange.

IV. Engagements of the several Parties. payee, and to every subsequent holder, fairly entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance, that he is to be found at the place at which he is described to be, if for that purpose.

In default of any of these particulars, the of the parties before-mentioned, on due diligence being exercised on their parts, not only for the payment of the original sum mentioned in the bill, but also, in some cases, for damages, interest, and costs; and he is equalfor the holder of the bill is not to be affected But the payee of a bill who is a trader, and | by the circumstances that may exist between the drawer and another; the personal credit of the drawer being pledged for the due honour of the bill. Beawes. See ante, I. 7.

If a man write his name on a blank piece of paper, and deliver it to another, with authority to draw on it a bill of exchange to any amount, at any distance of time, he renders himself liable to be called on as the drawer of any bill so formed by the person to whom he has given the authority. 1 H. Black. Rep. 313.

If acceptance be refused, and the bill returned, this is notice to the drawer of the refusal of the drawee; and then the period when the debt of the former is to be considered as contracted is the moment he draws the bill; and an action may be immediately commenced against him; though the regular time of payment, according to the tenor of the bill be not arrived. For the drawee not having given credit, which was the ground of the contract, what the drawer has undertaken has not been performed. Doug. 55. Mitford v. Mayor. See also 2 Stra. 949. cited 3 Wils. 16, 17.

When a bill of exchange is indorsed by the person to whom it was made payable, as between the indorsor and the indorsee, it is a new bill of exchange; as it is also between every subsequent indorsor and indorsee: the indorser, therefore, with respect to all the par-ties subsequent to him, stands in the place of the drawer, being a collateral security for the acceptance and payment of the bill by the drawee; his indorsement imposes on him the same engagement that the drawing of the

bill does on the drawer; and the period when that engagement attaches is the time of the indorsement. 1 Salk. 133: 2 Show. 441. 494: counts might be adjusted between the drawer. For the old cases on this and the drawer. For the old cases on this and

Nothing will discharge the indorser from his engagement but the absolute payment of the money, not even a judgment recovered against the drawer, or any previous indorser. 3 Mod. 86: 2 Show. 441. 494. Neither is the engagement of an indorser discharged by the ineffectual execution against the drawer, or any prior or subsequent indorsor. 2 Black. Rep. 1235: and see 4 Term. Rep. 825.

The engagement of the drawer and indorsors is, however, still but conditional. The holder, in order to entitle himself to call upon them in consequence of it, undertakes to perform certain requisites on his part, a failure in which precludes him from his remedy against them. Where the payment of a bill is limited at a certain time after sight, it is evident the holder must present it for acceptance, otherwise the time of payment would never come; it does not appear that any precise time, within which this presentment must be made, has in any case been ascertained: but it must be done as soon as, under all the circumstances of the case, that can conveniently be done; and what has been said on the presentment of bills and notes payable on demand, seems exactly to apply here. See ante, I. 6; and Roscoe on Bills, 143.

Whether the holder of a bill, payable at a certain time after the date, be bound to present for acceptance immediately on the receipt of it, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have been directly determined: in practice, however, it frequently happens that a bill is negotiated and transferred through many hands without acceptance: and not presented to the drawee till the time of payment, and no objection is ever made on that account. See 5 Burr. 2671: 1 Term Rep. 713.

If, however, the holder in fact presents the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to resort for non-payment; to the drawer that he may know how to regulate his conduct with respect to the drawee, and make other provision for the payment of the bill; and to the indorsors, that they may severally have their remedy in time against the parties on whom they have a right to call; and it, on account of the holder's delay, any loss accrue by the failure of any of the preceding parties he must bear the loss. 5 Burr. 2670: 1 Term Rep. 712.

It is also the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has been made; and it would be prejudicial to com-

merce, if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee. For the old cases on this subject, see 1 Salk. 127. 132. 133: 1 Show. 155: 1 Ld. Raym. 743: 2 Stra. 829. This time for demand of payment seems, at present, to be regulated by the cases as to notice to preceding indorsors immediately following.

A presentment either for payment or acceptance must be made at seasonable hours; which are the common hours of business in the place where the party lives to whom the

presentment is to be made.

To a banker the presentment must be made in the hours of banking business; but in other cases it must be at a reasonable hour: and eight o'clock in the evening was held reasonable in London, though the house was shut up, and nobody there to pay it. 2 Barn. & Adol. 188. By 39 and 40 G. 3. c. 42. bills due on Good Friday are payable on the day before, and to be presented then; and so also as to Christmas Day, and solemn fast days, and thanksgi ving days, by 7 and 8 G. 4. c. 15.

If acceptance or payment be refused, or the drawee of the bill, or maker of the note, has become insolvent, or has absconded, notice from the holder himself must be given to the preceding parties; and in that notice it is not enough to say that the drawee or maker refuses, is insolvent, or has absconded, but it must be added that the holder does not intend to give him credit. The purpose of giving notice is not merely that the indorsor should know that default has been made, for he is chargeable only in a secondary degree; but to render him liable, it must be shown that the holder looked to him for payment, and gave him notice that he did so. See 1 Stra. 441. 515: 2 Black. Rep. 747. as to bills: and 1 Stra. 649: 2 Stra. 1087: 1 Term Rep. 170. as to notes.

What should be considered as a reasonable time within which notice should be given, either of non-acceptance or non-payment, has been subject to much doubt and uncertainty: it was once held, that a fortnight was a reasonable time; but that is now much narrowed. 1 Mod. 27.

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice; but if on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties to whom notice is to be given reside at a different place from the holder and drawee, is, that notice must be sent by the next post. Under the same circumstances, the same rule obtains in the case of non-payment. 1 Term Rep. 169. So also, in case the drawee or maker has absconded, or cannot be found, notice of these circums-

non-payment, must be sent by the first post.

The great difficulty has been to establish any general rule, where the party entitled to notice resides in the same place, or at a place at a small distance from that in which the holder lives. On this point, as well as on the question of what shall be considered as a reasonable time for making the demand of payment, it has been an object of no little controversy, whether it was the province of the jury or of the judge to decide (see ante, I. 6.); till lately it seems the jury have been permitted to determine on the particular circumstances of each individual case, what time was reasonably to be allowed, either for making demand or giving notice. Doug. 515. (681.)

But it having been found that this was productive of endless uncertainty and inconvenience, the court, on several occasions, have laid it down as a principle, that what shall be considered as a reasonable time in either case is a question of law: juries have, however, struggled so hard to maintain their privilege in this respect, that in two cases they narrowed the time for demand, contrary to the opinion of the court; and, on a second trial being granted, they, in both cases, adhered to their opinion, contrary to the direction of the judge. In one of them, however, application being made for a third trial, the court would have granted it, had not the plaintiff precluded himself by proving his debt under a commission of bankrupt, which had issued against the drawees of the bill between the time of the verdict and the application. See Doug. 515. 1 Term Rep. 171. and the cases there cited. In a third case, where the struggle by the jury was to give a longer time for notice than was necessary, the court adhered to their principle, and granted no less than three trials. 1 Term Rep. 167. 9. Tindal v. Brown. It seems, therefore, fully established, that what shall be reasonable time is a question of law; and generally that a demand must be made, and notice given, as soon as, under all the circumstances, it is possible so to do.

If the parties reside in the same place, notice must be given on the day following that on which the party learns of the dishonour. 1 Stark. 314: 2 Camp. 208. Where the parties reside in different places, it is sufficient to send notice by the next post after the day when the dishonour is known. 6 East, 3: 5 Maule & S. 68: 2 Barn & A. 496: 15 East, 293: 1 Moo. & Malk. 61: 4 Bing. 715.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice; and if it be proved on the part of the plaintiff, that from the time the bill was drawn till the time

stances, either in case of non-acceptance or it became due, the drawee never had any effeets of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know this fact; and if he had no effects in the drawee's hands, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the nonpayment of the bill, or the want of notice that it has been dishonoured. 1 Term Rep. 410: and see 1 Term Rep. 405.

Yet, though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the indorsor, if no notice was given him of the bill being dishonoured; for though the drawer may have received no injury, the indorsor, who must be presumed to have paid a valuable consideration for the bill, probably has. 2 Term Rep.

Though in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a subsequent promise by the drawer to discharge the bill; vet where he had no effects it may; though it appear that, in fact, he sustained an injury for want of such notice; such a subsequent promise is an acknowledgment that he had no right to draw on the drawee; and if he has in fact sustained damage, it is his own fault. But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether the want of notice can be waived. See 2 Term Rep. 713,

In the manner in which notice, either of non-acceptance or non-payment, is given, there is a remarkable difference between inland and foreign bills; in the former no particular form of words is necessary to entitle the holder to recover against the drawer or indorsors the amount of the bill, on failure of the drawee or acceptor; it is sufficient if it appear the holder means to give no credit to the latter, but to hold the former to their responsibility. 1 Term Rep. 170. But in foreign bills other formalities are required; if the person to whom the bill is addressed, on presentment, will not accept it, the holder is to carry it to a person vested with a public character, who is to go to the drawee and demand acceptance, and if he then refuse, the officer is there to make a minute on the bill itself, consisting of his initials, the month, the day, and the year, with his charges for minuting. He must afterwards draw up a solemn declaration, that the bill has been presented for acceptance, which was refused, and that the holder intends to recover all damages which he, or the deliverer of the money to the drawer, or any other, may sustain on account of the non-acceptance: the minute is, in common language, termed the noting of the bill; the solemn declaration, the protest; and the person whose office it is to do these acts, a public notary; and to his protestation all foreign courts give credit. Mal. 264: Mar. 16.

This protest must be made within the regu-

lar hours of business, and in sufficient time to | and inland bills of exchange at common law have it sent to the holder's correspondent by seems to have been this. A protest for non-the very next post after acceptance refused; acceptance or non-payment of a foreign bill for if it be not sent by that time, with a letter discharged the drawer and the other parties entitled to notice; and noting alone is not sufficient; there must absolutely be a protest to render the preceding parties liable. Bull. N.P. 271: 2 Term Rep. 713.

But in this case the holder is not to send the bill itself to his correspondent; he must retain it, in order to demand payment of the

drawee when it becomes due.

When the bill becomes due, whether it was accepted or not, it is again to be presented for payment within the days of grace, and if payment be refused, the bill must be protested for non-payment, and the bill itself, together with the protest, sent to the holder's correspondent, unless he shall be ordered by him to retain the bill, with a prospect of obtaining its discharge from the acceptor. Beawes.

As this protest on foreign bills must be made on the last day of grace, and immediate notice sent to the parties concerned, it seems established that such a bill is payable, on demand made, at any time that day within reasonable hours; and that the acceptor has not the whole day to pay the bill. 4 Term Rep.

170.

Besides the protest for non-acceptance and non-payment, there may also be a protest for better security; this is usual when a mer-chant, who has accepted a bill, happens to become insolvent, or is publicly reported to have failed in his credit, or absents himself from 'Change before the bill he has accepted becomes due; or when the holder has any reason to suppose it will not be paid; in such cases he may cause a notary to demand better security, and on that being refused, make protest for want of it: which protest must also be sent to the parties concerned by the next post. Mar. 27: 1 Ld. Raym. 743.

Where the original bill is lost, and another cannot be had of the drawer, a protest may be made on a copy, especially where the refusal of payment is not for want of the original bail, but merely for another cause. 1 Show. 164.

The effect of protest for non-acceptance or non-payment, is to charge the drawer or indorsers, not only with the payment of the principal sum, but with interest, damages, and expences; which latter consists usually of the exchange, re-exchange, provision and postage, together with the expenses of the protest. See Stra. 649.

Whenever interest is allowed, and a new action cannot be brought for it, which is the case on bills and notes, the interest is to be calculated up to the time of signing final judgment. 2 Burr. 1086, 1087; and see 2 Term

The principal difference between foreign

was, and still is, essentially neccessary to of advice, the holder will be construed to have charge the drawer on the default of a drawee; nothing, not even the principal sum, could or can, at this time, be recovered against him without a protest; no other form of notice having been admitted by the custom of merchants as sufficient: but on inland bills, simple notice, within a reasonable time, of the default of the drawec, was held sufficient to charge the drawer, without the solemnity of a protest: the disadvantage arising from thence was this, that notice entitled the holder to recover only the sum in the original bill, which, in many cases, might be a very serious disadvantage: to remedy this inconvenience in some degree, the stat. 9 and 10 W. 3. c. 17. and afterwards the stat. 3 and 4 Anne, c. 9. were passed; the professed intention of which acts was, to put inland bills on the same footing as foreign ones; so far as relates to the recovery of damages, interest, and costs, (i.e. expences) by means of the protest they have done it; but there are several minute particulars, in which. from an attentive perusal of the acts, it will appear they still differ.

To the constitution of a bill of exchange, as has been said before, it is not necessary that the words value received should be inserted; and the want of these in a foreign bill cannot deprive the holder of the benefit of a protest; but that benefit, in case of non-payment, is not given by the statutes to inland bills which want these words, and therefore they cannot be protested for non-payment; and the second act provides that "where these words are wanting, or the value is less than 201., no protest is neccessary either for non-acceptance or non-payment;" the safest construction of which seems to be, that inland bills, without the words value received, or under 201. shall continue as at comman law, and shall not be entitled to the privilege of a protest, either for non-acceptance or non-payment: and it seems now that a protest is in no case necessary on an inland bill. 2 Barn.

& A. 696.

An inland bill, payable at so many days after sight, cannot be protested at all; and no inland bill can be protested till after the expiration of three days of grace; notice of which protest is, by the statute, to be sent within fourteen days after the protest. 4 Term Rep. 170.

There appears also to be another difference subsisting between foreign and inland bills of exchange; for where acceptance and payment both are refused on foreign bills, it seems necessary that there should be a protest for each: but under the stat. 3 and 4 Anne, c. 9 it seems that one protest for either, on an inland bill, is sufficient.

On inland bills, where damages, interest,

the principal sum is to be recovered; for when and such holder gave the acceptor time upon there is no protest for non-payment, presenta- the bill, he, from that moment, had no demand tion for payment must be made so early on the last day of grace, that the holder may give notice of non-payment by the next post. See

That part of the stat. 3 and 4 Anne, c. 9. which puts notes on the same footing with inland bills, makes no express provision for protesting them for non-payment; but there can be no doubt that the practice under which such a protest is frequently made is founded

in justice.

As to several nicetics relative to qualified acceptances, and protests under peculiar cir-

1 Wils. 185: Doug. 249.

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance.-The acceptor may, however, be discharged by an express declaration of the holder, or by something equivalent to such declaration. Doug. 237. (249.)—But no circumstances of against an indorsor, it is not necessary for indulgence shown to the acceptor by the hold- the indorsee to show an attempt to recover er, nor an attempt by him to recover of the against the drawer of a bill of exchange, or drawer, will amount to an express declaration the payce-indorsor of a promissory note. See of discharge. Dong. 235. (247.)—Neither 1 Salk. 131. 133: 1 Stra. 441: 1 Ld. Raym. will any length of time short of the statute of 443 and, finally, Heylin v. Adamson, 2 Burr. limitations, nor the receipt of part of the mo- 669; on the principles of all which cases it is ney from the drawer or indorsor, nor a pro- now finally settled, that to entitle the indorsee mise by indorsement on the bill by the draw- to recover against the indorsor of an inland er to pay the residue, discharge the holder's bill of exchange, it is not necessary to demand remedy against the acceptor. Doug. 238. (250.) in note; but see Stra. 733: see anie, II. The drawee of a bill may cancel his acceptance is enacted "that if any person accept a bill before the bill is re-delivered to the holder, of exchange for and in satisfaction of any Cox. v. Troy, 5 Barn. & A. 474.

or indersor be no discharge to the acceptor, yet the receipt of part from the acceptor of a such person accepting of any such bill for his bill, or the maker of a note, is a discharge to the drawer and indorsors in the one case, and to the indorsors in the other, unless due notice be given of the non-payment of the resi- test according to the directions of the act, due; for the receipt of part from the maker or acceptor without notice, is construed to be a See Camilge v. Allenby, 6 Barn. & C. 373. giving of credit for the remainder, and the undertaking of the preceding parties is only conditional to pay, in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker, will not discharge the drawer or indorsors; for it is for their advantage that as much should be received from others as may 1 Ld. Raym. 744: 2 Stra. 745: 1 Wils 48: Bull. N. P. 271.—So the receipt of part from an indorsor is no discharge of the draw-

er or preceding indorsor.

and costs [expences] are to be recovered, tales, a bankrupt, it was determined by Lord there is more indulgence in the time allowed for notice of non-payment than where only drawer upon an acceptor of a bill of exchange, against the drawer, whether solvent or not." Petitions after Trin. Term, 1805 (which had been frequently determined by Lord Thurlow in preceding cases of a similar nature.)

If the drawer of a note, or the acceptor of a bill, be sued by the indorsee, and the bail pay the debt and costs, this absolutely discharges the indorsor as much as if the principal had paid the note or bill; and the bail cannot afterwards recover against the indorsor in the

name of the indorsee. 1 Wils. 46.

Though, in order to entitle himself to call on any of the preceding parties, in default of cumstances, see Beaves' Lex. Merc .: see also the acceptor of a bill, or maker of a note, it be necessary that the holder should give due notice of such default to the party to whom he means to resort, yet notice to that party alone is sufficient as against him; it is not necessary that any attempt should be made to recover the moncy of any of the other collateral undertakers; or, in case of such attempt being made, to give notice of its being without effect. Thus, in order to entitle himself to recover the money of the first drawer.

By the said stat. 3 and 4 Anne, c. 9. § 7. it former debt or sum of money formerly due Though the receipt of part from the drawer to him, this shall be accounted and esteemed a full and complete payment of such debt, if debt, do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his proeither for non-acceptance or non-payment."

V. 1. Actions and Remedies on Bills and Notes .- Before the doctrine of bills of exchange was well understood, and the nature and extent of the customs relative to them fully recognized by the courts, the remedy on them was sought in different forms of action, according the opinions which were entertained of the applicability of the several forms to the respective situations of the parties. See Hardr. 485. 7: 1 Mod. 285: 1 Vent. 152: 1 Freem. 14: 1 Lev. 298: 11 Mod. 190: Comb. 204: 1 Salk. 125: 12 Mod. 37. 345: Skinn. In Exparte Wilson, in the matter of Por- 346: Str. 680: 8 Mod. 373: 1 Mod. Ent. 312

pl. 13: Morg. Prec. 51. Kesselower v. Tims, v. Robley, Tr. 14 G. 3: 1 H. Black. Rep. 89. B. R. E. 22 G. 3. The conclusion, resulting from all which cases seems to be, that where a privity exists between the parties, there an action of debt, or of indebitatus assumpsit may be maintained; but that where it does not exist, neither of these actions will lie.

A privity exists between the payee and the drawer of a bill of exchange, the payee and drawer of a promissory note; the indorsee and his immediate indorsor of either the one or the other; and perhaps between the drawer and acceptor of a bill: provided that in all these cases, a consideration passed respectively between the parties. If a bill is drawn, payable for value received, debt lies by the drawer against the acceptor. 1 Barn. & C. 674. So by an indorsee against his immediate indorsor. 3 Price, 253: 1 Barn. & C. 681.

But it seems to be considered, than no privity exists between the indorsee and acceptor of a bill, or the maker of a note, or between an indorsee and a remote indorsor of either.

The action which is now brought on a bill of exchange, is a special action of assumpsit, founded on the custom of merchants.

That custom was not at first recognized by the court, unless it was specially set forth, and therefore it was deemed necessary to set forth, by way of inducement, so much of it as applied to the particular case, and imposed on the defendant a liability to pay. See 1 Wils. 189: 1 Ld. Raym. 21. 175: 3 Mod. 86: 4 Mod. 242.

But when the custom of merchants was recognized by the judges as part of the law of the land, they declared they would take notice of it as such, ex officio, it became unnecessary to recite the custom at full length; a simple allegation, that "the drawer, mentioning him by his name, according to the custom of merchants, drew his bill of exchange, &c." was sufficient. And if the plaintiff, still adhering to former precedents, thought proper to recite the custom in general terms, and did not bring his case within the custom so set forth; yet if, by the law of merchants, as recognized by the court, the case as stated, entitled him to his action, he might recover; and the setting forth of the custom was reckoned surplusage and rejected. See 1 Show. 317: 2 Ld. Raym. 1542.

Whether the drawer of a bill, or the indorsor of a bill or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it against the acceptor or maker, in the character of indorsee, seems undecided; but there is a case which clearly shows that a drawer or indorsor cannot maintain an action against the acceptor in the character of indorsee, where the indorsement is after the refusal of payment; because when a bill is returned unpaid, either on the drawer or indorsor, its negotiability is at an end. Beck in the notes.

But if a bill is payable to the drawer's own order, and taken up by him, he may re-issue it. Callow v. Laurance, 3 Maule & S. 95: and see Pownall v. Ferrand, 6 Barn. & C.

The action, therefore, in which the drawer or indorsor, after payment of the money in default of the acceptor, may recover, the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or indorsor, and not as indorsee. Vide Simonds v. Parminter, 1 Wils. 185: vide Morg. Prec. 43, 44. 50: 4 Term Rep. 82. 5.

If the drawce, without having effects of the drawer, accept and duly pay the bill without having it protested, he may recover back the money in an action for money paid, laid out, and expended to the use of the drawer. Vide Smith v. Nissen, 1 Term Rep. 269.

Debt lies by the payee against the maker of a promissory note expressed to be for value received. 2 B. & P. 78. And by the drawer against the acceptor of a bill payable to the drawer or his order, expressed to be for value received, 1 Barn. & C. 674.

An action lies by the indorsee against the indorsor upon a bill of exchange, immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not clapsed. 3 East. R. 481.

Instead of bringing an action on the custom or on the statute, the plaintiff may in many cases use a bill or note, only as evidence in another action; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence: or if the count on the instrument be defective, he may give it in evidence, in support of some of the other counts for money had and received, or money lent and advanced according to the circumstances of the transaction. Tatlock v. Harris, 3 Term Rep. 174: and see 6 Barn. & C.

The holder of the bill or note may sue all the parties who are liable to pay the money; either at the same time, or in succession: and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be stayed in any action against the acceptor without payment of debt and costs in all the actions; but in all actions against the drawer or indorsor, they will be stayed on payment of debt and costs in that action. 4 Term R. 691: Tidd. 586.

But though he may have judgment against all, yet he can recover but one satisfaction: yet though he be paid by one he may sue out execution for the costs in the several actions against the others. 2 Vesey, 115: and see 1 Stra. 515: see ante, IV. and tit. Bankrupt,

Vol. I .-- 32

statute of limitations: and by the express provision of the statute of Queen Anne, all actions on promissory notes must be brought within the same time as is limited by the statute of James, with respect to actions on the case. And it is no good replication to this plea, that it was on account between merchants, where it appears to be for value received. *Comb.* 190, 392.

2. Manner of Declaring and Pleading.—As the action on a bill of exchange is founded on the custom of merchants, so that on a promissory note is founded on the stats. 3 and 4 Anne, c. 9. In both cases, however, it is necessary that all those circumstances should either be expressly stated, or clearly and inevitably implied, which, according to the characters of the parties to the action, must necessarily concur, in order to entitle the plaintiff to recover. See the new brief forms of declarations on bills and notes in the Rules of Court, T. T. 1831.

An action lies by the indorsee against the indorsor upon a bill of exchange, immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not elapsed. Ballingalls v. Gloster, 3 East, 481.

In stating the bill on the note, regard must be had to the legal operation of each respectively. 1 Burr. 324, 5. It has been decided that the legal operation of a bill, or of a note, payable to a fictitious payee, is, that it is payable to the bearer, and therefore it is proper, in the statement of such a bill, to allege that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a note, that the maker thereby promised to pay such a sum to the bearer. Lewis, 3 Term Rep. 183: Minet & al. v. Gibson & al. Id. 485: Confirmed in Dom. Proc: see H. Black. Rep. 569: Collis v. Emett, H. Black. Rep. 313: and more fully as to subject, post, 2. of this division.

Or in such a case, the plaintiff may state all the special circumstances, and if the verdict correspond with them, he will be entitled to recover. See 1 H. Black. Rep. 569.

A bill or note payable to the order of a man, may, in any action by him, be stated as payable to himself, for that is its legal import: or it may be stated in the very words of it, with an averment that he made no order.

If a note purport to be given by two, and be signed only by one, a declaration generally, as on a note by that one who signed it, will be good; for the legal operation of such a note is, that he who signed promised to pay. Semb. 1 Burr. 323.

On a note to pay jointly and severally, a declaration against one in the terms of the note will be good. Burchill v. Slocock, 2 Ld. Raym. 1545. So on a note to pay jointly or severally, (Cowp. 832.) contrary to former determinations.

Inland bills and notes may be stated to

To this action the defendant may plead the have been made at any place where the plaintiff chooses to lay his action, because the action on them is transitory, and may be stated to have arisen any where. In an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action, but the manner of acceptance needs not to be alleged. 2 Ld. Raym. 1542; 1 Ld. Raym. 364, 5. 374, 5: 1 Salk. 127. 9: Carth. 459.

If the bill or note was payable to order, and the action by an indorsee, such indorsements must be stated as to show his title; an indorsement by the payee must at all events be stated, because without that, it cannot appear that he made any order, on the existence of which depends the title of the indorsec. If the first indorsement was special, to any person by name, in an action by an indorsee after him, his indorsement must, for the same reason, be stated: so also must all special indorsements.

But if the indorsement was in blank, and the action be against the drawer, acceptor or payee, no other indorsement is necessary to be stated than that of the payee; in an action against a subsequent indorsor, his indorsement at least must be added: in an action on a bill or note payable to bearer, no indorsement need be stated, because it is transferable without indorsement. See ante,

In an action against the drawer or indorsor of a bill, or against the indorsor of a note, it is absolutely necessary, on account of nonpayment of the bill or note, to state a demand of payment from the acceptor of the bill, or the maker of the note, and due notice of refusal given to the party against whom the action is brought: for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error. The general rule of pleading in this case is, that where the plaintiff omits altogether to state his title or cause of action, it is not necessary to prove it at the trial: and therefore there is no room for presumption that there was actual proof. Rushton v. Aspinall, Doug. 679. (684.) But if the title be only imperfectly stated, with the omission only of some circumstances necessary to complete the title, they shall, after a verdict, be presumed to have been proved; and in some cases no advantage can be taken of the want of them on a general demurrer. Doug. 684. in the notes.

3. The Evidence.—Most part of what might be said as to the proof and defence in actions on bills or notes necessarily arises out of the general doctrine already explained.

The plaintiff must in all cases prove so much of what is necessary to entitle him to his action, and what must be stated in his declaration, as is not, from the nature of the thing and the situation of the parties, necessarily admitted.

In an action against the acceptor, it is a | and all of those to whom an indorsment has general rule that the drawer's hand is admitted; because the acceptor is supposed to be acquainted with the writing of his correspondent; and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn. 1 Ld. Raym. 444: Stra. 946: 3 Burr. 1354: see 1 Bl. 390. But if the drawer indorse, his handwriting to the indorsement must be proved. In an action against the acceptor, therefore, where the acceptance was on view of the bill, whether in writing on the bill, or by parole, it is not necessary to prove the hand-writing of the drawer. That of the acceptor himself must of course be proved; and that of every person through whom the plaintiff, from the nature of the transaction, must necessarily derive his title.

On a bill payable to bearer, there is no person through whom the holder derives his title; in an action against the acceptor, therefore, on such a bill he is only to prove the hand-writing of the acceptor hinself. But in an action against the acceptor of a bill payable to order, the plaintiff must prove the hand-writing of the very payee who must be the first indorsor. Sec 4 Term. Rep. 28. If the indorsement of the payee be general, the proof of his hand-writing is sufficient; if special, that of his indorsee must be proved: but otherwise that of any other of the indorsors is not requisite, though all the subsequent indorsements be stated in the declaration. Any subsequent holder may declare as the indorsee of the first indorsor; but in this case, in order to render the evidence correspondent to the declarations, all the subsequent names must be struck out, either at or before the trial. See ante, III. But the plaintiff, in the case of a transfer by delivery (see ante, III.), may be called upon to prove that he gave a good consideration for the bill or note, without the knowledge of its having been stolen, or of any of the names having been forged. 1 Burr. 542 : Dougl. 633. Peacock v. Rhodes. But a mere notice will not alone put the plaintiff on proof of the consideration; the defendant must first impeach it. 2 Camp. 5. 516: 1 Moo. & M. 240. And though the acceptance be subsequent to the indorsments, yet the necessity of proving the payee's hand-writing is not, by this means, superseded. Say, 233: 1 Term Rep. 654.

In an action by an indorsee against the drawer, the same rules obtain with respect to proof of the hand-writing of the indorsors as in an action against the acceptors. See Collis v. Emett, 1 H. Black. Rep. 313. That of the drawer himself must of course be proved. It must be also proved that the plaintiff has used due diligence. See ante, IV.

From the rule, that in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the payee being the drawer or first indorsor,—

stated, is as follows:

been specially made, arose the question which long, and greatly, agitated the commercial world, on the subject of indorsements in the name of fictitious payees. A bill payable to the order of a fictitious person, and indorsed in a fictitious name, is not a novelty among merchants and traders. See Stone v. Freeland, B. R. sittings after Easter, 1769, alluded to in 3 Term Rep. 176: see also Peacock v. Rhodes, Dougl. 632: Price v. Neal. 3 Burr. 1354. But in the years 1786, 7, and 8, two or three houses connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be sufficient to procure currency to their bills, adopted, in a very extensive degree, a practice which before had been found convenient on a smaller scale. So long as the acceptors or drawers could either procure money to pay these bills. or had credit enough with the holder to have them renewed, the subject of these fictitious indorsements never came in question. But, when the parties could no longer support their credit, and a commission of bankrupt became necessary, the other creditors felt it their interest to resist the claims of the holders of these bills; and insisted that they should not be admitted to prove their debts, because they could not comply with the general rule of law requiring proof of the hand-writing of the first indorsor. The question came before the chancellor by petition. He directed trials at law, and several were had; three against the acceptor in the King's Bench, and one against the drawer in the Common Pleas, though not all expressly by that direction. See Tatlock v. Harris, 3 Term Rep. 174: Vere v. Lewis, 3 Term Rep. 183: Minet & al. v. Gibson & al., 3 Term Rep. 483: 1 H. Black. Rep. 569: Collis v. Emett, 1 H. Black. Rep. 313. From the decisions on these cases, the principal of which was affirmed in the House of Lords, and which have settled that such bills are to be considered as payable to bearer, (see ante, 2, of this division V.) it follows, that proof of the acceptor's hand only is sufficient to entitle the holder to recover on the bill; and in the case of Tatlock v. Harris, where a bill was drawn by the defendant and others on the defendant, it was determined that a bona fide holder for a valuable consideration might recover the amount against the acceptor in an action for money paid or money had and received.

[The principal case above alluded to, as affirmed in the House of Lords is that of Minet & al. v. Gibson & al. already so often mentioned. It is better known by the name of Gibson and Johnson, v. Minet and Fector; and the opinions of the judges in the House of Lords, are very fully and accurately reported in 1 H. Black. Rep. 561: 1 Bro. P. C. 48. The effect of the determination, as there stated, is as follows:

If a bill of exchange be drawn in favour of difference. Birt v. Kershaw, 2 East, 458; a fictitious payee, with the knowledge, as well but see Jones v. Brooke, 4 Taunt. 464. contra, of the acceptor as of the drawer; and the name of such payee be indorsed on it by the drawer with the knowledge of the acceptor, which fic-titious indorsement purports to be to the drawer himself or his order; and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted; but it does not appear that there was an intent to defraud any particular person; such innocent indorsee for a valuable consideration may recover against the acceptor as on a bill payable to bearer. Perhaps also, in such case, the innocent indorsee might recover against the acceptor, as on a bill payable to the order of the drawee; or on a count stating the special circumstances. But in order to be effectual against the acceptor, it must be known to him that the payee of the bill was fictitious. Camp. 130. 180.

Other cases, Master & al. v. Gibson & al. and Hunter v. Gibson & al. were afterwards brought before the House of Lords (June, 1793,) on demurrers to evidence; on which the judges gave their opinion, that it was not | draw, accept, or indorse bills or notes, proof of competent to the defendants to demur; and that on the record, as stated, no judgment could be given. See Bro. P. C. A venire de novo was accordingly awarded, and a new trial had in Hunter v. Gibson, in which a bill of exceptions to evidence was tendered; on this the Court of King's Bench gave judgment for plaintiff, and that judgment was affirmed in dom. proc. See Bro. P. C. tit. Prom. Notes, ca. 2, 3. The whole disclosed a system of a bill negotiation to the amount of a million a year, on fictitious credit, which ended in the bankruptcy of many; but which had at least the good effect of showing that the obligations of law are not so easily eluded as those of honour and conscience.]

In an action by an indorsee against an indorsor, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any indorsor, before him against whom the action is brought; every indorsor being, with respect to subsequent indorsees or holders, a new drawer. 1 Ld. Raym. 174: Str. 444: 2 Burr. 675. Where an action is by one indorsor who has paid the money, proof must be given of the payment. 1 Ld. Raym. 743.

An indorsor on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorsor, to prove that he had satisfied the note; being either liable to the plaintiff on the note, if the action were defeated, or to the defendant for money had and received if the action succeeded. And his being also liable in the latter-case to compensate the defendant for the costs incurred in the action by such non-payment makes no

which is the better authority.

In an action by the drawer against the acceptor, where the bill has been paid away and returned, it is necessary to prove the handwriting of the latter, demand of payment from him, and refusal, the return of the bill, and payment by the plaintiff. 10 Mod. 36, 7: 1 Wils. 185: see ante, 1. of this division

In an action on the case by the acceptor against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself: or something equivalent, as his being in prison on execution. 3 Wils. 18.

Where a bill is accepted, or a bill or note is drawn or indorsed by one of two or more partners, on the partnership account, proof of the signature of the partner accepting, drawing, or indorsing, is sufficient to bind all the rest. 1 Salk. 126: 1 Ld. Raym. 175. See Carvick v. Vickery, Doug. 353: 7 East, 210: 13 East, 175.

Where a servant has a general authority to his signature is sufficient against the master; but his authority must be proved, as that it was a general custom for him to do so, &c. See Comb. 450: 12 Mod. 346.

An action on a bill of exchange being by an executor, and upon a debt laid to be due to testator, it was held necessary to prove that the acceptance was in the testator's life-time. 12 Mod. 447.

Where the defendant suffers judgment by default, and the plaintiff executes a writ of inquiry, it is sufficient for the latter to produce the note or bill without any proof of the defendant's hand. See 2 Str. 1149: , Barnes, 233, 4: 2 Black. Rep. 748: 3 Wils. 155; and finally, 3 Term. Rep. 301. Green v. Hearn; in which the court said, that by suffering judgment to go by default, the defendant had admitted the cause of action to the amount of the bill, because that was set out on the record; and the only reason for producing it to the jury on executing the writ of inquiry, was to see whether any part of it had been paid. And now, on such judgment, a writ of inquiry is not necessary: for the court, on application by the plaintiff, will, if no good reason be shown to the contrary, refer it to the proper officer, to compute the damages and costs, and calculate the interest. Ruled Anon. B. R. Hil. 26 G. 3: Rashleigh v. Salmon, H. Black. Rep. C. P. 252.

4. The Defence.—Besides the different subjects of defence, which may be collected from the whole of the general principles here so fully entered into, the most usual are those which arise either from the total want of consideration, or from the illegality of the consideration for which the bill or note was given. See this Diet. tit. Consideration; and Roscoe | B. & C. 466: 1 C. & P. 163; and see 3 Bingh. on Bills.

In general no advantage can be taken of the illegality of the consideration, but as between the persons immediately concerned in the transaction; any subsequent holder of the bill or note, for a fair consideration, cannot be affected by it. But there are cases in which it has been determined, that, by the construction of certain statutes, even the innocent in-dorsee shall not recover against the acceptor of the bill, or drawer of the note. As on stat. 9 Anne, c. 14. § 1. which absolutely invalidates notes, bills, &c. given for money won at play. 2 Stra. 1155. So, on stat. 12 Anne, st. 2. c. 16. § 1. as to securities on usurious contracts. Lowe v. Waller, Doug. 736. (but this is now altered by (58 G. 3. c. 93.) And, reasoning by analogy, against notes given by a bankrupt to procure his certifi-

It has, however, been repeatedly ruled at Nisi Prius, that wherever it appears that a bill or note has been indorsed over, after it is due, which is out of the usual course of trade, that circumstance alone throws such a suspicion on it, that the indorsee must take it on the credit of the indorsor, and must stand in the situation of the person to whom it was payable. See 3 Term Rep. 80. 83.

By stats. 7 and 8 G. 4. c. 15. (England), and 9 G. 4. c. 24. (Ireland), bills falling due on Good Friday, Christmas-day, and Fast days, are made payable the day before, and in such cases notice of the dishonour thereof is not necessary to be given until the day after

such Good Friday, &c.

A holder was allowed to recover in an English court on a bill drawn in France, on a French stamp; though, in consequence of its not being in the form required by the French code, he had failed in an action in France. Wynne v. Jackson, 2 Russ. 351.

VI. Of Bills lost, stolen, or forged.—See ante, III. and the general principles already exemplified.

The acceptor who pays under a forged indorsement by a person who had found a lost bill is liable to the real payee. 3 T. R. 127.

If a bill of exchange with a blank indorsement be stolen and negotiated, an innocent indorsee shall recover upon it of the drawer. 2 Doug. 633.

If a Bank bill payable to A. B. or bearer, be lost, and it is found by a stranger, payment to him would indemnify the Bank; yet A. B. may have trover against the finder, though not against his assignee, for valuable consideration which creates a property. 3 Salk. 71.

Where a bill broker discounts a stolen bill for a stranger upon being merely satisfied with the goodness of the acceptance, the broker is not entitled to recover against the acceptor, if the jury think his suspicions ought

444

If the possessor of a bill by any accident loses it, he must cause intimation to be made by a notary public before witnesses, that the bill is lost or mislaid, requiring that payment be not made of the same to any person without his privity. And by stat. 9 and 10 W. 3. c. 17. if any inland bill of exchange for five pounds or upwards, shall be lost, the drawer of the bill shall give another bill of the same tenor, security being given to indemnify him in case the bill so lost be found again. The remedy on the statute is in equity. 7 Barn. & C. 95. If the party could recover at law, notwithstanding the loss, equity will not relieve him. 1 Ves. 341: 16 Ves. 430.

If a bill lost by the possessor should afterwards come into the possession of any person paying a full and valuable consideration for it, without knowledge of its having been lost, or grounds for suspecting it, the drawer (and acceptor, if the bill was accepted) must pay it when due to such fair possessor; so that the provision of the statute may, in many cases, be useless to the loser of the bill.—But against the person who finds the bill, the real owner may maintain an action of trover. 1 Salk. 126: 1 Ld. Raym. 738. See Master v. Miller, 4 T. R. 320: and see 4 Barn. & C. 332: 3

If a bill payable to A. or order get into the hands of another person of the same name as the payee, and such person, knowing he is not the real person in whose favour it was drawn, indorse it, he is guilty of forgery. 4 T. R. 28.

An alteration of the date of the bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can be afterwards brought upon it, even by an innocent indorsee, for a valuable consideration. 4 T. R. 320; affirmed in Cam. Scac. 5 T. R. 367: 2 H. B. 141: 1 Anstr. 225. And after a bill has been once negotiated an alteration renders it void under the stamp laws. 15 East, 416: 10 East, 431: Roscoe on Bills, 34.

If upon a bill being presented for acceptance the drawee alter it as to the time of payment, and accept it so altered, he vacates the bill as against the drawer and indorsers; but if the holder acquiesce in such alteration and acceptance, it is a good bill as against the holder and acceptor. 1 Taunt. 420.

Stealing any bill, note, &c. is felony in the same degree as if the offender had stolen any chattel of the like value with such bill, or

note, &c.

By stat. 9 G. 4. c. 24. (Ireland) where a bill or note is lost, the drawer shall give another or indemnity, if required; and a bill accepted in satisfaction of a former bill is deemed full

By stat. 1 W. 4. c. 36. (repealing all former acts as to forgery in England; but which does to have been excited. 5 D. & R. 524: S. C. 3 not extend to any offence committed in Scotutter, dispose, or put off, knowing the same to be forged, or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on, or assigment of, any such bill or note, or any acceptance of any bill of exchange, with intent to defraud any person, the offender shall be guilty of felony, and shall suffer death as a felon. § 3, 4.

There are also Bills of CREDIT between merchants, of which the following is a form: (It is believed they are now little in use.)

This present writing witnesseth that I, A. B., of London, merchant, do undertake, to and with C. D. of, &c. merchant, his executors and administrators, that if the said C. D. do de-liver, or cause to be delivered unto E. F. of, &c. or to his use, any sum or sums of money, amounting to the sum of, &c. of lawful British money, and shall take a bill under the hund and seal of the said E. F., confessing and showing the certainty thereof; that then I, my executors or administrators, having the same bill delivered to me or them, shall and will immediately, upon the receipt of the same, pay, or cause to be paid, unto the said C. D. his executors or assigns, all such sums of money as shall be contained in the said bill; at, &c. For which payment, in manner and form aforesaid, I bind myself, my executors, administrators, and assigns, by these presents. In witness, &c.

BILL OF LADING. A memorandum signed by masters of ships, acknowledging the receipt of the merchants' goods, of which there are usually three parts, one kept by the consignor, one sent to the consignee, and one kept by the captain. See titles Factor, Merchant.

BILL OF MIDDLESEX. (Now virtually abolished by the Act for uniformity of process.

2 W. 4. c. 39.) See tit. Process.

BILL OF RIGHTS. The statute 1 W. and M. stat. 2. cap. 2. is so called, as declaring the true rights of British subjects. See title Liberty, where this important act is stated at

BILL OF SALE, is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels; for if a man promises or gives any chattels without valuable consideration, or without delivering possession, this doth not alter the property, because it is nudum pactum, unde non oritur actio; but if a man sells goods by deed under seal, duly executed, this alters the property between the parties, though there be no consideration, or no delivery of possession; because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting. Yelv. 196: Cro. Jac. 270: 1 Brown, 111: 6 Co. 18.

But what is chiefly to be considered under this head, is the statute of 13 Eliz. cap. 5. by

land or Ireland), if any person shall offer, avoid the debt or duty of another, shall (as against the party only, whose debt or duty is so endeavoured to be avoided) be utterly void. except grants made bonu fide, and on a good (which is construed a valuable) consideration."

A. being indebted to B. in 400l. and to C. in 201. C. brings debt against him, and, pending the writ, A. being possessed of goods and chattels to the value of 300l. makes a secret conveyance of them all, without exception, to B. in satisfaction of his debt; but, notwithstanding, continues in possession of them, and sells some of them, and others of them being sheep, he sets his mark on; and resolved that it was a fraudulent gift and sale within the aforesaid statute, and shall not prevent C. of his execution for his just debt; for though such sale hath one of the qualifications required by the statute, being made to the creditor for his just debt, and consequently on a valuable consideration, yet it wants the other; for the owner's continuing in possession is a the possession is the only indicium of the property of a chattel, and therefore this sale is not made bona fide. 3 Co. 80: Mo. 638: 2 Bulst. 226. See Edwards v. Harben, 2 Term R. 587: Kidd v. Rawlinson, 2 Bos. & Pull. 59. But the continuing in possession is not conclusive of fraud. 3 Barn. & Adol. 498: Ry. & Moo. 312.

As the owner's continuing in possession of goods after his bill of sale of them is evidence (though not conclusive) of a fraudulent conindicium of the property of a chattel, which is a thing unfixed and transitory; so there are other marks and characters of fraud; as a general conveyance of them all without any exception; for it is hardly to be presumed that a man will strip himself entirely of all his personal property, not excepting his bedding and wearing apparel, unless there was some secret correspondence and good understanding settled between him and the vendee for a private occupancy of all, or some part of the goods for his support; also a secret manner of transacting such bill of sale, and unusual clauses in it: as that it is made honestly, truly, and bona fide, are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it. 3 Co. 81: Mo. 638.

If goods continue in the possession of the vendor after a bill of sale of them, though there is a clause in the bill that he shall account annually with the vendee for them, yet it is a fraud: since if such colouring were admitted, it would be the easiest thing in the world to avoid the provisions and cautions of the aforesaid act. Mo. 638: S. C. 3 B. & Adol. 498.

If A. makes a bill of sale of all his goods, in consideration of blood and natural affection, which it is enacted, "That all fraudulent conveyances of lands, &c. goods and chattels, to conveyance in respect of creditors; for the considerations of blood, &c. which are made | were current in England. the motives of this gift, are esteemed in their sents the gold besantine to have been equivanature inferior to valuable considerations which are necessarily required in such sales, by 13

Eliz. cap. 5.

If A. makes a bill of sale to B. a creditor, and afterwards to C. another creditor, and delivers possession at the time of sale to neither; afterwards C. gets possession of them, and B. takes them out of his possession, C. cannot maint in trespass, because, though the first bill of sale is fraudulent against creditors, and so is the second, yet they both bind A. As therefore B.'s is the elder title, the naked possession of C. ought not to prevail against it.

See farther on this subject title Fraud .-

See also title Bankrupt, II.

BILL OF STORE. A kind of license granted at the Custom-house to merchants, to carry such stores and provisions as are necessary for their voyage custom free. A bill of sufferance is a licence granted to a merchant, to suffer him to trade from one English port to another without paying custom. See title Navigation Acts.

BILLETS OF GOLD, Fr. billot.] Are wedges or ingots of gold, mentioned in the

statute 27 E. 3. c. 27.

BILLANGSGATE market to be kept every day, and toll is appointed by statute: all persons buying fish in this market may sell the same in any other market by retail; but none but fishmongers shall sell them in shops; if any person shall buy any quantity of fish at Billingsgate for others, or any fishmonger shall engross the market, they incur a penalty of 201. And fish imported by foreigners shall be forfeited, and the vessel, &c. See 36 G. 3. c. 119. § 1. &c. Vide Fish and Fishermen.

BINOMIUM VINOCIUM, BRINONIUM VINOVIA, BINOVIA. Binchester, in the

bishoprick of Durham.

BIRD. Ordinarily kept in a state of confinement, and not being the subject of larceny at common law, persons steeling, or having in possession, or the plumage thereof, punishable summarily before one or two justices, by 7 and 8 G, 4, c, 29, \S 31, 32.

BIRRETTUM. A thin cap fitted close to the shape of the head; and is also used for the cap or coif of a judge, or serjeant at law.

Spelm.

BIRTHS, BURIALS, AND MARRIAGES, By statute, a duty was granted on births and burials of persons, from 5%, a duke, &c. down to 10s. and 2s. And the like on marriages; also bachelors, above twenty-five years of age, were to pay 1s. yearly. Sint. 6 and 7 W. 3. c. 6. Expired, as to the duties. See tit. Stamps, Registers, Taxes.

BISANTHUM, besautine, or besaut. ancient coin, first coined by the Western emperors at Bizantium or Constantinople. It was of two sorts, gold and silver; both which by him to the archbishoprick of York; the

Chaucer reprelent to a ducat; and the silver besantine was computed generally at two shillings. In some old leases of land there have been reserved, by way of rent, unum bisantium vel duos soli-

BLSCOT. At a session of sewers held at Wigenhale, in Norfolk, 9 Ed. 3, it was decreed, That if any one should not repair his proportion of the banks, ditches, and causeys by a day assigned, xiid, for every perch unrepaired should be levied upon lam, which is called a bilaw; and if he should not, by a second day given him, accomplish the same, then he should pay for every perch 2s, which is called bi-scut. Hist. of Imbanking and Draining, f. 254.

BISHOPS AND ARCHBISHOPS.—A BISHOP (episcopus, is the chief of the clergy in his diocese, in England, Wales, or Ireland, and is the archbishop's suffragan or assistant.

An Archeisnop (Archiepiscopus) is the chief of the clergy in his province, in England or Ireland, and is that spiritual secular person who hath supreme power under the king in all ecclesiastical causes: and the manner of his creation and consceration, by an archbishop and two other bishops, &c. is regulated by stat. 25 H. S. c. 20. (See post, Bishop.) An archbishop is said to be enthroned, when a bishop is said to be installed; and there are four things to complete a bishop or archbishop, as well as a parson; first, election, which resembles pre-entation; the next is confirmation, and this resembles admission; next, consecration, which resembles institution; and the last is installation, resembled to induction. 3 Salk. 72.

In ancient times the archbishop was bishop all over England, as Austin was, who is said to be the first archbishop here; but, before the Saxon conquest, the Britons had only one his hop, and not any archbishop. 1 Roll. Rep.

328: 2 Roll. 440.

But at this day the ceclesiastical state of England and Wales, is divided into two provinces or archbishopricks, to wit, Canterbury and York; and twenty-four bishopricks (besides the hishoprick of Sodor and Man, the hishop of which is not a lord of parliament., archbishop hath within his province bishops of several dioceses. The archbishop of Canterbury hath under him, within his province, of ancient foundations, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, S. lisbury, Exeter, Bath and Wells, Worcester, Coventry and Litchfield, Hereford, Llandaff, St. David's, Bangor, and St. Asaph; and four founded by King Henry 8, creeted out of the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough, and Oxford. The archbishop of York hath under him four, viz. the bishop of the county palatine of Chester, newly erected by King Henry 8, and annexed

archbishop anciently had, which time hath

taken from him. Co. Lit. 94.

ricks created by Hen. 8. in England, out of the revenues of the dissolved monasteries. Burn. E. L. 78.—Thomas Thirlby was the only bishop that ever filled that see. He surrendered the bishoprick to Ed. 6. A. D. 1550, depose, for any just cause, &c. 2 Roll. Ab. 223. 30th March; and, on the same day, it was dissolved, and added again to the bishoprick of London. Rym. Fæd. 15. p. 222. Queen Mary afterwards filled the church with Beneparliament, turned it into a collegiate church,

subject to a dean.

The archbishop of Canterbury is now styled metropolitanus et primus totius Anglia; and the archbishop of York styled primus et me-tropolitanus Anglia. They are called archbishops in respect of the bishops under them; and metropolitans, because they were conse-crated at first in the metropolis of the pro-4 Inst. 94. Both the archbishops have distinct provinces, wherein they have suffragan bishops of several dioceses, with precedency of all the clergy; next to him the jurisdiction under them. The archbishop hath also his own diocese, wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal; thus having two concurrent jurisdictions, one as ordinary, or the bishop himself within his diocese; the other as superintendant, throughout his whole province, of all ecclesiastical matters, to correct and supply the defects of other bishops.

The archbishop is entitled to present, by lapse, to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. (See tit. Advowson.) And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own, to be provided for such suffragan bishop; in lieu of which it is now usual for the bishop to make over, by deed, to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his option, which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed, by the popes, to the metropolitan of Canter-

The archbishop of Canterbury hath the privilege to crown all the kings of England; and to have prelates to be his officers; as for instance, the bishop of London is his provincial dean; the bishop of Winchester, his chancellor; the bishop of Lincoln, his vice-chancellor; the bishop of Salisbury, his precentor; the bishop of Worcester, his chaplain, &c. It more. 10. Leighlin and Ferns. 11. Clovne.

county palatine of Durham: Carlisle; and the and clergy of his province to convocation, upon Isle of Man, annexed to the province of York by King Henry 8; but a greater number this cases of appeal, where there is a supposed default of justice in the ordinary; and he hath ten from him. Co. Lit. 94.

Westminster was one of the new bishop- he confirms the election of bishops, and afterwards consecrates them, &c. And he may appoint coadjutors to a bishop that is grown infirm. He may confer degrees of all kinds; And he hath power to grant dispensations in any case, formerly granted by the see of Rome, not contrary to the law of God; but if the case is new and extraordinary, the king and dictine monks, and Elizabeth, by authority of his council are to be consulted. Stats. 25 H. 8. c. 21: 28 H. 8. c. 16. § 6. This dispensing power is the foundation of the 'archbishop's granting special licences to marry at any place or time, to hold two livings and the like; and in this also is founded the right he exercises of conferring degrees in prejudice of the two Universities. He may retain eight chaplains; and, during the vacancy of any see, he is guardian of the spiritualities. Stats. 21 H. 8. c. 13: 25 H. 8. c. 21: 28 H. 8. c. 16.

The archbishop of Canterbury hath the archbishop of York; next to him the bishop London; next to him the bishop of Durham; next to him the bishop of Winchester; and then all the other bishops of both provinces, after the seniority of their consecration; but if any of them be a privy counsellor, he shall take place next after the bishop of Durham. Stat. 31 H. S. c 10: Co. Lit. 94: 1 Ought. Ord.

Jud. 486.

The first archbishop of York that we read of was Paulinus, who, by Pope Gregory's appointment, was made archbishop there about the year of our Lord 622. Godol. 14.

The archbishop of York hath the privilege to crown the queen-consort, and to be her

The archbishop of Canterbury is the first peer of the realm, and hath precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm: and as he hath the precedence of all the nobility, so also of all the great officers of state. Godol.

The archbishop of York hath the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the lord chancellor. Godol. 14.

In IRELAND there are four archbishops, viz. Armagh, primate of all Ireland; 2. Dublin, primate of Ireland; 3. Cashel, primate of Munster; and 4. Tuam, primate of Connaught; and eighteen bishops, viz. 1. Meath. 2. Kildare. 3. Derry. 4. Raphoe. 5. Limerick, Ardfert, and Aghadoe. 6. Dromore. 7. Elphin. 8. Down and Connor. 9. Waterford and Lisis the right of the arckbishop to call the bishops | 12. Cork and Ross. 13. Killaloe and Kilfenora. 14. Kilmore. 15. Clogher. 16. Ossory. 1. His power of ordination, which is gained 17. Killala and Achonry. 18. Clonfert and

Kilmaduagh.

By Irish act 17, 18 Car. 2. c. 10. a bishoprick in Ireland is declared incompatible with any ecclesiastical dignity or benefice in England or Wales. Sec stats. 52 G. 3. c. 62. as to the power of coadjutors to bishops and archbishops in Ireland; 53 G. 3. c. 92. as to demise of mensal lands by bishops there; and 7 G. 4. c. 30. § 3—5. as to advances to them for purchase of lands to improve their residences.

In Scotland after the Reformation, the titles of archbishop and bishop were introduced in 1572, and bestowed on elergymen ordained members of cathedral churches. By the act of 1592, c. 116. presbyterian church government was established by kirk sessions, presbyteries, provincial synods, and general assemblies. By act 1606, c. 2. bishops were restored; but in 1638 presbytery was a second time introduced. By act 1662, c. 1. presbytery was again displaced by prelacy; and finally by acts 1689, c. 3. and 1690, cc. 5. 29. presbytery was re-established, and has since so continued.

A Bishor is elected by the king's congé d' elire, or licence to elect the person named by the king, directed to the dean and chapter; and if they fail to make election in twelve days, they incur the penalty of a præmunire, and the king may nominate whom he pleases by letters patent. Stat. 25 H. 8. c. 20. was to avoid the power of the sec of Rome. This election or nomination, if it be of a bishop, must be signified by the king's letterspatent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected, which they are bound to perform immediately. After which the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. Archbishops and bishops refusing to confirm such election, incur the penalties of a pramunire. This stat. 25 H. 8. c. 20. was repealed by Edward 6. but is held to be constructively revived, and to be still in force. It does not, however, apply to the five bishoprics created by Henry 8. subsequent to its passing, which have always been pure donatives in form as well as substance. See 1 Comm. 380. and Coleridge's notes there, but no authorities are cited. On confirmation, a bishop hath jurisdiction in his diocese; but he hath not a right to his temporalities till consecration. 'The consecration of bishops, &c. is confirmed by act of parliament.

It is directed, in the form of consecrating bishops, that a bishop, when consecrated, must be full thirty years of age.

Vol. I. -33

on his consecration, and not before; and thereby he may confer orders, &c. in any place throughout the world. 2. His power of diction, which is limited, and confined to his see. 3. His power of administration and government of the revenues; both which last powers he gains by his confirmation: and some are of opinion, that the bishop's jurisdiction, as to ministerial acts, commences on his election. Palm. 473. 475.

The king may not seize into his hands the temporalities of bishops, but upon just cause, and not for a contempt, which is only fineable. See tit. Temporalities. Bishops are allowed four years for payment of their first fruits, by stat. 6 Ann. c. 27. Every bishop may retain four chaplains. Vide stat. 21 H. 8. c. 13. §

16: 8 Eliz. c. 1.

A bishop hath his consistory court, to hear ceclesiastical causes; and is to visit the clergy, &c. He consecrates churches, ordains, admits, and institutes priests; confirms, suspends, excommunicates, grants licenses for marriage, makes probates of wills, &c. Co. Lit. 96: 2 Roll. Ab. 230. He hath his archdeacon, dean and chapter, chancellor, and vicar-general, to assist him: may grant leases for three lives, or twenty-one years, of land usually letten, reserving the accustomed yearly rents. Stats. 32 H. S. c. 28: 1 Eliz. c. 19. § 5. See this Dict. tit. Leases.

The chancellor to the bishop is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some University. Stat. 37. H. S. c.

By stat. 24 G. 3. § 2. c. 35. the bishop of London, or any bishop by him appointed, may admit to the order of deacon or priest, subjects of countries out of his majesty's dominions, without requiring the oath of obedience. But no person shall be thereby enabled to exercise such offices within his majesty's dominions. And see stat. 59 G. 3. c. 60. tit. Or-

By stat. 26 G. 3. c. 84. the archbishops of Canterbury or York, with such other bishops as they shall call to their assistance, may consecrate subjects of countries out of his majesty's dominions to be bishops, without requiring the usual oaths; pursuing the forms prescribed by the act. But no such bishops or their successors, or persons ordained by them. shall exercise their functions within his majesty's dominions.

The right of trial by the lords of parliament, as their peers, it is said, does not extend to bishops; who, though they are lords of parliament (except the bishop of Sodor and Man), and sit there by virture of their baronies, which they hold jure ecclesia, yet are not ennobled in blood, and consequently not It is held that a hishop hath three powers; peers with the nobility. 3 Inst. 30, 31: see

1 Comm. 401: 4 Comm. 264: and this Dict.; bed, or vein, is guilty of felony, and may be tit. Parliament.

Archbishopricks and bishopricks may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself. Comm. 382.

The following are some of the popular distinctions between archbishops and bishops. The archbishops have the style and title of Grace, and Most Reverend Father in God by Divine Providence. The bishops, those of Lord and Right Reverend Father in God by Divine Permission. Archbishops are inthroned; bishops installed.

Mr. Christian in his notes on 1 Comm. 380, says, that the supposed answer of a bishop on his consecration, " Nolo episcopari," is a vulgar error. See tit. Advowson, Coadjutor,

Parson, &c.

Bishops and Archbishops were not within the old statutes of limitation; but now see Limitation of Actions, II. 1. Prescription,

Tithes, VII.

BISHOPRICK. The diocese of a bishop. BISSEXTILE, bissextilis.] Leap year, so called because the sixth day before the calends of March is twice reckoned, making an additional day in the month of February; so that the bissextile year hath one day more than the others, and happens every four years. This intercalation of a day was first invented by Julius Cæsar to make the year agree with the course of the sun. And, to prevent all doubt and ambiguity that might arise thereupon, it is enacted by the statute de anno bissextili, 21 H. 3. that the day increasing in the leap-year, and the day next before, shall be accounted but one day. Brit. 209: Dyer, 17. See tit. Year.

BLACK ACT, or WALTHAM BLACK ACT. The stat. 9 G. 1. c. 22. now repealed by stat. 7 & 8 G. 4. c. 27. was so called, having been occasioned by some devastations committed near Waltham, in Hampshire, by persons in disguise, or with their faces blacked.

For many of the offences mentioned in the former stat. and which have with amendments been re-enacted by subsequent acts, see tit. Assault, Burning, Cattle, Larceny, Felony, Malicious Injuries, and other appropriate titles.

BLACK ACTS. Acts printed in the old black letter. This term is applied to the acts of the 5 Jameses of Scotland, and those of Mary and James VI.—See tit Statutes.

BLACK BOOK, is a book lying in the Exchequer. See stat. Annals. 154.

BLACK LEAD. By stat. 7 and 8 G. 4. c. 29. § 37. persons stealing or severing with intent to steal, the ore of any metal or any black lead or black cawke, &c. from any mine,

punished as in the case of simple larceny.

BLACK MAIL, Fr. maille, a link of mail, or small piece of metal or money.] Signifies in the north of England in the counties of Cumberland, Northumberland, &c. a certain rent of money, corn, or other thing, anciently paid to persons inhabiting upon or near the borders, being men of name and power, allied with certain robbers within the said counties, to be freed and protected from the devastations of those robbers. But by stat. 43 Eliz. c. 13. to take any such money or contribution, called black-mail, to secure goods from rapine, is made a capital felony, as well as the offences such contribution was meant to guard against. See also the Scotch acts 1567, c. 21. 1587, c. 102.

It is also used for rents reserved in work, grain, or baser money; which were called reditus nigri, in contradistinction to the blanch farms, reditus albi. See tits. Alba Firma and

Blanch Firmes.

BLACK-ROD. The gentleman usher of black-rod is chief gentleman usher to the king; he belongs to the garter, and hath his name from the black rod, on the top whereof sits a lion in gold, which he carrieth in his hand. He is called, in the black book, fol. 255, Lator virgæ nigræ, & hostiarius; and in other places, virgæ bajulus. His duty is, ad portandum virgam coram domino rege ad festum sancti Georgii infra castrum de Windsore; and he hath the keeping of the chapterhouse door, when a chapter of the order of the garter is sitting; and, in the time of par-liament, he attends on the house of peers. His habit is like to that of the register of the order, and garter-king at arms; but this he wears only at the solemn times of the festival of St. George, and on the holding of chapters. The black rod he bears is instead of a mace, and hath the same authority; and this officer hath anciently been made by letters patent under the great seal, he having great power; for to his custody all peers, called in question for any crime, are first committed.

BLACK WARD, is when a vassal holds ward of the king; and a sub-vassal holds ward of that vassal. Scotch Dict.

BLACKWELL HALL. The public market of Blackwell Hall, London, is to be kept every Thursday, Friday, and Saturday, at certain hours; and the hall-keepers not to admit any buying or selling of woollen cloth at the said hall upon any other days or hours, on penalty of 100l. Factors selling cloth out of the market, shall forfeit 51. &c. Registers of all the cloths bought or sold, are to be weekly kept: and buyers of cloth, otherwise than for ready money, shall give notes to the sellers for the money payable; and factors are to transmit such notes to the owners in twelve days, or be liable to forfeit double value, &c. Stat. 8 and 9 W. 3. c. 9: see also stat. 4 and 5 P. & M. c. 5. & 26: 39 Eliz. c. | parlance-roll aided after verdict for the plain-20. § 12: 1 G. 1. c. 15.

BLADARIUS, a corn-monger, meal-man. or corn-chandler. It is used in our records for such a retailer of corn. Pat. 1 Ed. 3. par. 3. m. 13: see tit. Clothiers.

BLADE, bladum.] In the Saxon signifies generally fruit, corn, hemp, flax, herbs, &c. Will. de Mohun released to his brother all the manor of T ... Salvo instauro suo & blado, &c. excepting his stock and corn on the ground. Hence bladier is taken for an en-

grosser of corn or grain.

BLANCH FIRMES. In ancient times the crown-rents were many times reserved in libris albis, or blanch firmes: in which case the buyer was holden dealbare firmam, viz. his base money or coin, worse than standard. was molten down in the Exchequer, and reduced to the fineness of standard silver; or instead thereof, he paid to the king 12d. in the pound by way of addition. Lowndes's Essay upon Coins, p. 5.

BLANCH-HOLDING, is one of the ancient tenures of the law of Scotland, the duty payable being generally trifling, as a penny Scotch, or a pepper corn, &c. if required. On the abolition of ward-holding, by 20 G. 2. c. 50. all lands held formerly ward of the crown were converted into blanch holding: and so by 25 G. 2. c. 20. all lands held ward of the

BLANCOFORDA. Blandford, in Devon-

BLANCUM CASTRUM. Blane Castle, in Monmouthshire.

· BLANDFORD. An act was passed for rebuilding the town of Blandford in the county of Dorset, burnt down by fire in the year

1731. Stat. 5 G. 2. c. 16. BLANK BAR, is used for the same with what we call a common bar, and is the name of a plea in bar, which, in an action of trespass, is put in to oblige the plaintiff to assign

the certain place where the trespass was committed. 2 Cro. 594.

BLANK BONDS. Bonds heretofore known in the practice of the Scotch law, where the creditor's name was left blank, and which passed like bills by mere delivery, the bearer being at liberty to put in his name and sue for payment; they were declared void by the act 1696, c. 25.

BLANKS, were a kind of white money coined by H. 5. in those parts of France which were then subject to England, the value whereof was 8d. Stow's Annals, p. 586. These were forbidden to be current in this realm. 2 H. 6. c. 9. See tit. Alba Firma, Blanch Firmes.

BLANKS, in judicial proceedings, certain void spaces sometimes left by mistake. A blank (supposing something material wanting) in a declaration, abates the same. 4 Ed. 4. 14: 20 H. 6. 18. And such a blank is a good cause of demurrer. Blanks in the im- most worthy of blood to inherit his ancestor's

tiff. Hob. 76. Parker v. Parker.

BLASPHEMY, blasphemia.] Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature. Lindw. c. 1. And blasphemies of God, as denying his being, or providence; and all contumelious reproaches of Jesus Christ, &c. are offences by the common law, punished by fine, imprisonment, pillory, &c. 1 Hawk. P. C. And by stat. 9 and 10 W. 3. c. 32. any one who by writing, speaking, &c. should deny any of the persons in the Trinity to be God; assert there are more Gods than one, &c. was rendered incapable of any office; and, for the second offence, disabled to sue any action, to be executor, &c. and made liable to three years' imprisonment. But this act is repealed by 53 G. 3. c. 160. (see tit. Trinity.) The former act did not take away the common law punishment, but gave a cumulative punishment, and the prosecutor had still his option to proceed at common law under the stat. 3 B. & A. 161. Likewise by stat. 3 Jac. 1. c. 21. persons jestingly or profanely using the name of God, or of Jesus Christ, or of the Holy Ghost, or of the Trinity, in any stageplay, &c. incurs a penalty of 10l. A publication stating our Saviour to have been an impostor and a murderer is a libel at common law. 1 B. & C. 26. See Religion, Libel.

BLATUM BULGIUM. Bulness, in Cum-

BLAUNPAIN, alias BLANCPAIN. Whit-

BLE, signifies sight, colour, &c. And blee is taken from corn: as Boughton under the

BLENCH, BLENCH-HOLDING. See tit. Alba Firma.

BLENHEIM. See Marlborough, Duke of. BLESTIUM. Old Town, in Hereford-

BLETA, Fr. bleche.] Peat, or combustible earth dug up and dried for burning. Rot. Parl. 35 Ed. 1.

BLINKS, boughs broken down from trees, and thrown in a way where deer are likely to

BLISSOM, corruptly called blossom, is when a ram goes to the ewe, from the Teutonick Blets, the bowels.

BLOATED FISH or HERRING, are those which undergo a less process of pickling and drying than others. See tit. Fishery.

BLODEUS, Sax. blod.] Deep red colour; from whence comes bloat and bloated, viz. sanguine and high-coloured, which, in Kent, is called a blousing colour; and a blouse is there a red-faced wench. The prior of Burcester, A. D. 1425, gave his liveries of this colour. Paroch. Antiq. 376.

BLOOD, sanguis.] Is regarded in descents of lands; for a person is to be the next and

estate. Co. Lit. 13. See Jenk. Cent. 203.

See tit. Descent, Heir.

BLOODWIT, or bloudwit, compounded of the Sax. blod, i. e. sanguis: and wyte, old English, misericordia.] Is often used in ancient charters of liberties for an amercement for bloodshed. Skene writes it bloudveit; and says veit in English is injuria; and that bloudveit is an amerciament or unlow (as the Scotch call it) for wrong or injury, as bloodshed is: for he that hath bloudveit granted him, bath free liberty to take all amercements of courts for effusion of blood. Fleta saith, Quod significat quietantiam misericordiæ pro effusione sanguinis. Lib. 1. c. 47. And according to some writers, blodwite was a customary fine paid as a composition and atonement for shedding or drawing of blood, for which the place was answerable, if the party was not discovered: and therefore a privilege or exemption from this fine or penalty was granted by the king, or supreme lord, as a special favour. So king Henry II. granted to all tenants within the honour of Willingford, Ut quieti sint de Hidagio, & blodewite, &c. Paroch. Antiq. 114. In Scotland bloodwit is a riot wherein blood is spilt.

BLOODY-HAND, is one of the four kinds of circumstances by which an offender is supposed to have killed deer in the king's forest: and it is where a trespasser is apprehended in the forest, with his hands or other parts bloody, though he be not found chasing or hunting of the deer. Manhood. In Scotland, in such like crimes, they say taken in the fact, or with the red hand. See Back.

berind.

BLOSSEVILLA. Bloville, Blofield.

BOCK-HORD, or book-hoard, librorum, horreum.] A place where books, evidences, or

writings are kept.

BOCKLAND, Sax. quasi bookland.] A possession or inheritance held by evidence in writing. See LL. Allueredi, c. 36. Bockland signifies deed land or charter land; and it commonly carried with it the absolute property of the land; wherefore it was preserved in writing, and possessed by the Thanes or nobler sort, as Prædium nobile, liberum & immune a servitiis vulgaribus & servilibus, and was the same as allodium, descendible unto all the sons, according to the common course of nations and of nature, and therefore called gavelkind; devisable only by will, and thereupon termed Terræ Testamentales. Spelm. of Feuds. This was one of the titles which the English Saxons had to their lands, and was always in writing: there was but one more, and that was Folkland, i. e. Terra Popularis, which passed from one to another without any writing. See Squire on the Anglo Saxon Government: and this Dict. tit. Tenure.

BODOTRIA. Edinburgh Firth.

BODUNA. The people of Gloucestershire and Oxfordshire.

BOGS, in Ireland. Tracts of uncultivated land, the draining and cultivating whereof have been in the contemplation of the legislature. See stat. 49 G. 3. c. 102. continued by 51 G. 3. c. 122: 52 G. 3. c. 74. but expired, for appointing commissioners to inquire into the nature and extent of such logs. These commissioners made several detailed and valuable reports, with plans annexed of all the bogs in Ireland, and suggestions for the means of draining them, which reports were printed by order of the House of Commons, 1810—1814.

BOIS, Fr.] Wood, and sub-bois, underwood.

See Boscus

BOLERIUM PROM. See Antivesteum. BOLHAGIUM, or boldagium, a little house or cottage. Blount.

BOLT. A bolt of silk or stuff, seems to have been a long narrow piece: in the accounts of the priory of Burcester. It is mentioned,

Paroch. Antiq. p. 574.

BOLTING. A term of art used in our inns of court, whereby is intended a private arguing of cases. The manner of it at Gray's Inn is thus: an ancient and two barristers sit as judges; three students bring each a case, out of which the judges choose one to be argued, which done, the students first argue it, and after them the barristers. It is inferior to mooting, and may be derived from the Sax. bolt, a house, because done privately in the house for instruction. In Lincoln's Inn, Mondays and Wednesdays are the bolting days, in vacation time; and Tuesdays and Thursdays the moot days.

DE BONNA FASSATO. Goodrick.

BONA FIDE. That we say is done bona fide, which is done really, with a good faith, without any fraud or deceit.

BONAGHT, or bonaghty, was an exaction in Ircland, imposed on the people at the will of the lord, for relief of the knights, called bonaghti, who served in the wars. Antiq. Hibern. p. 60.

BONA NOTABILIA. See tit. Executor,

V. 3.

BONA PATRIA. An assise of countrymen or good neighbours. It is sometimes called assisa bonæ patriæ, when twelve or more men are chosen out of any part of the county to pass upon an assise: otherwise called juratores, because they are to swear judicially in the presence of the party, &c. according to the practice of Scotland. Skene. See Assissors.

BONA PERITURA. Goods that are perishable. The stat. Westm. 1.3 Ed. 1. c. 4 as to wrecks of the sea, ordains, that if the goods within the ship be bona peritura, such things as will not endure a year and a day, the sheriff shall sell them, and deliver the money received to answer it. See this Dict. tit. Wreck.

DE BONA VILLA. Bonevil.

BONCHA. A bunch, from the old Lat. honna or hunna, a rising bank, for the bounds

of fields; and hence bown is used in Norfolk, no advantage from such a transaction. And if for swelling or rising up a bunch or tumor, &c.

BOND. A bond or obligation is a deed whereby the obligor, or person bound, obliges himself, his heirs, executors, and administrators to pay a certain sum of money to another (the obligee) at a day appointed.

I. General Rules as to the Nature and Form of this Security.

II. Who may be Obligors and Obligees.

III. The Ceremonies necessary to constitute a Bond or Obligation.

IV. Of the Condition; and what shall be a Performance or Breach thereof.

V. Of the Discharge and Satisfaction of Bonds; 1. by the Act of the Party; or 2. by the Act of the Law.

VI. Of Actions and Pleadings on Bonds.

I. The Nature and Form of the Security .-If the bond be without a condition, it is called a single one, simplex obligatio; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest; which principal sum is usually one half of the penal sum specified on the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living, and after his death the obligation descends on his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a direct, yet a collateral charge upon the lands.

The condition may be either in the same deed, or in another, and sometimes it is included within, and sometimes indorsed upon the obligation; but it is commonly at the foot of the obligation. Bro. Obl. 67. A memorandum on the back of a bond may restrain the same

by way of exception. Moor. 67.

This security is also called a specialty; the debt being therein particularly specified in writing, and the party's scal, acknowledging the debt or duty, and confirming the contract; rendering it a security of a higher nature than those entered into without the solemnity of a seal.

As to the assignment of bonds, see tit. As-

signment.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive; or if it be uncertain or insensible, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is malum in se, the obligation itself is void; for the whole is an the condition be possible at the time of making it, and afterwards become impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudeuce or foresight of the obligor could guard against such a contingency. Co. Lit. 206. See post, IV.; and tit. Condition.

On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, viz. his principal, interest, and expences, in case the forfeiture accrued by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And this practice having gained some footing in the courts of law (see 2 Keb. 553: Salk. 596, 7: 6 Mod. 11. 60. 101.), the stat. 4 and 5 Ann. c. 16. at length enacted, in the same spirit of equity, that in case of a bond conditioned for the payment of moncy, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and suit commenced thereon, shall be a full satisfaction and discharge.

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; , for though in strictness it may be accounted his own fault why he did not take out execution, and therefore not entitled to interest; yet, as by the judgment he is entitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him the principal and interest, which incurred as well before as after the entering up of the judgment. Ab. Eq.

The Court of Chancery will not generally carry the debt beyond the penalty of a bond. Yet where a plaintiff came to be relieved against such penalty, though it was decreed, it was on the payment of the principal money, interest, and costs; and notwithstanding they exceeded the penalty, this was affirmed. I Vern. 350: 1 Eq. Ab. 92: 16 Vin. tit. Penalty: 3. Comm. 435: 3 Bac. Ab. Obligation. (A.)—And where the condition of a bond is to perform a collateral act, damages may be recovered beyond the penalty, and the court of K. B. will not stay the proceedings on payment of the money into court. 2 Term. Rep. 388. See White v. Sealy, Doug. 49. Semb. contra; but the authority of which is much shaken by the case in 2 Term. Rep. 388. where Buller, J. re. marked that there were several cases where the judgment had been carried beyond the penalty. 6 Term Rep. 303: 2 Marsh. 226.—Where the principal is the same sum as the penalty of the bond, and the condition is to pay lawful interest, damages may be recovered beyond the penalty. Ry. & Moo. Ca. 105. unlawful contract, and the obligee shall take In Elliot v. Davis (Bunb. 23.) interest on a

bond was decreed (in Scace.) to be paid, though or elsewhere, and, during such restraint, enit exceeded the penalty. See also Collins v. ters into a bond to the person who causes the Collins, the case of an annuity, Burr. 820: restraint, the same may be avoided for duress Holdip v. Otway, 2 Saund. 106: Dewall v. Price, Show. P. C. 15.

FORM of a BOND OF OBLIGATION, with Condition for the Payment of Money.

Know all men by these presents, That I David Edwards, of Lincoln's Inn, in the county of Middlesex, Esquire, am held and firmly bound to Abraham Barker, of Dale Hall, in the county of Norfolk, Esquire, in the penal sum of ten thousand pounds, of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September, in the forty-sixth year of the reign of our sovereign Lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the faith and so forth, and in the year of our Lord one thousand eight hundred and -

The condition of this obligation is such, that if the above bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful money of Great Britain, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void, and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered, being first David Edwards (L.S.) duly stamped, in the presence of A. B.

For irregular forms of bonds or obligations, see 1 Leon. 25: 3 Leon. 299: Cro. Jac. 208. 607. Bro. tit. Obligation, &c.; from whence, and other authorities, which the regularity of modern practice has rendered uninteresting, it appears that the courts always inclined to support the justice of the plaintiff's case, without much regard to mere errors in form, or arising from accident.

II. Who may be Obligors or Obligees.—All persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations. 5 Co. 119: 4 Co. 124: 1 Roll. Abr. 340.

But if a person is illegally restrained of his liberty, by being confined in a common gaol Baron and Feme.

of imprisonment. Co. Lit. 253: 2 Inst. 482. Vide tit. Duress.

So in respect of that power and authority which a husband has over his wife, the bond of a feme covert is ipso facto void, and shall neither bind her nor her husband. See tit.

Baron and Feme.

So though an infant shall be liable for his necessaries, such as meat, drink, clothes, physic, schooling, &c. yet if he bind himself in an obligation, with a penalty for payment of any of those, the obligation is void. Doct. and Stud. 113: Co. Lit. 172: Cro. Jac. 494. 560: 1 Sid. 112: 1 Salk. 279: Cro. Eliz. 920. See tit. Infants.

So an infant cannot bind fimself in a bond with a penalty conditioned for payment of interest as well as principal. 8 East, Rep. 330. And though the infant confirm it after 21, still it is invalid, unless the confirmation be of as high a nature as the bond. 3 Marsh.

& S. 477.

Also, though a person non compos mentis shall not be allowed to avoid his bond, by reason of insanity and distraction, yet may a privy in blood, as the heir, and privies in representation, as the executor and administrator, avoid such bonds; also if a lunatic after office found, enters into a bond, it is merely void. 4 Co. 124. Beverley's case. But see 2 Stra. 1104. that lunacy may be given in evidence on the general issue. See tit. Lu-

But if an infant, feme covert, &c. who are disabled by law to contract and to bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c. 1 Roll.

Rep. 41.

If a servant makes a bill in form, "Memorandum, that I have received of A. B. to the use of my master C. D. the sum of 40l. to be paid at Michaelmas following," and thereto sets his seal, this is a good obligation to bind himself; for though, in the beginning of the deed, the receipt is said to be to the use of the master, yet the repayment is general, and must necessarily bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no remedy against the master. Yelv. 137. Godbolt.

Infants, idiots, as also feme coverts, may be obligees; and here the husband is supposed to assent, being for his advantage; but if he disagrees, the obligation has lost its force; so that after the obligor may plead non est factum; but if he neither agrees nor disagrees, the bond is good; for his conduct shall be esteemed a tacit consent, since it is to his advantage. 5 Co. 119. b: Co. Lit. 3. a. See tit.

An alien may be an obligee; for since he therefore, if in the obligation the obligor be is allowed to trade and traffic with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us. Co. Lit. 129. b: Moor. 431: Cro. Eliz. 142. 683: Cro. Car. 9: 1 Salk. 46: 7 Mod. 15. See tit. Alien.

Sole corporations, such as bishops, prebends, parsons, vicars, &c., cannot be obligees, and therefore a bond made to any of these shall enure to them in their natural capacities; for no sole body politic can take a chattel in succession, unless it be by custom; but a corporation aggregate may take any chattel, as bonds, leases, &c. in his political capacity, which shall go in succession, because it is always in being. Cro. Eliz. 464: Dyer, 48.a: Co. Lit. 9. a. 46. a: Hob. 94: 1 Roll. Abr. 515.

If a drunken man gives his bond, it binds him; and a bond without consideration is obligatory, and no relief shall be had against it, for it is voluntary, and as a gift. Jenk. Cent. 109. But see Cole v. Robins, Hill. 2 Ann. per Holt, referred to in Bull. N. P. 172. that on the general issue, defendant may give in evidence that they made him sign the bond when he was so drunk he knew not what he did. A person enters voluntarily into a bond, though there was not any consideration for it; if there be no fraud used in obtaining the same, the bond shall not be relieved against in equity: but a voluntary bond may not be paid in a course of administration, so as to take place of real debts, even by simple contract; yet it shall be paid before legacies. 1 Chan. Cas. 157. An heir is not bound, unless he be named expressly in the bond; though the executors and administrators are. Dy. 13.

It is clearly agreed that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and seve- date, or hath a false or impossible date; for rally; in which last case the obligee must sue them jointly, or he may sue any one of them at his election; but if they are jointly and not severally bound, the obligee must sue them jointly; also in such case, if one of them dies, his executor is totally discharged, and the survivor and survivors only chargeable. 2 Roll. Abr. 148: Dyer, 19. 310: 5 Co. 10: Dal. 85. pl. 42: 1 Salk. 393: Carth. 61: 1 Lutw. 696.

If three enter into an obligation, and bind themselves in the words following, Obligamus nos et utrumque nostrum per se pro toto et in solido, these make the obligation joint and several. Dyer, 19. b. pl. 114.

III. The Ceremonies to constitute a Bond. -It is said, that there are only three things essentially necessary to the making a good obligation, viz. writing on paper or parchment, sealing, and delivery; but it hath been adjudged not to be necessary that the obligor named Erlin, and he signs his name Erlwin, that this variation is not material, because subscribing is no essential part of the deed, sealing being sufficient. 2 Co. 5. a. Godard's case: Noy. 21. 85: Moor. 28: Stile, 97: 2 Salk. 462: 5 Mod. 281.

And though the seal be necessary, and the usual way of declaring on a bond is, that the defendant by his bond or writing obligatory sealed with his seal, acknowledged, &c.; yet if the word scaled be wanting, it is cured by verdict and pleading over, for all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation. Dyer, 19. a: Cro. Eliz. 571. 737: Cro. Jac. 420: 2 Co. 5: 1 Vent. 70: 3 Lev. 348: 1 Salk. 141: 6 Mod. 306.

Also, though sealing and delivery be essential in an obligation, yet there is no occasion in the bond to mention that it was sealed and delivered; because, as Lord Coke says, these are things which are done afterwards. 2 Co. 5.a.

The name of the obligor subscribed, 'tis said, is sufficient, though there is a blank for his christian name in the bond. Cro. Jac. 261. Vide Cro. Jac. 558: 1 Mod. 107. In these cases, though there be a verdict, there shall not be judgment. Where an obligor's name is omitted to be inserted in the bond, and yet he signs and scals it, the Court of Chancery may make good such an accident; and in case a person takes away a bond fraudulently, and cancels it, the obligee shall have as much benefit thereby as if not cancelled. 3 Chan. Rep. 99. 184.—Where a man was bound, and not said to whom, the name was supplied. 3 Lev. 21: 2 Ves. Sen. 100: 2 Jac. & Walk. 1 .- Where the obligatory part omitted the word "pounds," it was supplied. & Barn. & C. 568.

An obligation is good though it wants the the date, as hath been observed, is not of the substance of the deed; but herein we must take notice that the day of the delivery of a deed or obligation is the day of the date, though there is no day set forth. 2 Co. 5. Godard's case; Noy. 21. 85, 86: Hob. 249: Stile, 97: Cro. Jac. 136. 264: Yelv. 193: 1 Salk. 76: see Styles v. Wardle, 4 Barn & C.: Steel v. Mart, 4 Barn. & C. 72.

If a man declare on a bond, bearing date such a day, but does not say when delivered, this is good; for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply that it was first delivered at another day, for this would be a departure. Cro. Eliz. 773: 2 Lev. 348: 1 Salk. 141. Vide. 1 Brownl. 104: 1 Lev. 196.

A plaintiff may suggest a date in a bond, where there is none, or it is impossible, &c. where the parties and sum are sufficiently expressed. 5 Mod. 282. A bond dated on the same should sign or subscribe his name; and that day on which a release is made of all things up to the day of the date, is not thereby dis- | broken. 4 H. 7. 1: Co. Lit. 384. Where charged. 2 Roll. Rep. 255.

deed, the jury are not estopped to find the truth, viz. that it was delivered before the 2 Co. 4. 6: 3 Keb. 332: see 4 Barn. & C.

A person shall not be charged by a bond, though signed and sealed, without delivery, or words, or other thing amounting to a delivery. 1 Leon. 140. But a bond or deed may be delivered by words, without any act of delivery; as where the obligor says to the obligee, Go and take the said writing, or take it as my deed, &c. So an actual delivery, without speaking any word, is sufficient: otherwise, a man that is mute could not deliver a deed. Co. Lit. 36. a: Cro. Eliz. 835: Leon. 193: Cro. Eliz. 122.

Interlineation in a bond, in a place not material, will not make the bond void; but if it be altered in a part material, it shall be void. 1 Nels. Abr. 391. And a bond may be void by rasure, &c.; as where the date, &c. is rased after delivery, which goes through the whole. 5 Rep. 23. If the words in a bond at the end of a condition, That then this obligation to be void, are omitted, the condition will be void, but not the obligation. See farther Bac. Ab. Obligation. (C.)

IV. The Condition .- The condition of a bond was, that A. L. should pay such a sum upon the 25th of December, or appear in Hilary term after in the court of B. R. He died after the 25th of December, and before Hilary term, and had not paid any thing: in this case the condition was not broken for non-payment, and the other part is become impossible by the act of God. 1 Mod. Rep. 265. And when a condition is doubtful, it is always! taken most favourably for the obligor, and against the obligee; but so as a reasonable construction be made as near as can be according to the intention of the parties. Dyer,

If no time is limited in a bond for the payment of money, it is due presently and payable on demand. 1 Brownl. 53. But the judges have sometimes appointed a convenient time for payment, having regard to the dis-tance of a place, and the time wherein the thing may be performed. And if a condition be made impossible in respect to time, as to make payment of money on the 30th of February, &c. it shall be paid presently. Jones, 143: see 1 Leon. 101.

A bond made to enfcoff two persons; if one dies before the time is past wherein it should be done, the obligor must enfeoff the survivor of them, or the condition will be broken; and if it be that B. and others shall enjoy land, and the obligor and B. the obligee do disturb the rest, by this the condition is dic, or the rent, &c. should be discharged, or

one is bound to do an act to the obligee him-If the bond was delivered before the date, self, the doing it to a stranger by appointment on issue, non est factum, joined on such a of the obligee, will not be a performance of the condition. 2 Bulst. 149. But in such case equity would relieve; and probably a date, and it is a good deed from the delivery. judge, on such action coming before him, would order plaintiff to be non-suited. If the act be to be done at a certain place, where the obligor is to go, to Rome, &c., and he is to do the sole act without limitation of time, he hath term during life to perform the same: if the concurrence of the obligor and obligee is requisite it may be hastened by the request of the obligee. 6 Rep. 30: 1 Roll. Abr. 437. Where no place is mentioned for performance of a condition, the obligor is obliged to find out the person of the obligee, if he be in England, and tender the money, otherwise the bond will be forfeited; but when a place is appointed he need seek no farther. Co. Lit. 210: Lit. 340. And if, where no place is limited for payment of money due on a bond, the obligor, at or after the day of payment, meets with the obligee, and tenders him the money, but he goes away to prevent it, the obligor shall be excused. 8 Ed. 4.

The obligor, or his servant, &c. may tender the money to save the forfeiture of the bond, and it shall be a good performance of the condition, if made to the obligee, though refused by him; yet if the obligor be afterwards sued, he must plead that he is still ready to pay it, and tender the money in court. Co. Lit. 208.

In the performance of the condition of an obligation, the intention of the parties is chiefly to be regarded: and therefore a performance in substance is sufficient, though it differ in words or some material circumstance; as if one be bound to deliver the testament of the testator, if he plead that he had delivered letters testamentary, it is sufficient. Bro. Condition 156: 17 Ed. 4. 3: 1 Roll. Abr.

If the condition of an obligation be to procure a lawful discharge, this must be by a release, or some discharge that is pleadable, and not by acquittance, which is but evidence. 1 Keb. 739.

If the party who is bound to perform the condition disables himself, this is a breach; as where the condition is, that the feoffee shall reinfeoff, or make a gift in tail, &c. to the feoffor, and the feoffee, before he performs it, make a feoffment or gift in tail, or lease for life or years in præsenti or futuro to another person, or marry or grant a rent-charge, or be bound in a statute or recognisance, or become professed; in all those cases the condition is broken; for the fcoffee has either disabled himself to make any estate, or to make it in the same plight or freedom in which he received its and better the conditions. which he received it; and being once disabled, he is ever disabled, though his wife should

he should be deraigned, &c. before the time | the plaintiff, paid to him 51. which he accepof the reconveyance. Co. Lit. 221, 222: Poph. 110: 1 Co. 25. a: 1 Roll. Abr. 447: 5 Co. 21. a.

Where the condition is in the conjunctive, regularly both parts must be performed: yet, to supply the intention of the parties, it is held, that if a condition in the conjunctive be not possible to be performed, it shall be taken in the disjunctive; as if the condition be, that he and his executors shall do such a thing, this shall be taken in the disjunctive, because he cannot have an executor in his life-time; so if the condition be that he and his assigns shall sell certain goods, this shall be taken in the disjunctive, because both cannot do it. Rol. Abr. 444: Owen, 52: 1 Leon, 74: Goulds. 71.

See farther in this Dict. tits. Condition, Consideration, Gaming, Marriage; as to Re-

signation Bonds, see tit. Parson.

A bond made with condition not to give evidence against a felon, &c. is void; but the defendant must plead the special matter. Wilson, 341. &c. Condition of a bond to indemnify a person from any legal prosecution is against law, and void. 1 Lutw. 667. And if a sheriff takes a bond as a reward for doing of a thing, it is void. 3 Salk. 75.

A bond for payment of a sum of money to the obligee, to induce him to discharge a person in his custody as an impressed sailor, is void. 9 East, 416. A bond given to persons who would be prejudiced by a private act of parliament, in consideration of their withdrawing their opposition to it, is not illegal. Jac. R. 64: 2 Madd. 356: and see Bac. Ab. Obligation (C.) (7th ed.) The obligor cannot plead that the consideration or condition of the bond was in fact different from what is stated, unless he shows fraud; for he is estopped by his deed. 2 Barn. & Adol. 544. But if he shows fraud or illegality, he may so plead. 2 Wils. 247: 9 East, 408: 9 Barn. & C. 462.

V. 1. The Discharge and Satisfaction of Bonds.—Where a lesser sum is paid before it is due, and the payment is accepted, it shall be good in satisfaction of a greater sum; but after the money is due, then a lesser sum, though accepted, shall not be a satisfaction for a greater sum. Thus in debt upon bond conditioned to pay 81. defendant pleaded payment of 51. before the day mentioned in the condition, which the obligee accepted in satisfaction of the bond, and upon demurrer this was adjudged a good plea. Moor, 677. Vide 3 Bulst. 301.—Payment after the day, of a less sum, is not good, as the bond is forfeited, at common law; and there is not any statute to relieve. See Bac. Ab. Accord and Satisfaction. (A.) (7th ed.)

Debt upon bond of 16l. conditioned to pay 81. 10s. on a certain day; the defendant plead.

ted in satisfaction of the debt; and upon demurrer, the plaintiff had judgment, because the desendant had pleaded the payment of the 51. generally, without alleging that it was in satisfaction of the debt. It is true, he sets forth, that it was accepted in satisfaction of the debt, but it ought likewise to be paid in satisfaction. 5 Rep. 117. Debt upon bond, conditioned, that in consideration the plaintiff had paid 121. to the defendant, he became bound to pay the plaintiff 121. if he lived one month after the date of that bond; and if not paid at that time, then to pay him 14l. if he lived six months after the date of the bond; the defendant pleaded, that after the six months he paid plaintiff 8l., and then gave him another bond in the penalty of 201. conditioned to pay him 10l. on a certain day, in full satisfaction of the other bond, and that the paintiff did accordingly accept the said bond; upon a demurrer to this plea, it was held ill; for admitting that one bond might be given in satisfaction of another, yet it cannot be after the other is forfeited, as it was in this case; because after the forseiture the penalty is vested in the obligee, and a less sum cannot be a satisfaction for a greater. 1 Lut. 464.

It hath been adjudged, that the acceptance of one bond cannot be pleaded in satisfaction of another bond. Cro. Car. 85: Moor, 872: Cro. Eliz. 716. 727: 2 Cro. 579. Thus in debt on a bond of 100l. conditioned for the payment of 52l. 10s. on a certain day, the defendant pleaded that at the day, &c. he and his son gave a new bond of 100l., conditioned for the payment of 52l. 10s. at another day then to come, which the plaintiff accepted in satisfaction of the old bond; and upon demurrer it was adjudged for the plaintiff, because the acceptance of a new bond to pay money at another day, could not be a present satisfaction for the money due on the day when it was to be paid on the old bond. Hob. 68. But it is otherwise where the second is not given by the obligor; as in debt upon bond against the defendant as heir, &c. he pleaded that his ancestor, the obligor, died intestate, and that W. R. administered, who gave the plaintiff another bond in satisfaction of the former: there was a verdict for the defendant: and it being moved in arrest of judgment, this distinction was made, that if the obligor, who gave the first bond, had likewise given the second, it would not have discharged the first; but in this case the second bond was not given by him who gave the first, but by his administrator, which had mended the security, because he may be chargeable de bonis propriis; and for that reason the second bond was held to be a discharge of the first. 1 Mod. 225. See Bac. Ab. Accord and Satisfaction. (7th ed.)

2. A bond on which neither principal nor ed, that, before that day, he, at the request of interest has been demanded for 20 years, will Vol. I.-34

be presumed in equity to be satisfied, and be | business, and retain the clerk in the same decreed to be cancelled; and a perpetual injunction granted to stay proceedings thereon. 1 Ch. Rep. 79: Finch. Rep. 78: see Mod. Ca. 22.—But satisfaction may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand.—Yet length of time is no legal bar; it is only a ground for the jury to presume satisfaction. 1 Term Rep. 270. And the presumption of payment may be rebutted by evidence that the obligor had not the means of paying. Fladong v. Winter, 19 Ves. 196: see 1 Camp. 217: 2 Moo. & Malk. 44.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is a release of the debt, and the executor cannot sue the other obligor. 8 Co. 136: 1 Salk. 300: and vide 1 Jon. 345. But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged, but it remains assets in his hands, to pay both debts and legacies. Cro. Car. 373: Yelv. 160. See tit. Executor, IV. 8.

If a feme sole obligee take one of the obligors to husband, this is said to be a release in law of the debt, being her own act.

8 Co. 136. a: March. 128.

If one obligor makes the executor of the obligee his executor, and leaves assets, the debt is deemed satisfied, for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator de bonis non, &c. of the obligee can ever sue the surviving obligor. Hob. 10.

But if two are bound jointly and severally to A. and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor. 2 Lev. 73. See tit.

Executor, IV. 8.

an obligation, and the obligee release to one of them, both are discharged. Co. Lit. 232. a. But a covenant not to sue one of several obligors has not this effect. Dean v. Newhall, 8 Term Rep. 168: 6 Taunt. 239.

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleaded, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon demurrer it was adjudged, that the obligation, by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were severally bound. 2 Lev. 220: 2 Show. 289: Sed. qu.

If the condition of a bond be, that a clerk shall faithfully serve, and account for all money, &c. to the obligee and his executors, this does not make the obligor liable for money received by the clerk in the service of the executors of the obligee, who continue the

employment, with the addition of other business, and an increase of salary. 1 Term Rep. 287.—But such a bond is not discharged by the obligees taking another partner into their house; it is a security to the house of the obligees. 1b. 291. n. And so also as to a similar bond to trustees for an insurance company. It is a security to the existing body of persons, carrying on the same business under the same name, and may be sued on, though the shares are not in the same hands. 12 East, 400. But if the bond is to pay to C. D. and E. all sums which they shall advance, it does not cover advances made after death of C. and the introduction of another party. 3 East, 484: and see 3 Camp. 53. acc.; and 1 New R. 34.

VI. Actions and Pleadings on Bonds.-In a bond where several are bound severally, the obligee is, at his election, to sue all the obligors together, or all of them apart, and have several judgments and executions; but he shall have satisfaction but once; for if it be of one only, that shall discharge the rest. Dyer, 19. 310. Where two or more are bound in a joint bond, and only one is sued, he must plead in abatement, that two more sealed the bond, &c. and aver that they are living, and so pray judgment de billa, &c. And not demur to the declaration. Sid. 420.

If action be brought upon a bond against two joint and several obligors jointly, and both are taken by capias, here the death or escape of one shall not release the other; but the same kind of execution must be taken forth against them: it is otherwise when they

are sued severally. Hob. 59.

Also, if two or more be jointly bound, though regularly one of them alone cannot be sued, yet if process be taken out against all, and one of them only appears, but the others stand out to an outlawry, he who appeared If two are jointly and severally bound in shall be charged with the whole debt. 9 Co.

If a bond is made to three, to pay money to one of them, they must all join in the action, because they are but as one obligee.

Yelv. 177.

So if an obligation be made to three, and two bring their action, they ought to show the third is dead. 1 Sid. 238. 420: 1 Vent. 34.

Though there be several obligees, yet a person cannot be bound to several persons severally; and therefore an obligation of 2001. to two, to pay 100l. to the one, and the other 100l. to the other, is a void condition. Dyer, 350. a. pl. 20: Hob. 172: 2 Brownl. 207: Yelv.

If A. bind himself in a sum to B. to pay to C., who is a stranger, a payment to C. is a payment to B., and in an action upon it, the count must be upon a bond payable to B. 1 Sid. 295: 2 Keb. 81.

In debt the declaration was, that the defend-

BOND VI.

ant became bound in a bond of ——, for the want of stating a tender; for the tender only payment of —— to him, his attorney or as- is traversable. 3 Lev. 104. signs, and on over of the bond it appeared. that it was to pay to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance it was said, that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon. 6 Mod. 228. Robert v. Harnage.

So if A. makes a bond to B. to pay to such person as he shall appoint; if B. does not appoint one, payment to him is a payment to B., and if B. appoint none, it shall be paid to

B. himself. 6 Mod. 228.

If A. by his bill obligatory, acknowledges himself to be indebted to B. in the sum of 10l. to be paid at a day to come, and binds himself and his heirs in the same bill in 201. but does not mention to whom he is bound, yet the obligation is good, and he shall be intended to be bound to B. to whom he acknowledged before the 10l. to be due. 2 Roll. Abr. 148. Franklin v. Turner.

If an infant seal a bond, and be sued thereon, he is not to plead non est factum, but must avoid the bond by special pleading; for this bond is only voidable, and not in itself void. 5 Rep. 119. But if a bond be made by a feme covert, she may plead her coverture, and conclude non est factum, &c. her bond being void. 10 Rep. 119: see Bac. Ab. Obligation (F.): and the note to Thomas & Fraser's Coke's Reports, vol. 5. 119. b. Or plead non est factum, and give coverture in evidence. If a bond depends upon some other deed, and the deed becomes void, the bond is also void.

As to the pleading of performance, the defendant must set forth in what manner he hath performed it. Thus, in debt on a bond, with condition for performance of several things, the defendant pleads that the condition of the said deed was never broken by him, and held an ill plea: because, for saving the bond, it is necessary for the defendant to show how he hath performed the condition; and this sort of pleading was never admitted. 2 Vent. 156.

So if he had pleaded that he performed every thing, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly; but if the condition were for performance of covenants in an indenture, performance were generally a good plea. 1 Lev. 302. This must be understood where the covenants are set forth, and appear to be all in the affirmative. For if some are in the affirmative, some in the negative, or any in the disjunctive, the defendant should plead specially.

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place he was ready to pay the money, but that nobody was there to receive it; and held ill on a general demurrer, for

In debt on a bond with condition, the defendant pleads a collateral plea, which is insufficient; the plaintiff demurs and hath judgment, without assigning a breach; for the defendant, by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not; but if the plaintiff had admitted the plea, and made a replication which showed no cause of action, it had been otherwise; but if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment without assigning a breach. 1 Lev. 55. 84: 3 Lev. 17. 24. This must mean, if the plea was bad in substance.

And in all cases of debt on an obligation with condition (that of a bond to perform an award only excepted), if the defendant plead a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the special matter alleged; for he that excuses a non-performance admits it, and the plaintiff need not show that which the defendant hath supposed and admitted. Salk. 138.

But if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff, in his replication, must show a breach; for then he has no cause of action, unless he show it: and this difference will give the true reason, and reconcile the following cases. 1 Salk. 138: 1 Lev. 55. 84. 226: Saund. 102. 159. 317: 3 Lev. 17. 24: 1 Vent. 114: Cro. Eliz. 320: Yelv. 78.

But by stat. 4 Anne, c. 16. if an action of debt be brought on single bill, or judgment, after money paid, such payment may be pleaded in bar. So if a bond with a condition, upon payment of principal and interest due by the condition, though such payment was not strictly made according to the condition, yet it may be pleaded in bar.

By stat. 8 and 9 W. 3. c. 11. § 8. in actions on bonds for performance of covenants, the plaintiff may (which is held must) assign as many breaches as he pleases, and the jury may assess damages. The defendant paying the damages, execution may be staid: but the judgment to remain to answer any future breach, and plaintiff may then have scire facias against the defendant; and so toties quoties. As to the cases which are and are not within this statute, see Bac, Ab. Obligation. (F.) (7th ed.) Generally it applies to all bonds except those conditioned for payment of a gross sum.

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff, so he may plead

payment as to part, and as to the rest an acquittance. 1 Salk. 180.

But a defendant in an action on a bond cannot plead non est factum, and a tender as

to part. 5 Term Rep. 97,

In debt on an obligation the defendant cannot plead nil debet, but must deny the deed by pleading non est factum; for the seal of the party continuing, it must be dissolved eo ligamine quo ligatur. Hard. 332: Hob. 218. In bonds to save harmless, the defendant

being prosecuted, is to plead non damnifica-

The stealing of any bond or bill, &c. for money, being the property of any one, made felony, as if offenders had taken other goods of like value. Stat. 7 and 8 G. 4. c. 29. § 5. See tit. Felony.

Bonds are within the last statute of limitation. 3 and 4 W. 4. c. 42. § 3. See Limitations of Actions, II, 3. And see Pleading.

BONDAGE. Is slavery; and bondmen, in Domesday, are called servi, but rendered different from villani.-Et de toto tenemento, quod de ipso tenet in bondagio in soca de Nortone cum. pertin. Mon. Angl. 2 par. fol.

609. See Nativus.

BONIS NON AMOVENDIS. A writ directed to the sheriffs of London, &c. where a writ of error is brought; to charge them that the person against whom judgment is obtained be not suffered to remove his goods, till the error is tried and determined. Reg. Orig. 131.

BONIUM, seu BOVIUM. Boverton, or Cowbridge; in Glamorganshire, also Bangor,

in Flintshire.

BOOKS. By stat. 7 A. c. 14. § 10. if any book shall be taken or otherwise lost out of any parochial library, any justice may grant his warrant to search for it; and if it shall be found, it shall, by order of such justice, be restored to the library.

The sole right of printing books, bequeathed to the two Universities of England, the four Universities of Scotland, and the Colleges of Eton, Westminster, and Winchester is secured

to them by stat 15 G. 3. c. 53.

From the 7th to the 11th century books were very scarce. To that was chiefly owing the universal ignorance which prevailed during that period. After the Saracens conquered Egypt in the seventh century, the communication with that country (as to Europe, &c.) was almost entirely broken off, and the papyrus no longer in use. So that paper was used, and as the price of that was high, books became extremely rare, and of great value. Vide Robertson's History of Charles the Fifth, 1 vol. 233, 234.

In the eleventh century the art of making paper was invented, the number of manuscripts was thereby increased, and the study of the sciences greatly facilitated. See farther as to Books, tit. Literary Property.

BOOK of RATES. See title Customs.

BOOK of RESPONSES, is that which the director of the chancery keeps, particularly to note a seizure, when he gives order to the sheriff in that part to give it to an heir, whose service has been returned to him. The form of it is respondent vice comes, &c. Scotch Dict

BOOKSELLERS, and authors of books,

&c. See title Literary Property.

BOOTING, or BOTING-COKN, rent-corn, anciently so called. The tenants of the manor of Haddenham, in com. Bucks, formerly paid booting corn to the prior of Rochester. Antiq. of Purveyance, fol. 418. It is thought to be so called, as being paid by the tenants by way of bote, or boot, viz., as a compensation to the lord for his making them leases, &c.

BORCOVICUS and BOROVICUM. Ber-

wick-upon-Tweed.

BORDAGIUM. See Bordlode.

BORDARIA. A cottage, from the Sax.

bord, domus.

BORDARII, or BORDIMANNI. These words often occur in Domesday, and some think they mean boors, husbandmen, or cottagers. In the Domesday inquisition they were distinct from the villani; and seemed to be those of a less servile condition, who had a bord or cottage, with a small parcel of land allowed to them, on condition they should supply the lord with poultry and eggs, and other small provisions, for his board or entertainment. Some derive the word bordarii from the old Gall. bords, the limits or extreme parts of any extent; as the borders of a country, and the borderers inhabitants in those parts. Spelm.

BORDER WARRANT. The judge ordinary on either side of the border betwixt England and Scotland, gives warrant for arresting the person or effects of an inhabitant of the opposite side, until he finds security

judicio sisti.

BORD-HALFPENY, Sax. bord, a table, and halpeny, or half-penny. Spelm.] A small toll, by custom paid to the lord of the town for setting up boards, tables, booths, &c. in fairs and markets.

BORDLANDS. The demesnes which lords keep in their hands for the maintenance of their board or table. Bract. lib. 4. tract. 3. c.

Spelm.

BORDLODE, or BORDAGE. A service required of tenants to carry timber out of the woods of the lord to his house: or it is said to be the quantity of food or provision, which the bordarii, or bordmen, paid for their bord-lands. The old Scots had the term of burd, and meetburd for victuals and provisions; and burden sack, for a sack full of provender: from whence it is probable came our word burden. Spelm.

BORD-SERVICE. A tenure of bord-lands; by which some lands in the manor of Fulham in com. Mid. and elsewhere, are held of the bishop of London, and the tenants do now pay six-pence per acre in lieu of finding provision, anciently, for their lord's board or table. | Litt. § 165; as in Edmunton, &c. Blount.

BORD-BRIGCH, borg-bryce, or burgbrych, Sax.] A breach or violation of surety-ship, pledge-breach, or breach of mutual fidelity

BOREL-FOLK, i. e. country people, from the Fr. boure floccus, because they covered their heads with such stuffs. Blount.

BORGH UPON WEIR OF LAW, is to find caution to answer as law will. Scotch Dict.

BORLASIUS. Borlace.

BOROUGH, Fr. burg. Lat. burgus, Sax. borhoe.] Signifies a corporate town, which is not a city; and also such a town or place as sends burgesses to parliament. Verstegan saith, that burg, or burgh, whereof we make our borough, metaphorically signifies a town having a wall, or some kind of inclosure about it: and all places that, in old time, had among our ancestors the name of borough, were one way or other fenced or fortified. Lit. § 164. But sometimes it is used for villa insignior, or a country town of more than ordinary note, not walled. A borough is a place of safety, protection, and privilege, according to Somner; and in the reign of king Hen. II. burghs had so great privileges, that if a bond-man or servant remained in a borough a year and a day, he was by that residence made a freeman. Glanville. And why these were called free burghs, and the tradesmen in them free burgesses, was from a freedom to buy and sell, without disturbance, exempt from toll, &c. granted by charter. It is conjectured that borhoe, or borough, was also formerly taken for those companies consisting of ten families, which were to be pledges for one another: and we are told by some writers that it is a street or row of houses close to one another. Brac. lib. 3. tract. 2. c. 10: Lamb. Duty of Const. p. 8. Vide Squire's Anglo-Saxon Government, 236. 247. 251. 254. 258. 262.264. Trading boroughs were first founded in the time of Alfred. Squire, 247. 251.

In Scotland boroughs are divided into royal boroughs and boroughs of barony; the former holding of the king, the latter of a subject. The magistrates of royal boroughs have the same jurisdiction within the borough as sheriffs in their counties.

A borough is now generally understood to be a town, either corporate or not, that sends burgesses to parliament. 1 Comm. 114. and Coleridge'e Note there. See title Burgage. Tenure, Corporation, Parliament.

BOROUGH COURTS. Vide Courts.

BOROUGH HEADS, BOROUGH-HOLDERS, Borsholders, or Bursholders, quasi borhealders. See title, Headborough.

BOROUGH-ENGLISH. A custom relative to the descent of lands, in some ancient boroughs, and copyhold manors, that estates shall descend to the youngest son; or, if the owner hath no issue, to his younger brother; Kitch.

This is so named, in contradistinction, as it were, to the Norman customs, and is noticed

by Glanville, lib. 7. c. 3.

Littleton gives the following reason for this custom. Because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors have, indeed, given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night; and that therefore the youngest son was most certainly the tenant's offspring. But it does not appear that this custom ever prevailed in England (nor even in Scotland), though that error for a long time prevailed. See this Dict. tit. Mercheta Mulierum.-Possibly this custom of borough-english may be the remnant of the pastoral state of our British and German ancestors, in which the youngest child was necessarily most helpless. See 2 Comm.

This custom goes with the land, and guides the descent to the youngest son, although there be a devise to the contrary. 2 Lev. 138. If a man, seised in fee of lands in borough-english, makes a feoffment to the use of himself and the heirs male of his body, according to the course of the common law, and afterwards die seised, having issue two sons, the youngest son shall have the lands by virtue of the custom, netwithstanding the feoffment. Dyer, 179.

If a copyhold in borough-english be surrendered to the use of a person and his heirs, the right will descend to the youngest son according to the custom. 1 Mod. 102. And a youngest son shall inherit an estate in tail in borough-english. Noy, 106. But an heir at common law shall take advantage of a condition annexed to borough-english land; though the youngest son shall be entitled to all actions in right of the land, &c. 1 Nels. Ab. 396. And the eldest son shall have tithes arising out of land borough-english; for tithes of common right are not inheritances descendible to an heir, but come in succession from one clergyman to another. Ibid. 347.

Borough-english land being descendible to the youngest son, if a younger son dies without issue male, leaving a daughter, such daughter shall inherit jure repræsentationis. 1 Salk. 243. It hath been adjudged where a man hath several brothers, the youngest may inherit lands in borough-english: yet it is said where a custom is, that land shall go to the youngest son, it doth not give it to the youngest uncle, for customs shall be taken strictly; and those which fix and order the descents of inheritance, can be altered only by parliament. Dyer, 179: 4 Leon. 384: Jenk. Cent. 220.

By the custom of borough-english, the widow

shall have the whole of her husband's lands in | common phrase to-boot, i. e. compensationis dower, which is called her free-bench; and this is given to her the better to provide for the younger children, with the care of whom she is entrusted. Co. Lit. 33. 111: F. N. B. 150: Mo. pl. 566.

Borough-english is one of those customs of which the law takes particular notice; there is no occasion to prove that such custom actually exists, but only that the lands in question are subject thereto. 1 Comm. 76. the extension of the custom to the collateral line must be specially pleaded. Robinson Gavelk. 38. 43. 93. And as borough-english may be extended by special custom, so may it be restrained; and therefore the customary descent may be confined to fee-simple. Mar. 54. cited Robins, Appendix: see 1 Inst. 110. b, in n.

BOROUGH GOODS. As to their being devisable, see tits. Will, Executor.

BORROWING. See tit. Bailment.

BORSHOLDERS. See tit. Headborough. BORTMAGAD, Sax. Bord, domus & Ma-

gad. ancilla.] A house-maid. Spelm.
BOSCAGE, boscagium.] That food which wood and trees yield to cattle; as mast, &c. from the Ital. bosco, silva: but Manwood observes, to be quit de boscagio, is to be discharged of paying any duty of wind-fall wood in the forest. See Spelm. in n.

BOSCARIA. Wood-houses; from boscus; or ox-houses, from bos. See Bostar: Mon.

Angl. tom. 2. fol. 302.

DE BOSCO. Bois, boys.

DE BOSCO ARSO. Brentwood, or burntwood.

DE BOSCO ROARDI. Borhard.

BOSCUS. An ancient word, signifying all manner of wood; Bosco, Italian, bois, French. Boscus is divided into high wood or timber, hautboys, and coppice or under-woods, sub-hoscus, sub-bois: but the high wood is properly called saltus, and in Fleta we read it maeremium. Cum una carecta de mortuo bosco. Pat. 10 H. 6.

A certain rustical pipe, BOSINNUS. mentioned in ancient tenures.

BOSTAR. An ox stall. Mat. Paris. anno

BOTE, Sax.] A recompense, satisfaction, or amends. The Saxon bote is synonymous to the word estovers. See tit. Common of Estovers. House-bote is a sufficient allowance of wood to repair, or burn in the house; which latter is sometimes called fire-bote. Ploughbote and cart-bote, are wood to be employed in making and repairing all instruments of husbandry: and hay-bote or hedge-bote, is wood for repairing of hays, hedges, or fences. 2 Comm. 35. Hence also comes man-bote, compensation, or amends for a man slain, &c. In king Ina's laws it is declared what rate was ordained for expiation of this offence, according to the quality of the person slain. Lamb. cap. 99. From hence, likewise, we have our void. Atlas, 2 Hagg. 48.

BOTELESS. In the charter of H. 1. to Tho. archbishop of York, it is said, that no judgment or sum of money shall acquit him that commits sacrilege; but he is in English called boteless, viz. without emendation. Lib. Albas penes Cap. de Suthnet. int. Plac. Trin. 12 Ed. 2. Ebor. 48. We retain the word still in common speech; as it is bootless to attempt such a thing; that is, it is in vain to attempt it.

BOTELLARIA. A buttery or cellar, in which the butts and bottles of wine, and other

liquors, are deposited.

A booth, stall, or standing, BOTHA. in a fair or market. Mon. Angl. 2 par. fol.

BOTHAGIUM. Boothage, or customary dues paid to the lord of the manor or soil, for the pitching and standing of booths in fairs or markets. Paroch. Antiq. p. 680.

BOTHNA, or buthna, seems to be a park where cattle are inclosed and fed. Hector Boethius, lib. 7. cap. 123. Bothena also signifies a barony, lordship, &c. Skene.

BOTILER OF THE KING (pincerna regis), is an officer that provides the king's wines, who (according to Fleta), may by virtue of his office, choose out of every ship ladened with sale wines, one cask before the mast, and one behind. Fleta, lib. 2. c. 21. This officer shall not take more wine than he is commanded, of which notice shall be given by the steward of the king's house, &c. on pain of forfeiting double damages to the party grieved; and also to be imprisoned and ransomed at the pleasure of the king. Stat. 25 Ed. 3. st. 5. c. 21: see tit. Customs. As to butlerage and prisage, see Bac. Ab. Smuggling. (C.) (7th

BOTTOMRY, or ottomree, fænus nauticum.] Is generally where a person lends money to a merchant, who wants it to traffick, and is to be paid a greater sum at the return of a certain ship, standing to the hazard of the voyage; and in this case, though the interest be greater than that allowed by law, it is not usury. See this subject more fully treated under tit. In-

The Court of Admirality has an established jurisdiction over bottomry bonds, which are founded upon sea-risks, and defeasible by the destruction of the ship in the course of her voyage: but where a bond was not defeasible by any such casualty, and remained in full force whether the ship sunk or swam, the Admiralty Court doubted its jurisdiction to proceed upon it.

In bottomry-bonds, which are contracts in the nature of mortgages of ships, the lender and not the borrower is to run the risk, in consideration of the exorbitant interest allowed as the pretium periculi. A bond reserving maritime interest, but excluding sea-risk, is

one ox can plough. Mon. Angle. par. 3. fol.

91: see Oxgang

BOUCHE OF COURT, commonly called budge of court, was a certain allowance of provision from the king, to his knights and servants that attended him in any military expedition. The French avori bouche a court, is to have an allowance at court, of meat and drink: from bouche, a mouth. But sometimes it extended only to bread, beer, and wine. And this was anciently in use as well in the houses of noblemen as in the king's court.

BOVERIUM, or boveria. An ox-house. Mon. Angl. par. 2. fol. 210.

BOVETTUS. A young steer or castrated

bullock. Paroch. Antiq. p. 287.

BOVICULA. An heifer or young cow; which, in the East Riding of Yorkshire, is called a whee, or whey.

BOUGH OF A TREE. Seisin of land given by it, to hold of the donor, in capite.

Mad. Exch. i. 62. See tit. Entry.

BOUND, or boundary, bounda.] The utmost limits of land, whereby the same is known and ascertained. See 4 Inst. 318: and tit. Abuttals.

BOUNDARY ACT. A name given to the 2 and 3 W. 4. c. 64., whereby the division of counties, and the limits of cities and boroughs in England and Wales were settled and described, so far as respects the election of members to serve in parliament. The boundaries fixed by this statute are also to be those of the cities and towns within the corporation act now pending

BOUNDARIES OF COUNTIES, &c. By stat. 7 G. 4. c. 64. § 12. felonies and misdemeanors committed on the boundaries of counties, or within 500 yards thereof, or begun in one county and completed in another, may be tried in either. And by § 13. where the side, centre bank, &c. of any river, canal, or highway, constitutes the boundaries of two counties, offences committed in any journey or voyage, may be tried in any county through which the course of the voyage or journey may have been.

BOUND BAILIFFS. See tit. Bailiffs. BOUNTIES ON EXPORTATION. See tit. Navigation Act.

BOUNTY OF Q. ANNE, for maintaining poor clergymen. See First Fruits.

BOW-BEARER. An under officer of the forest, whose office is to oversee, and true inquisition make, as well of sworn men as unsworn, in every bailiwick of the forest; and of all manner of trespasses done, either to vert or venison, and cause them to be presented, without any concealment, in the next court of attachment, &c. Crompt. Juris. fol. 201.

BOWYERS. One of the ancient companies of the city of London. By stat. 8 Eliz. c. 10. a bowyer dwelling in London, was to have always ready fifty bows of elm, witch-

BOVATA TERRÆ. As much land as of 10s. for every bow wanting; and to sell them at certain prices, under the penalty of 40s. And by stat. 12 E. 4. c. 2. parents and masters were to provide for their sons and servants a bow and two shafts, and cause them to exercise shooting, on a pain of 6s. 8d. &c. See also stat. 33 H. 8. c. 6: and tit. Game.

BRACELETS. Hounds, or rather beagles of the smaller and slower kinds. Pat. 1 Rich.

2. p. 2. m. 1.

BRACENARIUS, Fr. braconnier.] Α huntsman, or master of the hounds. Anno 26 Ed. 1. Rot. 10. in dorso.

BRACETUS. A hound: brachetus is in Fr. brachet, braco canis sagax, indagator leporum; so braco was properly the large fleet hound; and brachetus the smaller hound; and brachete the bitch of that kind. Monastic. Ang. tom. 2. p. 283.

BRÁCINUM. A brewing: the whole quantity of ale brewed at one time, for which tolsestor was paid in some manors. Brecina,

a brew-house, MS.

BRANDING in the hand, or face with a hot iron. A punishment inflicted by law for various offences, after the offender hath been allowed clergy. See tit. Clergy, benefit

BRANDY, A liquor made chiefly in France, and extracted from the lees of wine. In the stat. 20 Car. 2. c. 1 upon an argument in the Exchequer, anno 1668, whether brandy were a strong water or spirit, it was resolved to be a spirit: but in the year 1669, by a grand committee of the whole House of Commons, it was voted to be a strong water perfectly made. See the stat. 22 Car. 2. c. 4: see tits. Customs, Excise, Navigation Act.

BRASIUM. malt: in the ancient statutes brasiator is taken for a brewer, from the Fr. brasscur; and at this day is used for a maltster or malt-maker. Paroch. Antiq. p. 496.

BRASS, is to be sold in open fairs and markets, or in the owners' houses, on pain of 101., and to be worked according to the goodness of metal wrought in London, or shall be forfeited: also searchers of brass and pewter are to be appointed in every city and borough by head officers, and in counties by justices of peace, &c., and in default thereof, any other person skilful in that mystery, by oversight of the head officer, may take upon him the search of defective brass, to be forfeited, &c. Stat. 19 H. 7. c. 6. Brass and other metal fixed to any building, persons stealing or ripping, cutting or breaking, with intent to steal, guilty of felony, and may be punished as in case of simple larceny. 7 and 8 G. 4. c. 29. §

44: and see tit. Fixtures.

BRAWLING, or QUARRELLING IN THE CHURCH. See Church, Churchward.

BREACH OF CLOSE. See tit. Trespass. BREACH OF COVENANT. The not performing of any covenant, expressed or imhazel, or ash, well made and wrought, on pain | plied, in a deed; or the doing an act, which

BREACH OF DUTY. The not executing any office, employment, or trust, &c. in a

due and legal manner.

BREACH OF PEACE. Offences against the public peace, are either such as are an actual breach of the peace, or constructively so, by aiding to make others break it. See tit. Peace.

BREACH OF POUND. The breaking any pound or place where cattle or goods distrained are deposited, to rescue such distress; which is an indictable offence at common law. See tit. Distress; Pound-breach.

BREACH OF PRISON. See tit. Escape;

Prison-breaking.

BREACH OF PROMISE, violateo fidei.] A breaking or violating a man's word, or undertaking; as, where a person commits any breach of the condition of a bond, or his covenant, &c. entered into, in an action on the bond, &c. the breach must be assigned. In debt on bond, conditioned to give account of goods, &c. a breach must be alleged, or the plaintiff will have no cause of action. 1 Saund. 102. See tits. Bond, Condition, Covenant.

BREAD AND BEER. The assise of bread, beer, and ale, &c. is granted to the Lord Mayor of London and other corporations. Bakers, &c. not observing the assise, to be set in the pillory. \ Stat. 51 H. 3. st. 1: Ord. Pistor. and 51 H. 3. st. 6: vide 2 and 3 Ed. 6.

By stat. 31 G. 2. c. 29. (explained and restrained as to time of prosecution to seven days, 33 G. 3. c. 37.) containing regulations concerning the assise of bread, and to prevent adulteration, so much of stat. 51 H. 3. st. 6. entitled assisa panis et cervisæ, as relates to the assise of bread, and the stat. 8 A. c. 18. and all amendments by subsequent acts are repealed. The weight of the peck loaf, when well baken, is fixed at 17lb. 6oz. Avdps. and the rest in proportion. The weight of a sack of flour, at 2 cwt. 2 grs. or 280lb. net. which is to produce twenty peck loaves, weighing 347lbs. 80z. So that 3lb. 60z. is added to the weight of the flour by the materials of each peck loaf, when baked. And see farther stat. 32 G. 2. c. 18. how penalties not appropriated by stat. 31 G. 2. c. 29. shall be distributed. See also stat. 3 G. 3. c. 6. (for Scotland,) &c. and c. 11. wherein there are farther regulations concerning the assise of bread, and for preventing the adulteration thereof.

See also stat. 13 G. 3. c. 62., as to standard

wheaten bread. And see tit. Corn. See the stat. 36 G. 3. c. 22., amended by 41 G. 3. (U. K.) c. 12. respecting inferior sorts of bread; 37 G. 3. c. 98: 38 G. 3. c. 62., and c. v. 39 and 40 G. 3. c. 74. 97: and 45 G. 3. c. 23. as to the assise and price of bread in London and its environs, but which are all

the party covenanted not to do. See tit. Cove- | repealed by a local act, 55 G. 3. c. 99. As to the assise of bread out of London, &c. see 31 G. 2. c. 29: 13 G. 3. c. 62: 37 G. 3. c. 98: 45 G. 3. c. 23: and 53 G. 3. c. 116: see also 39 and 49 G. 3. c. 18. 74: 41 G. 3. st. 1. c. 16, 17: and 41 G. 3. (U. K.) c. 1, 2. for temporary regulations to prevent the sale of bread till baked twenty-four hours.

By stat. 34 G. 3. c. 61. bakers are prohibited from carrying on their trade during Sundays,

except at certain hours.

Under these statutes, bread deficient in weight or quality may be seized by justices, mayors, &c.; and bread is to be marked by the bakers according to its quality, W. for wheaten, and H. for household.

The 51 H. 3. st. 1. mentioned under this

title, has been repealed.

With respect to bakers exercising their

trade on a Sunday, see Sunday.

The latest act, imposing regulations as to the baking of bread where an assize is set, is the 5 G. 4. c. 50; where there is none, the 59 G. 3. c. 36: 1 and 2 G. 4. c. 50.

BREAD of TREET, or TRITE, panis tritici.] Is bread mentioned in the stat 51 H. 3. of assise of bread and ale, wherein are particularised wastel-bread, cocket-bread, and bread of treet, which answer to the three sorts of bread mentioned in the statute of Anne, called white, wheaten, and household bread. In religious houses they heretofore distinguished bread by these several names, panis armigerorum, panis conventualis, panis puerorum, et panis famulorum. Antiq. Not. BREAKING OF ARRESTMENT, is an

action wherein it is narrated, that though arrestment was laid on, payment, nevertheless, was made; the pursuer, therefore, concludes, that the breaker should refound him, and besides should be punished according to law.

Scotch Dict.

BREAKING and entering any dwelling-house, whether by night or by day, and stealing therein goods, however small the amount, is now felony, and the offender shall suffer death. By 7 and 8. G. 4. c. 29. § 11, 12. persons entering a dwelling-house with in-tent to commit felony, or being therein and committing felony, and breaking out of the same in the night time, are guilty of burglary. See farther tits. Burglary, Church, Housebreaking.

BRECCA, from the Fr. breche.] A breach or decay. In some ancient deeds there have been covenants for repairing muros et breccas, portas et fossata, &c.-De brecca aque inter Woolwich et Greenwich, supervidend. Pat. 16 R. 2. A duty of 3d. per ton on shipping was granted for amending and stopping of Dagenham breach, by stat. 12 A.

BRECINA. Vide Bracinum.

BREDE. A word used by Bracton for broad: as too large and too brede, is proverbially too long and too broad. Bract. lib. 3. quantities than casks of 4 1-2 gallons. By a tract. 2. c. 15. There is also a Saxon word by-law of the common council, brewers' drays

brede signifying deceit. Leg. Canut. c. 44. BREDWITE, Sax. bread and wite.] A fine or penalty imposed for defaults in the assise of bread; to be exempt from which was a special privilege granted to the tenants of the honour of Wallingford by King Henry II. Paroch. Antiq. 114.

BREHON AND BREHON LAW. See tit.

BRESINA. Wether-sheep. Mon. Angl. 1. c. 406.

BRENAGIUM. A payment in bran, which tenants anciently made to feed their lord's hounds. Blount.

BRETOYSE, or BRETOISE. The law of the marches of Wales, in practice among

the ancient Britons.

BREVE. A writ; by which a man is summoned or attached to answer in action; or whereby any thing is commanded to be done in the king's courts, in order to justice, &c. It is called breve from the brevity of it; and is directed either to the chancellor, judges, sheriffs, or other officers. Bract. lib. 5. tract. 5. cap. 17. See Skene de verb. Breve, and this Dict. tit. Writ.

BREVE PERQUIRERE. To purchase a writ or licence of trial, in the king's courts, BREVE PERQUIRERE. by the plaintiff qui breve perquisivit; and hence comes the usage of paying 6s. 8d. fine to the king, where the debt is 40l. and of 10s. where the debt is 100l. &c. in suit and trials

for money due upon bond, &c

BREVE DE RECTO. A writ of right or licence for a person ejected out of an estate, to sue for the possession of it when detained

from him. See tit. Right.

BREVIA TESTATA. It is mentioned by the feudal writers. Vide Feud. l. 1. 64. Our modern deeds are in reality nothing more than an improvement or amplification of the brevia testa. See tit. Deed.

BREVIBUS and ROTULIS LIBERAN-DIS. A writ or mandate to a sheriff to deliver unto his successor the county, and the appurtenances, with the rolls, briefs, remembrance, and all other things belonging to that

office. Reg. Orig. fol. 295.

BREWERS .- As to the dimensions of their casks, see tit. Coopers. By stat. 24 G. 3. st. 2. c. 41. brewers of strong and small beer are to take out annual licences from the officers of excise.-Brewers are by this and other acts, subject to various regulations under the excise laws. Duties of excise are imposed on beer and ale by various acts.—Notice to the Excise Office must be given, and entry made, of places for brewing beer and ale. See stats. 12 C. 2. c. 24: 15 C. 2. c. 11: and 5 G. 3. c. 43: see also stats. 1 W. & M. st. 1. c. 24: 7 and 8 W. 3. c. 30: 8 and 9 W. 3. c. 19: 33 G. 3. c. 23: 42 G. 3. c. 38. to prevent cellor was impeached by the commons with frauds by brewers. By stat. 32 G. 3. c. 8. § great zeal, for bribery, in selling the places of

shall not be in the streets of London after eleven in the forenoon in summer, and one in winter. 2 Stra. 1085: Hardw. 405: Andr. 91. See tit. Excise.

The last statute relative to brewers is the 5 G. 4. c. 54., imposing various penalties for brewing or selling ale, beer, or porter, contrary to its provisions. It has since been

amended by the 9 G. 4. c. 68.

BRIBERY, from the Fr. briber, to devour or eat greedily.] Is a high offence, where a person, in a judicial place, takes any fee, gift, reward, or brocage for doing his office, or by colour of his office, but of the king only.

Inst. 145: Hawk. P. C. i. c. 67.

Taken more largely, it signifies the receiving, or offering, any undue reward, to or by any person concerned in the administration of public justice, whether judge, officer, &c. to influence his behaviour in his office: and sometimes it signifies the taking or giving a reward for appointing another to a public office. 3 Inst. 9: 4 Comm. 139. To take a bribe of money, though small, is a great fault; and judges' servants may be punished for receiving bribes. If a judge refuse a bribe offered him, the offerer is punishable. Fortescue, cap. 51.

Bribery in inferior judicial or ministerial offices is punished by fine and imprisonment, which may also be inflicted on those who offer a bribe, though not taken. 4 Comm. 140: 3 Inst. 147. Bribery in a judge was anciently looked upon as so heinous an offence, that it was sometimes punished as high treason; and it is at this day punishaable with forfeiture of office, fine, and imprisonment. Blackstone says that Chief Justice Thorpe was hanged for this offence in the reign of Edward III.; but this is denied by Lord Coke. 3 Inst. 145: and see Rot. Parl. 10 R. 2. st. 24, for his pardon.—And by a stat. 11 H. 4. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. 4 Comm. 140. cites 3 Inst. 146.-In the reign of King James I. the earl of Middlesex, lord treasurer of England, being impeached by the commons for refusing to hear petitions referred to him by the king, till he had received great bribes, &c., was by sentence of the lords, deprived of all his offices, and disabled to hold any for the future, or to sit in parliament; also he was fined fifty thousand pounds, and imprisoned during the king's pleasure; 1 Hawk. P. C. c. 67. & 7; but the fine was remitted on the accession of Charles I. and the proceeding appears to have been instigated rather by revenge than justice. In 11th George I. the lord chan-1. common brewers must not sell beer in less masters in chancery, for exorbitant sums,

Vol. I.-35

and other corrupt practices, tending to the great loss and ruin of the suitors of that court: and the charge being made good against him, being before divested of office; he was sentenced by the lords to pay a fine of thirty thousand pounds, and imprisoned till it

was paid. See 6 Sta. Tri. 112. By stat. 12 R. 2. c. 2. the chancellor, treasurer, justices of both benches, barons of the exchequer, &c. shall be sworn not to obtain or nominate any person in any office for any gift, brocage, &c. And the sale of offices concerning the administration of public justice, &c. is prohibited on pain, forfeitures, and disability, &c. by 5 and 6 Ed. 6. c. 16. is repealed as to the customs, by 6 G. 4. c. 105. § 10.) In the construction of the statute of Ed. 6. it has been resolved that the officers of the ecclesiastical courts are within the meaning of that act, as well as the officers in the courts of common law; but no office in fee is within the statute; and it hath been adjudged, that one who contracts for an office, contrary to the purport of the said statute 5 and 6 Ed. 6. c. 16., is so disabled to hold the same, that he cannot be restored to a capacity of holding it by any grant or dispensation whatsoever. Cro. Jac. 269. 386: 1 Hawk. P. C. c. 67. It is said the statute does not extend to the plantations. Salk. 411: 1 Hawk. P. C. c. 67. § 5.

To bribe persons either by giving money or promises, to vote at elections of members of corporations which are erected for the sake of public government, is an offence for which an information will lie. 12 Mod. 314: 2 Ld. Raym. 1377: 1 Black. 383. But the court will grant such information very cautiously, since the additional penalties by statute. 1 Black. 380. See tit. Parliament.

An attempt to induce a man to advise the king, under the influence of a bribe, is criminal, though never carried into execution. 4 Burr. 2499. Offering money to a privy counsellor, to procure the reversion of an office in the gift of the crown, has been adjudged a misdemeanor and punishable by information. Rex v. Vaughan, 1 Hawk. P. C. c. 67. § 7. in note.

As to officers of the Customs, &c. taking bribes, see tit. Customs.

As to bribery in elections to parliament, see tit. *Parliament*, VI. (B. 3.) and farther in general, tit. *Extortion*.

Bribery still remains a crime at common law, and the legislature never meant to take away the common law crime, but to add a penal action. Burr. Rep. 1335: 1 Black. Rep. 380. And a conviction upon information granted by the Court of K. B., is the same as if the defendant had been convicted upon an indictment.

fy in some of our old statutes, one that pilfers other men's goods. 28 Ed. 2. cap. 1. BRICOLIS. An engine mentioned in Blount, by which walls were beaten down.

BRICKS AND TILES. By stat. 17 Ed. 4. c. 4. the earth for tiles is to be digged and cast up before the 1st of November yearly, stoned and turned before the 1st of February, and before the 1st of March following. Every common tile must be 10 1-2 inches long, 6 1-4 broad, and 1-2 an inch thick.—Roof tiles 13 inches long, &c. And persons selling tiles contrary thereto forfeit double the value, and are liable to fine.

By stat. 17 G. 3. c. 42. bricks when burnt are to be 8 1.2 inches long, 2 1.2 thick, and 4 wide. Contracts for engrossing and enhancing the price of bricks made void, and a penalty of 20l. imposed on the parties, and directions are given as to pantiles.

rections are given as to pantiles.

Bricks and Tiles are liable to duties of excise, and to regulations for securing that duty in Great Britain and Ircland. See tit. Excise.

BRIDGE, pons.] A building of stone or wood erected across a river, for the common case and benefit of travellers. Public bridges, which are of general convenience, are of common right to be repaired by the whole inhabitants of that county in which they lie. Hale's P. C. 143: 13 Co. 33: Cro. Car. 365.

The inhabitants of a county are bound to repair every public bridge within it; unless, when indicted for the non-repair of it, they can show by their plea that some other person is liable; and every bridge in a highway is, by stat. 22 H. 8. c. 5 deemed a public bridge for this purpose. 1 East R. 192.

Where a particular district rebuilt a footbridge over a more convenient part of the stream, and converted it into a bridge for horses, earts, and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot-bridge only, and as they built quite a different bridge in a different place, which proved of common public utility to the county, the county, and not the district, are bound to repair it. Burr. 2594: Blackst. 685.

But a corporation aggregate, either in respect of a special tenure or certain lands, or in respect of a special prescription; also any other person, by reason of such a special tenure, may be compelled to repair them. Hale's P. C. 143: Dalt. c. 14: 6 Mod. 307.

A tenant at will of a house which adjoins to a common bridge, although he is not bound as between landlord and tenant to repair the house, yet if it becomes dangerously ruinous to the necessary intercourse of the bridge, the tenant is bound by reason of his possession, to repair it so far as to prevent the public being prejudiced. *Ld. Raym.* 856.

At common law those who are bound to repair public bridges must make them of such height and strength as shall be answerable to the course of the water; and they are not BRIDGE.

trespassers if they enter on any land adjoin-| decay, the statute had no operation on them ing to repair them, or lay the materials neces- before they were annexed to the county of the sary for the repairs thereon. Dalt. cap. 16. city. If a man erects a bridge for his own use, and the people travel over it as a common bridge, he shall, notwithstanding, repair it: though a highways; though it hath been adjudged person shall not be bound to repair a bridge, built by himself for the common good and public convenience, but the county must repair it. 2 Inst. 701: 1 Salk. 359. Where the inhabitants of a county are indicted for not repairing a bridge, they must set forth who ought to repair the same, and traverse that they ought. 1 Vent. 256. Unless, perhaps, where the real question is, whether it be a public or a common bridge.

A vill may be indicted for a neglect in not repairing a bridge; and the justices of peace in their sessions may impose a fine for defaults. And any particular inhabitant of a county, or tenant of land charged to repairs of a bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the fine assessed by the court for the default of the repairs, who are to have their remedy at law for a contribution from those who are bound to bear a proportionable share

of the charges. 6 Mod. 307.

If a manor is held by tenure of repairing a bridge or highway, which manor afterwards comes into several hands, in such case every tenant of any parcel of the demesnes and services is liable to the whole charge, but shall have contribution of the rest; and this though the lord may agree with the purchasers to discharge them of such repairs, which only binds the lord, and doth not alter the remedy which the public hath. 1 Danv. Ab. 744: 1

So if a manor, subject to such charge, comes into the hands of the crown, yet the duty upon it continues; and any person claiming afterwards under the crown, the whole manor, or any part thereof, shall be liable to an indictment or information, for want of due repairs. 1 Salk. 358.

If part of a bridge lie within a franchise. those of the franchise may be charged with the repairs for so much: also, by a special tenure, a man may be charged with the repairs of one part of a bridge, and the inhabitants of a county are to repair the rest. 1 Hawk. P. C. c. 77. § 2: Raym. 384, 385.

Where the king enlarges the boundaries of a city by annexing part of the county to the county of the city, the inhabitants of the county of such city are bound to repair bridges lying in the said enlarged boundaries, though such bridges were at the time of the making of the stat. 22 H. 8. c. 5. within the county at large. Stra. 177. And the true ground of this decision appears to have been, that the statute lays no absolute charge till the bridge is in decay: so that when the statute was made, though the bridges were within the county at large, yet, as they were not in

Indictments for not repairing of bridges will not lie but in case of common bridges on they will lie for a bridge on a common footway. Mod. Cas. 256. Not keeping up a ferry, being a common passage for all the king's people, is indictable, as well as not keeping up bridges. 1 Salk. 12.

By stat. 22 H. 8. c. 5. all householders dwelling in any county or town, whether they occupy lands or not: and all persons who have land in their own possession, whether they dwell in the same county or not, are liable to be taxed as inhabitants towards the repairs of a public bridge. Where it cannot be discovered who ought to repair a bridge, it must be presented by the grand jury in quarter sessions; and after inquiry, and the order of sessions upon it, the justices may send for the constables of every parish, to appear at a fixed time and place, to make a tax upon every inhabitant, &c.; but it has been usual, in the levying of money for repairs of bridges. to charge every hundred with a sum in gross, and to send such charge to the high constables of each hundred, who send their warrants to the petty constables, to gather it, by virtue whereof they assess the inhabitants of parishes in particular sums, according to a fixed rate, and collect it; and then they pay the same to the high constables, who bring it to the sessions.

This method of raising money was long observed; but by stat. 1 Ann. c. 18. justices in sessions, upon presentment made of want of reparations, are to assess every town, parish, &c. in proportion, towards the repairs of a bridge; and the money assessed is to be levied by the constables of such parishes, &c.; and being demanded, and not paid in ten days, the inhabitants shall be distrained; and when the tax is levied, the constables are to pay it to the high constable of the hundred, who is to pay the same to such persons as the justices shall appoint, to be employed according to the order of the justices, towards repairing of the bridge: and the justices may allow any person concerned in the execution of the act, 3d. per pound out of the money collected. All matters relating to the repairing and amending of bridges, are to be determined in the county where they lie, and no presentment or indictment shall be removed by certiorari. And by this statute, the evidence of the inhabitants of those places where the bridges are in decay, shall be admitted at any trial upon an information or indictment. &c.

By the common law, as declared and defined by stat. 22 H. 8. c. 5. where the inhabitants of a county are liable to the repair of a public bridge, they are also liable to repair 300 feet of the highway at each end of the bridge. R. v. Inhabitants of the West Rid-contractors for performance; which contracts ing of Yorkshire, 7 East R. 388. affirmed in arc to be entered with the clerk of the peace.

error, 5 Taunt. 284.

The inhabitants of a county are only bound to repair bridges over such waters as answer the description of flumen vel cursus aque, that is, water flowing in a channel between banks, more or less defined, although such channel may be occasionally dry; and therefore, where the road by which a bridge was approached passed between meadows, which were occasionally flooded by rain, and for convenient way to the bridge a raised causeway had been made, having arches or culverts at intervals for the passage of the flood water, which were equally necessary to the safety of the main bridge and the causeway; it was held that the inhabitants of the county were not bound to repair such arches, being at the distance of more than 300 feet from the main bridge. 1 Barn. & Adol. 289.

The county or riding is liable to the repair of a bridge built by trustees under aturnpike act, there being no special provision for exonerating them from the common law liability, or transferring it to others, though the trustees were enabled to raise tolls for the support of the roads. 2 East R. 342.

The county is liable to repair a bridge built in the highway and used by the public above 40 years, though originally erected for the convenience of an individual. 2 E. R. 356. n. See R. v. Buckinghamshire inhabitants, 12 East R. 192.

A new and substantial bridge of public utility, built within the limits of one county, and adopted by the public, must be repaired oy the inhabitants of that county, although it be built within 300 feet of an old bridge, repairable by the inhabitants of another county, who were bound in consequence under the stat. 22 H. 8. c. 5. to maintain such 300 feet of road, though lying in the other county.

R. v. Inhabitants of Devon, 14 East R. 377.

By 14 G. 2. c. 33. the justices at their general sessions may purchase or agree with

persons for any piece of land, not above one acre, near to any county bridge, in order to enlarge or more conveniently rebuild it; and the ground shall be paid for out of the moncy raised by statute 12 G. 2. c. 29. for better assessing, collecting, and levying of county rates, &c. See tit. County Rates.

By the said stat. 12 G. 2. c. 29. § 14. when any public bridges, &c. are to be repaired at the expence of the county, the justices at their general or quarter sessions, after presentment made by the grand jury of their want of reparation, may contract with any person for rebuilding or repairing the same, for any term not exceeding seven years, at a certain annual sum. They are to give public notice of their intention to make such contracts, which are to be made at the most imprisonment. reasonable prices, and security given by the

43 G. 3. c. 51. surveyors of county bridges. &c. in England, empowered to get materials for the repair of bridges in the same manner as surveyors of highways, under 13 G. 3. c. 78. Quarter sessions may widen and improve or alter the situation of county bridges, &c. Id. § 2. Tools and materials provided by the quarter sessions vested in the surveyor. Id. § 3. Inhabitants of counties may sue for damage done to bridges in the name of surveyors. Id. § 4. What sort of bridges inhabitants of counties shall be liable to repair. Id. § 5. Acts shall not extend to bridges repaired by tenure. § 7.

No persons are compellable to make a new bridge but by act of parliament: and the inhabitants of the whole county cannot, of their own authority, change a bridge from one

place to another.

If a man has toll for men and cattle passing over a bridge, he is to repair it; and toll may be paid in these cases, by prescription, or statute.

An action will not lie by an individual against the inhabitants of a county for an injury sustained from a county bridge being out of repair. Russell v. Men of Devon, 2 T. R. 667.

An indictment for not repairing a county bridge may be removed by certiorari at the instance of the prosecutor, notwithstanding the general words of the stat. 1 Ann. c. 18. § 5. that no such indictment shall be removed by certiorari. 6 T. R. 194; affirmed in error. 3 Boss. & Pull. 345. And many instances have occurred where informations and indictments for such offences have been so removed by the prosecutor, some of which happened soon after the passing of the stat. 6 T.R. 194. And so also a certiorari to remove such indictment, may be granted where others than the inhabitants of a county are bound to repair the bridge, the stat. of Anne extending only to bridges where the county is charged to repair: for when a private person or parish is charged, and the right will come in question, the act of W. and M. had allowed the

granting a certiorari. Stra. 900.

By stat. 7 and 8 G. 4. c. 30. § 13. if any person shall unlawfully and maliciously pull down or in anywise destroy any public bridge, or do any injury with intent, and so as thereby to render such bridge, or any part thereof, dangerous or impassable, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not less than four years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such

By 7 G. 4. c. 64. § 15. in an indictment or

information for felony or misdemeanor com- brigantine, a long but low built vessel, swift mitted with respect to any bridge, &c. erected or maintained wholly or in part at the expence of a county, riding, or division, or in respect to any goods provided at the expence of any such county, &c. to be used in making, repairing, &c. any such bridge, &c. or the highway at the ends thereof, the same may be laid to be the property of the inhabitants of tion to the repair of bridges [walls and cassuch county, riding, or division.
BRIDGE-MASTERS. There are bridge-

masters of London-bridge, chosen by the citizens, who have certain fees and profits belonging to their office, and the care of the said bridge, &c. Lex. Londin. 283.

BRIEF, brevis.] An abridgement of the client's case, made out of the instruction of counsel, on a trial at law; wherein the case of the party is to be briefly but fully stated, the proofs must be placed in due order, and proper answers made to whatever may be objected against the client's cause, by the opposite side; and herein great care is requisite, that nothing be omitted to endanger the cause.

An attachment has been granted against a party and his attorney for surreptitiously getting possession of the brief of a counsel on the other side, and applying the same to an improper purpose in his defence. See Bateman v. Conway, 1 Bro. P. C. 519. 8vo. ed.

Though a brief is not of itself evidence against the party for whom it is prepared, yet as a discovery of the secrets and merits of his case may be productive of perjury, or subornation of perjury, and thereby obstruct the justice of the court in which the suit is depending, the obtaining of it in a surreptitious manner is an offence highly deserving censure and punishment. Id.

Brief al 'evesque. A writ to the bishop,

which in Quare Impedit shall go to remove an incumbent, unless he recover or be presented

pendente lite. 1 Keb. 386.

BRIEF OUT OF THE CHANCERY, is a writ or command from the king to a judge, to examine by an inquest, whether a man be

nearest heir. Scotch Dict.

BRIEF OF DISTRESS, is a writ out of the chancery, after decree obtained against any landlord to distress his readiest goods, according to the old custom, now obsolete. Scotch Dict.

BRIEF OF MORTANCESTRY, is that which is used for entering of all heirs of de-

functs. Scotch Dict.

Briefs, or licences to make collection for repairing churches, restoring loss by fire, &c.

See tit. Church-wardens, III. 1.

BRIGA, Fr. brigue.] Debate or contention. BRIGANDINE, Fr. Lat. lorica.] A coat of mail or ancient armour, consisting of many jointed and scale-like plates, very pliant and easy for the body. This word is mentioned in stat. 4 and 5 P. &. M. c. 2. and some confound it with kaubergeon; and others with

in sailing.

BRIGANTES. The ancient name for the inhabitants of Yorkshire, Lancashire, bishoprick of Durham, Westmorland, and Cumber-Blount.

BRIGBOTE, or BRUG-BOTE, Sax. brig, pontus, and bote, compensatio.] The contributles,] which, by the old laws of the Anglo-Saxons, might not be remitted; but, by degrees, immunities were granted by our kings, even against this duty; and then to be quit of brig-bote signified to be exempt from tribute or contribution towards the mending or re-edifying of bridges. Fleta, lib. 1.c. 47: Selden's Titles of Honour, fol. 622: Spelm.

v. Brigbote and Burgbote.

BRISTOL. A great city, famous for trade: the mayor, burgesses, and commonalty of the city of Bristol are conservators of the river Avon, from above the bridge there, to Kingroad, and so down the Severn to the two islands called Holmes; and the mayor and justices of the said city may make rules and orders for preserving the river, and regulating pilots, masters of ships, &c. Also for the government of their markets: and the streets are to be kept clean and paved; and lamps or lights hung out at night. Stat. 11 and 12 W. 3. c. 23. No person shall act as a broker in the city of Bristol till admitted and licensed by the mayor and aldermen, &c. on pain of forfeiting 500l., and those who employ any such, to forfeit 50l. &c. by stat. 3 G. 2. c. 31. By the stat. 22 G. 2. c. 20. the stat. 11 and 12 W. 3. is rendered more effectual, so far as it relates to the paving and enlightening the streets; and divers regulations are made in relation to the hackney-coachmen, halliers, draymen, and carters, and the markets, and sellers of hay and straw, within the said city, and liberties thereof.

BROCAGE, brocagium.] The wages or hire of a broker, which is also termed brokerage. 12 R. 2. c. 2.

BROCELLA. This word, as interpreted by Dr. Thoroten, signifieth a wood: and is said to be a thicket or covert of brushes and brush-wood; from the obsolete Lat. brusca. terra bruscosa et brocia, Fr. broce, brocelle: and hence is our brouce of wood, and brousing of cattle.

BROCHA, Fr. broche.] An awl, or large packing-needle. A spit in some parts of England is called a broche; and from this word comes to pierce or broach a barrel.

BROCHIA. A great can or pitcher. Bract. lib. 2. tract. 1. c. 6. Where it seems that he intends saccus to carry dry, and brochia liquid things.

BRODEHALFPENY, or BROADHALF-

PENY. See Bordhalfpeny.

BROKERS, broccatores, broccarii et auxionarii.] Are those that contrive, make, and

conclude bargains and contracts between mer- kings in the forest of Burnwood, in com. chants and tradesmen, in matters of money and merchandize, for which they have a fee or reward. These are Exchange brokers; and by the stat. 10 R. 2. c. 1. they are called broggers: also broggers of corn is used in a proclamation of queen Elizabeth, for badgers. Baker's Chron. fol. 411. The original of the word is from a trader broken, and that from the Sax. broc, misfortune, which is often the true reason of a man's breaking: so that the name of broker came from one who was a broken trader by misfortune; and none but such were formerly admitted to that employment; and they were to be freemen of the city of London, and allowed and approved by the lord mayor and aldermen, for their ability and honesty.

By the stat. 6 Ann. c. 16. they are to be annually licensed in London by the lord mayor and aldermen, who administer an oath, and take bond for the faithful execution of their offices: if any persons shall act as brokers, without being thus licensed and admitted, they shall forfeit the sum of 500l., and persons employing them 50l.; and brokers are to register contracts, &c. under the like penalty: also brokers shall not deal for themselves on pain of forfeiting 2001.: they are to carry about them a silver medal, having the king's arms, and the arms of the city, &c. and pay 40s. a year to the chamber of the city. See I Merw. R. 156: 1 Holt's Ca. 431: 2 Stark. Ca. 14.

Brokers embezzling any money, goods or securities intrusted to them, declared to be guilty of a misdemeanor, punishable by 14 years' transportation or imprisonment, at the discretion of the court, by stat. 7 and 8 G. 4. c. 29 § 49. which see at length under tit. Embezzlement.

As to brokers in Bristol, see tit. Bristol. And as to pawnbrokors, see that tit. As to brokers illegally dealing in the funds or stocks who are usually known by the appellation of stock-jobbers, see tit. Funds. And as to brokerage and sale of offices, see tit. Offices. See also Stockbrokers.

BROK, an old sword or dagger.

BROSSUS. Bruised or injured by blows,

wounds or other casualty. Cowel.
BROTHEL-HOUSES. Lewd places, being the common habitations of prostitutes. A brothelman was a loose idle fellow; and a feme bordelier or brothelier, a common whore. And borelman is a contraction of brothelman. Chaucer. See Bawdy House.

BRUDBOTE. See Brigbote.

BRUERE, Lat. erica.] Signifies heathground; and brueria, briars, thorns, or heath, from the Sax. brær, briar. Paroch. Antiq. 620.

BRUILLUS. A wood or Grove; Fr. breil, breuil, a thicket or clump of trees in a park or forest. Hence the abbey of Bruer, in the forest of Whichwood, in Com. Oxon. and Bruel, Brehull, or Brill, a hunting seat of our ancient

Bucks.

BRUILLETUS. A small coppice or wood.

BRUNETTA. Properly Burneta, which

BRUSCIA, seems to signify a wood. Monast. tom. 1. pag. 774.

BRUSUA and BRUSULA. Brouse brushwood. Mon. Angl. tom. 1. fol. 773. Brouse or

BUBBLES. The South-sea project, and various other schemes, similar in the end intended, that of defrauding the subject, though different as to the means, were called by the name of bubbles. The stat. 6 G. 1. c. 18. made all unwarrantable undertakings, by unlawful subscriptions, subject to the penalties of a præmunire; but it is now repealed by 6 G. 4. c. 91. See Bac. Ab. Nuisance. (A.) (7th ed.) See tit. Funds.

BUCKLARIUM, a buckler. Claus. 26 E.

1. m. 8. intus.

BUCKSTALI,, a toil to take deer, which, by the stat. 19 H. 7. c. 11. is not to be kept by any person that hath not a park of his own, under penalties. There is a privilege of being quit of amerciaments for buckstalls. vileg. de Semplingham. See 4 Inst. 306.

BUCKWHEAT. French wheat, used in many counties of this kingdom: in Essex, it is called brank; and in Worcestershire, crap. It is mentioned in the stat. 15 Car. 2. c. 5.

BUCINUS. A military weapon for a foot-

Tenueres, pag. 74.

BUGGERY, or Sodomy, comes from the Italian bugarone or buggerare, and it is defined to be a carnal copulation against nature; and this is either by the confusion of species, that is to say, a man or woman with any animal; or of sexes, as a man with a man, or man unnaturally with a woman. 3 Inst. 58: 12 Co. Rep. 36. This sin against God, nature, and the law, it is said, was brought into England by the Lombards. Rot. Parl. 50 E. 3. numb. 58. In ancient times, according to some authors, it was punishable with burning, though others say with burying alive: but at this day it is a felony excluded clergy, and punished as other felonies, by stat. 9 G. 4. c. 31. § 15.

It is felony both in the agent and patient consenting, except the person on whom it is committed be a boy under the age of discretion (which is generally reckoned at fourteen), when it is felony only in the agent. 1 Hale's Hist. P. C. 670. and see stat. 9 G. 4. c. 31. § 18.

as to the proof required.

This, says Blackstone, is a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself.

BUILDINGS. If a house new built, ex- ginning so to do, any church, chapel, house, ceeds the ancient foundation, whereby that is &c., or any building or erection used in carthe cause of hindering the lights or air of rying on any trade or manufacture, or any another house, action lies against the builder. Hob. 131. In London a man may place ladders or poles upon the ground, or against houses adjoining for building his own, but he may not break ground: and builders of houses ought to have licence from the mayor and aldermen, &c. for a board in the streets, which are not to be incumbered. Cit. Lib. 30. 146. In new building of London it was ordained, that the outsides of the buildings be of brick or stone, and the houses for the principal streets to be four stories high, having, in the front, balconies, &c. by stat. 19 Car. 2. c. 3.

The laws for regulating of all buildings in the cities of London and Westminster, and other parishes and places in the weekly bills of mortality, the parishes of St. Mary-le-bone, and Paddington, St. Pancras, and St. Luke, at Chelsea, for preventing mischiefs by fire, are reduced into one act by stat. 14 G. 3. c. 78. The regulations of this law are very minute

and technical. See tit. Fire.

The building act, 14 G. 3. c. 78., was amended by the 50 G. 3. c. 75. (local) which permits John's Patent Tessera to be used in the covering of houses and buildings within the

places therein mentioned.

By stat. 7 and 8 G. 4. c. 29. § 44, if any person shall start or rip, cut, or break with intent to steal, any glass or woodwork belonging to any building, or any lead, iron, copper, brass or other metal, or any utensil or fixture whatever, made of metal or other material, fixed in or to any building, such offender shall be guilty of felony, and may be punished as in the case of simple larceny. And by § 14. persons breaking and entering any building, and stealing therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof (for the purposes of burglary and house-breaking as described in the two former sections of the stat.), shall be guilty of felony, and may be transported for life, or imprisoned not excecding four years, and (if a male) whipped in addition to such imprisonment.

By 7 and 8 G. 4. c. 30. § 2. persons unlawfully and maliciously setting fire to any house, &c., or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, are guilty of felony, and shall suffer death. By § 3. persons by force entering into any house, shop, building, or place, with intent to destroy any silk, woollen, linen, or cotton goods in the loom, or any machinery belonging to those manufacturers, are guilty of felony, and may be transported for life, or imprisoned not exceeding four years, and (if a male) whipped in addition to such imprisonment. By § 7. persons riotously and tumultuously assembling, and with force demolishing, pulling down, or destroying, or bebranch thereof, or any staith building, or erection used in conducting the business of any mine, shall be guilty of felony, and shall suffer death.

BULL, bulla.] A brief or mandate of the pope or bishop of Rome, from the lead, or sometimes gold seal affixed thereto, which Mat. Paris, anno 1237, thus describes: In bulla domini papæ stat imago Pauli a dextris crucis in medio bullæ figurata et Petri a sinistris. These decrees of the pope are often mentioned in our statute, as 25 Ed. 3: 28 H. 8. cap. 16: 1 & 2 P. & M. c. 8. and 13 Eliz. cap. 2. They were heretofore used, and of force, in this land: but by the statute 28 Hen. 8. c. 16. it was enacted, that all bulls, briefs, and dispensations had or obtained from the bishop of Rome, should be void. And by stat. 13 Eliz. c. 2. (see stat. 23 Eliz. c. 1.) if any person shall obtain from Rome any bull or writing, to absolve or reconcile such as forsake their due allegiance, or shall give or receive absolution by colour of such bull, or use or publish such bull, &c. it is high treason. By 7 Ann. c. 21. § 1, 2, 3, this extends to Scotland. See Rome, Papist.

BULL AND BOAR. By the custom of some places, a parson may be obliged to keep a bull and a boar for the use of the parishioners, in consideration of his having tithes of calves, pigs, &c. 1 Roll. Ab. 559: 4 Mod. 241: see

tit. Cattle.

BULLIO SALIS. As much salt as is made at one wealing or boiling; a measure of salt supposed to be twelve gallons. Mon. Ang.

BULLION. Sec tits. Coin, Money. also Gold.

BULTEL. The bran or refuse of meal after dressed: also the bag wherein it is dressed is called a bulter, or rather boulter. The word is mentioned in the statute de assissa panis et servisiæ, anno 51 H. 3. Hence comes bulted or boulted bread, being the

BUNDLES. A sort of records of the Chancery, lying in the office of the Rolls; in which are contained, the files or bills and answers, of hab. cor. cum causa; certiorari's; attachments, &c. scire facias's; certificates of statute-staple; extents and liberates; supersedeas's; bails on special pardons; bills from the Exchequer of the names of sheriffs; letters patent surrendered; and deeds cancelled; inquisitions; privy seals for grants; bills signed by the king; warrants of escheators; customers, &c.

BURGAGE TENURE. See tit. Tenures,

TENURE IN BURGAGE, is described by Glanvil (lib. 7. c. 3.) and is expressly said by Littleton, § 162. to be but tenure in socage: and lord of an ancient borough, in which the tenements are held by a rent certain. Litt. § 162,

It is indeed only a kind of town-socage: as common socage, by which other lands are holden, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to parliament (see tit. Borough): and where the right of election is by burgage-tenure, that alone is a proof of the antiquity of the bo-Tenure in Burgage, or Burgage Tenure, therefore, is, where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage by a certain established rent. 2 Comm. 82.

The free socage in which these tenements are held seems to be plainly a remnant of Saxon liberty: which may also account for the great variety of customs affecting many of these tenements so held in ancient burgage, the principal and most remarkable of which is, that called Borough-English. See

that title.

Other special customs there are, in different burgage-tenures: as in some, that the wife shall be endowed of all her husband's tenements, and not of the third part only, as at common law. Litt. § 166. In others that a man might (previous to stat. H. 8.) dispose of his tenements by will. Litt. § 167. Though this power of disposal was allowable in the Saxon times—a pregnant proof that these liberties of socage tenure were fragments of Saxon liberty. 2 Comm. 84. By the Reform Act, 2 W. 4. c. 45, the right of voting in respect of burgage tenements in cities and towns being counties of themselves, is preserved in perpetuity; in respect of burgage tenements in boroughs, the right is preserved to the individual voter so long as he personally shall remain qualified as an elector-subject of course to regulation under the act.

BURGAGE HOLDING, in Scotch law, is the tenure by which royal boroughs hold of the sovereign. The service is watching and warding, and is done by the burgesses within the territory of the borough, whether expressed in the charter or not. Scotch Dict.

BURG. A small walled town, or place of

privilege, &c. See Borough.

BURGBOTE, from burg, castellum, and bote, compensatio.] Is a tribute or contribution towards the building or repairing of castles, or walls of a borough or city: from which divers had exemption by the ancient charters of the Saxon kings. Rastal. burgbote significat quietantiam reparationis murorum, civitatis vel burgi. Fleta, lib. 1. c. 47: Spelm. v. Burghbote.

BURGESSES, burgarii et burgenses.] Properly men of trade, or the inhabitants of a borough or walled town; but this name is usu-

it is where the king or other person is ally given to the magistrates of corporate towns

In Germany, and other countries, they confound burgess and citizen; but we distinguish them, as appears by the stat. 5 R. 2. c. 4. where the classes of the commonwealth are thus enumerated, count, baron, banneret, chivaleer de countee; citizein de citee; burgess de burgh. See Co. Lit. 80. Those are also called burgesses who serve in parliament for any borough or corporation. See tit. Parliament. Burgesses of our towns are called, in Domesday, the homines of the king, or of some other great man; but this only shows whose protection they were under, and is not any infringement of their civil liberty. Squire, Ang. Sax. Gov. 260. n. Burgenses et homines burgorum et villarum, Madox. Excheq. 1 V. 333. The aid of burghs, ib. 1 V. 600, 601. See tit. Borough.

BURGH-BRECHE, Fidejussionis violatio. A breach of pledge, Spelm.] It is used for a fine imposed on the community of a town, for a breach of the peace, &c. Leg. Canuti,

BERGHERISTHE, or burgberiche, used in Domesday-book for a breach of the peace in a Blount.

BURGHBOTE. See burgbote.

BURGMOTE. A court of a borough. LL. Canuti, MS. cap. 44.—Berghmote is different; which see.

BURGHWARE, quasi burgiver.] A citi-

zen or burgess.

BURGLARY, Burgi latrocinium; by our ancient law called hamesecken, as it is in Scotland to this day. 4 Comm. 233.] A felony at common law, in (1.) breaking and entering (2.) the mansion house of another, or the walls or gates of a walled town, or a church, (see Sacrilege,) (3.) in the night, (4.) to the intent to commit some felony within the same; whether the felonious intent be executed or not. 1 Hawk. P. C. c. 38. § 1. 10: 4 Comm. 224.

By § 11 of stat. 7 and 8 G. 4. c. 29. it is enacted, "That every person convicted of burglary shall suffer death as a felon. And it is thereby declared that, if any person shall enter the dwelling-house of another with intent to commit felony, or, being in such dwellinghouse shall commit any felony, and shall in either case break out of the said dwellinghouse in the night time, such person shall be

deemed guilty of burglary." By § 13. of the same stat. it is enacted, "That no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediately, or by means of covered and enclosed passage leading from the one to

the other.

By stat. 7 G. 4. c. 64. § 28 a certain com- after having committed a felony in it. This pensation is allowed to persons active in apprehending offenders guilty of burglary; and by § 30. if any man be killed in endeavouring to apprehend such offender, such compensation may be paid to the wife or child, father or mother.

It seems the plainest method to consider the subject according to the four parts of the above definition; and (5.) to add something on the punishment of this offence.

1. There must be both a breaking and an entry to complete this offence. 1 Hawk. P. C. c. 38. § 3.

Every entrance into the house by a trespasser is not a breaking in this case, but there must be an actual breaking. As, if the door of a mansion-house stand open, and the thief enters, this is no breaking. So it is if the window of the house be open, and a thief, with a hook or other engine, draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine, draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 Inst. 64. But the following acts amount to an actual breaking, viz. opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 Hal. P. C. c. 552.

Having entered by a door which he found open, or having lain in the house by the owner's consent, unlatching a chamber-door, or coming down the chimney. 1 Hawk. P. C.

If thieves pretend business to get into a house by night, and thereupon the owner of the house opens his door, and they enter and rob his house, this is burglary. Kel. 42.

So if persons designing to rob a house, take lodgings in it, and then fall on the landlord and rob him; or where persons intending to rob a house, raise a hue and cry, and prevail with the constable to make a search in the house, and having got in by that means, with the owner's consent, bind the constable, and rob the inhabitants; in both these instances they are guilty of burglary, for these evasions rather increase the crime. 1 Hawk. P. C. c.

Where a servant opened his lady's chamber, which was fastened by a spring lock, with a design against her honour, this was

held burglary. East, P. C. 488.

If a person be within the house, and steal goods, and then open the house on the inside, and go out with the goods, this is burglary, though the thief did not break the house. Inst. 64. But this was not admitted to be law with any certainty; and therefore it was by stat. 12 A. st. 1. c. 7. created a burglary Vol. I.-36

statute is now repealed, but its provisions reenacted by stat. 7 & 8 G. 4. c. 29. noticed be-

Any the least entry, either with the whole, or with but part of the body, or with any instrument or weapon, will satisfy the word entered in an indictment for burglary: as if one do put his foot over the threshold, or his hand, or a hook, or pistol within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, &c. 1 Hawk. P. C. c. 38. § 7. But that the discharging the loaded gun is a sufficient entry seems very doubtful from what is said in Leach, 452. and East, P. C. 490.

Where it appeared that the prisoner had thrown up the sash of a window, and introduced between that and an inside shutter an instrument to force open the shutter, it was held that this did not constitute burglary, unless it appeared that the hand, or some part of it, was within the window. Rex v. Rust,

1 Ry. & M. 183.

Where a person raised the sash of a window, which was before partly open, so as to admit himself into a house, this was held not to be a breaking of the house. Rex v. Smith, Ry. & M. 178.

Breaking an outer window, and introducing the hand between the glass of the window and an inner shutter, is a sufficient breaking

and entering. C. C. R. 341.

So breaking a window of a shop, and introducing the finger so far as that the fore part of the finger was seen on the shop side of the glass. C. C. R. 499.

Lifting up a large iron grating placed over a cellar, and opening a window in a passage leading from that cellar, is a sufficient break-

C. C. R. 355.

So pulling down a sash of a window, though it has no fastening, and is only kept in its place by the pulley-weight; and that although there is an outer shutter to the window, which is not put to. C. C. R. 451.

But where thieves had bored a hole through the door, with a centre-bit, and part of the chips were found in the inside of the house, yet as they had neither got in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entry was ruled incomplete. 1 Hawk. P. C. c. 38. § 7. in note.

When several come with a design to commit burglary, and one does it while the rest watch near the house, here his act is, by interpretation, the act of all of them. And, upon a like ground, if a servant confederating with a rogue, let him in to rob a house, it has been determined by all the judges, upon a special verdict, that it is burglary both in the servant and the thief. Leach's Hawk. P. C. c. i. 38. § 9. and n.

2. It is certainly a dangerous, if not an into break out of a house in the night time, curable fault to omit the word dwelling house in an indictment for burglary in a house, der the same roof also. Leach's Huwk. P. C. But it seems not necessary or proper, in an i. c. 38. § 16. in n. indictment for burglary in a church, which, by all the ancient authorities, is taken as a distinct burglary. See 1 Hawk. P. C. c. 38. § 10. and the authorities there cited.

If a man hath two houses, and resides, sometimes in one of the houses, and sometimes in the other, if the house he doth not inhabit is broken in by any person in the

night, it is burglary. Poph. 52.

A chamber in an inn of court, &c. where one usually lodges, is a mansion-house; for every one hath a several property there. But a chamber where any person doth lodge as an inmate, cannot be called his mansion; though, if a burglary be committed in his lodgings, the indictment may lay the offence to be in the mansion-house of him that let them. Inst. 65: Kel. 83. If the owner of the house breaks into the rooms of his lodgers, and steals their goods, it cannot be burglary to break into his own house, but it is felony to steal their goods. Wood's Inst. 378. But see contra, 1 Hawk. P. C. c. 38. § 13, 14, 15.

If the owner live under the same roof with the inmates, there must be a separate outer door, or the whole is the mansion of the owner: but if the owner inhabit no part of the house; or even if he occupy a shop, or a cellar in it, but do not sleep therein, it is the mansion of each lodger, although there be but one outer door. Leach's Hawk. P. C. c. 38. § 15. in n. There being only one door, in common to all the inhabitants, makes no difference, where the owner does not sleep in any part of the house, for, in that case, each apartment is a separate mansion. Id. ib. § 14. n.

Chambers in inns of court, &c. have separate outward doors, which are the extremity of obstruction, and are enjoyed as separate property, as estates of inheritance for life, or during residence.-So a house divided into separate tenements, with a distinct outward door to each, will be separate houses. Id. ib. § 13. n.

Part of a house divided from the rest, having a door of its own to the street, is a man-

sion-house of him who hires it. Kel. 84.

To break and enter a shop, not parcel of the mansion-house, in which the shop-keeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion-house, in which a burglary may be committed. 1 H. H. P. C. 557. 558.—But see stat. 13 G. 3. c. 38. respecting burglary in the work-shops of the plate-glass manufactory, which is made single felony, and punishable with transportation for seven years.-If the shop-keeper sleep in any part of the building, however distinct that part is from the shop, it may be alleged to be his mansion-

A lodger in an inn hath a special interest in his chamber, so that if he opens his chamber-door, and takes goods in the house, and goes away, it seems not to be burglary. And where A. enters into the house of B. in the night, by the doors open, and breaks open a chest, and steals goods, without breaking an inner door, it is no burglary by the common law, because the chest is no part of the house; though it was felony, ousted of clergy, by statute 3 W. & M. c. 9.; and if one break open a counter or cupboard, fixed to a house, it is burglary. 1 Hale's Hist. P. C. 554.

All out-buildings, as barns, stables, warehouses, &c. adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them. And if the warehouse, &c. be parcel of the mansionhouse, and within the same, though not under the same roof, or contiguous, a burglary may be committed therein. But an out-house occupied with, but separated from, the dwellinghouse by an open passage, eight feet wide, and not within or connected by any fence, inclosing both, is not within the curtilage or homestall. Leach's Hawk. P. C. i. c. 38. 6 12. n.: 4 Comm. 225.

3. In the day-time there is no burglary.— As to what is reckoned night, and what day, for this purpose, anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be day-light, or crepusculum, enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moon-light; the malignity of the offence not so properly arising from its being done in the dark, as at the dead of night, when sleep has disarmed the owner, and rendered his castle defenceless. 4 Comm. 224: 1 Hawk. P. C. c. 38. § 1.

4. The breaking and entry must be with a felonious intent, otherwise it is only a trespass; and it is the same whether such intent be actually carried into execution, or only demonstrated by some attempt, of which the jury is to judge. And therefore such breaking and entry, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute. 4 Comm. 227: 1 Hawk. P. C. c. 38. § 18, 19.

One of the servants of the house opened his lady's chamber-door, which was fastened with a brass bolt, with design to commit a rape; and it was ruled to be burglary, and the defendant was convicted and transported. Stran-

481: Kel. 67.

A servant embezzled money intrusted to his care; left ten guineas in his trunk; quitted his master's service; returned; broke and entered the house in the night, and took away the ten house; provided the owner does not sleep un- guineas, and adjudged no burglary. Leach's Hawk. P. C. i. c. 38. § 18. n. Sed vide 1 Show.

5. Every man's house is considered as his castle, as well for defence against injury and violence, as for repose. 4 Co. 92.-To violate this security is considered of so atrocious a nature, that the alarmed inhabitant, whether he be an owner or a mere inmate (Cro. Car. 544), is by stat. 24. H. 8. c. 5. expressly permitted to repel the violence by the death of the assailants, without incurring the penalties even of excusable homicide.

The house wherein a woman lives apart from her husband, must be laid in an indictment for burglary to be the house of the husband, although he has never been in it. C. C. R. 491. And this although she may be living in a state of adultery. C. C. R. 517.

For further matter, see titles Clergy, Felo-

ny, Larceny.

BURI. Husbandmen. Mon. Angl. tom. 3.

p. 183.

BURIALS. Formerly persons dying were to be buried in woollen on pain of 5l.; stat. 30. Car. 2. c. 1; but this provision is repealed by 54 G. 3. c. 108. 34 G. 3. c. 11. repeals the duty imposed by 23 G. 3. c. 67: 25 G. 3. c. 75. on the registry of burials, &c. See Re-

The burial of persons found felo de se, is, by stat. 4 G. 4. c. 52. directed to take place, without any marks of ignominy, privately in the parish church-yard, between the hours of nine and twelve at night, under the direction

of the coroner.

The rector of a parish agreed verbally, in consideration of a sum of money, to allow one to erect a vault, and have the exclusive use thereof. The money was paid, and the vault constructed; but the rector subsequently caused the vault to be opened, and buried a corpse there. The grantee brought an action on the case for the disturbance. The action was held not to be maintainable, a rector having no power to grant the exclusive use of a vault. He may exercise a discretion in each particular instance, when application is made for leave to bury in the church. There must, as in the case of a pew, be either a faculty or a prescription to support such right. At all events, such right is not grantable by parol. Bryan v. Whistler, 8 B. & C. 188.

The court will not grant a mandamus to compel a rector to bury a parishioner in a vault, or in any particular part of a church-yard. 1 Barn. & Adol. 122. And a party has no right to be buried in an iron coffin without an increased fee being paid. 2 Hagg. C. R. 333: 3 Phill. R. 335.

BURNETA. Cloth made of dyed wood. A burnet colour must be dyed; but brunus color may be made with wool without dyeing, which are called medleys or russets. Lyndewood. Thus much is mentioned because this word is sometimes wrote bruneta.

BURNING IN THE HAND. Vide Brand

ing.

BURNING of houses, out-houses, malicious burnings, &c. See titles Arson, Malicious Injuries .- As to penalty on servants setting fire to houses by negligence, see title Fire. See farther titles Felons, Navy, Ships, Insurance.

BURROCHIUM. A burrock, or small wear over a river, where wheels are laid for the taking of fish. Cowel.

BURSA. A purse. Ex. Chart. vet.

BURSARIA. The bursery, or exchequer of collegiate and conventual bodies; or the place of receiving and paying, and accounting by the bursarii, or bursars. Paroch. Antiq. p. 288. But the word bursarii did not only signify the bursars of a convent or college; but formerly stipendiary scholars were called by the name of bursarii, as they lived on the burse or fund, or public stock of the University. At Paris, and among the Cistertian monks, they were particularly termed by this name. Johan. Major. Gest. Scot. lib. 1. c. 5.

BURSE, bursa, cambium, basilica.] An ex-

change or place of meeting of merchants.
BURSHOLDERS. See title Headborough. BUSONES COMITATUS. Bract. lib. 3. tract. 2. c. 1. Blount says busones is used for

BUSSA. A ship. Blount's Dict .- The vessels used in the herring fisheries are called

Busses and Smacks.

BUSSELLUS. A bushel; from buza, butta, buttis, a standing measure: and hence butticella, butticellus, bussellus, a less measure. Some derive it from the old Fr. bouts, leather continents of wine; whence come our leather budget and bottles. Kennet's Gloss.

BUSTA AND BUSTUS, busca and buscus,

&c. See Brucia and Brusula.

BUSTARD. A large bird of game, usually found on downs and plains, mentioned in the

stat. 25. H. 8. c. 11. See tit. Game.
BUTCHERS. These were anciently compelled by statute to sell their meat at reasonable prices, or forfeit double the value, to be levied by warrant of two justices of peace, &c. And were not to buy any fat cattle to sell again, on pain of forfeiting the value; but this not to extend to selling calves, lambs, or sheep, dead, from one butcher to another. Stat. 23 Ed. 3. c. 6 .- By stat 4. H. 7. c. 3. no butcher shall slay any beast within any walled town, except Carlisle and Berwick.-By the ordinance for bakers, incert. temp. butchers are not to sell swine's flesh meazled, or flesh dead of the murrain. By stat. 3 Car. 1. c. 1. butchers are not to sell or kill meat on Sunday.—By stat. 9 Ann. c. 11. regulations are made as to the watering and gashing hides; and the selling putrefied and rotten hides by butchers. See farther titles Cattle, Forestalling, Victuals.
BUTLER. See Botiler.

BUTLERAGE. See Prisage. BUTHSCARLE, butsecarl, buscarles (buscarli et buthsecarli). Mariners or seamen .-Selden's Mare Clausum, fol. 184.

BUTTER AND CHEESE .- Buyers of butter are to put marks on casks; and persons Customs. opening them afterwards, or putting in other butter, &c. shall forfeit 20s. 4 and 3 W. & M. c. 7. The said stat. 4 and 5 W. & M. c. 7. also contains regulations to compel warehouse-keepers weighers, searchers, and shippers, to BYE. Words ending in by or bee, signify receive all butter and cheese for the London market, without undue preference.-The stats. 8 G. 1. c. 27. and 17 G. 2. c. 8. regulate the sale of butter; the former in the city of York, the latter at New Malton-explained by § 18. of stat. 36 G. 3, c. 86,-38 G. 3, c. 73, § 1, such regulations not to extend to vessels not containing more than 14lb, nor to Scotland. The butter trade of Ireland (which may be termed a staple commodity of that kingdom,; is regulated by stats. 52 G. 3. c. 134: 53 G. 3. c. 46: 8 G. 4. c. 61: 9 G. 4. c. 88: 10 G. 4. c. 41. See titles Weights and Measure.

BUTTONS. By stat. 10 W. 3. c. 2. no person shall make, sell, or set on, any buttons law: guilds and fraternities of trades, by letmade of wood only, and turned in imitation of other buttons, under penalty of 40s. a dozen. A shank of wire being added to the button makes no difference. Ld. Raym. 712.

By the said stat. W. 3. no person shall make, sell, or set on, buttons made of cloth, or other stuffs of which clothes are usually made, on penalty of 40s.

By stat. 8 Ann. c. 6. no taylor, or other person, shall make, sell, set on, use, or bind, on any clothes, any buttons or button holes of cloth, &c. on pain of 5l. a dozen .- By this act

no power is given to make distress.

Stat. 4 G. 1. c. 7. is said in Burn's Justice (title Buttons) to be a loose, injudicious, ungrammatical act, and which, by its garb may seem to have been drawn up by taylors, or button-makers. This act imposes (indistinctly enough) 40s. a dozen on all such buttons and button holes, with an exception of velvet; it seems levelled against the taylors only; but clothes with such buttons and button holes exposed to sale, are to be forfeited and seized.

By stat. 7 G. 1. st. 1. c. 12. no person shall use, or wear, on any clothes (velvet excepted) any such buttons or button holes, on pain of 40s. a dozen, half to the witness on whose oath they are convicted; an application of the penalty deservedly reprobated as nearly singular, and on a principle not reconcileable to the usual rules of evidence.—This statute is also incorrect, particularly in making no disposal of a moiety of the penalty, in case of conviction or confession by the party.

These acts are seldom enforced, and do not seem very consistent with general policy. See title Taylors. 36 G. 3. c. 60, regulates the making and vending of mental buttons.

BUTTS. The place where archers meet with their bows and arrows to shoot at a mark, which we call shooting at the butts. Also butts are the end of short pieces of land in arable ridges and furrows: buttum terre, a butt of land. See title Abuttals.

BUTLERAGE OF WINES. See title

BUYING OF PLEAS. See title Maintenance, and Scotch Act, 1594, c. 216.

BUZONIS. The shaft of an arrow, before

a dwelling-place or habitation, from the Sax. by, habitatio.

BY-LAWS, bilagines, from the Sax. by, pagus, civitas, and lagen, lex, i. c. the laws of erties. Nuelm. voce Billagines. Or perhaps laws made obiter, or by the by.] Certain orders and constitutions of corporations, for the governing of their members: of courts-leet and courts-baron; commoners or inhabitants in vills, &c. made by common assent, for the good of those that made them, in particular cases, whereunto the public law doth not extend; so that they lay restrictions on the parties, not imposed by the common or statute ters patent of incorporation, may likewise make by-lars, for the better regulation of trade among themselves, or with others. Kitch. 45, 72: 6 Rep. 63.

In Scotland those laws are called laws of birlaw, or burlaw, which are made by neighbours elected by common consent in the birlaw-courts, wherein knowledge is taken of complaints betwixt neighbour and neighbour; which men so chosen are judges and arbitrators, and styled birlaw-men. And birlaws, according to Skene, are leges rusticorum, laws made by husbandmen, or townships, concerning neighbourhood amongst them. Skene, p. 33.

The power of making by-laws, being included in the very act of incorporating a corporation; and most by-laws being made by corporations, it seems more regular to consider the nature and effect of them under that See tit. Corporations.

In this place therefore we shall chiefly consider, I, who may make by-laws; and 2, the general requisites of them.

1. The inhabitants of a town, without any custom, may make ordinances or by-laws, for repairing of a church, or highway, or any such thing, which is for the general good of the public; and in such cases, the greater part shall bind all: though if it be for their own private profit, as for the well ordering of their common, or the like, they cannot make hy-laws without a custom to warrant it; and if there be a custom, the greatest part shall not bind the rest in these cases, unless it be warranted by custom. 5 Rep. 63 .- A custom to make a hy-law, may be alleged in an ancient city or borough.-So in an upland town, which is neither city nor borough. 1 Inst. 110. b: Cro. Car. 488: Hob. 212.

The free-holders in a court-leet may make hy-laws relating to the public good, which shall bind every one within the leet. 2 Danv. 457; Mo. 579. 584. And a court-baron may make by-laws, by custom, and add a penalty for the | if it be unreasonable for any particular, shall non-performance of them .- So, by custom, the tenants of a manor may make by-laws, for the good order of the tenants. 1 Roll. Ab. 366. l. 35: Mo. 75: Hob. 212 .- So may the homage. 1 Roll. Ab.: Dy. 322. (a.) But not without a custom. Sav. 74.—And a custom that the steward with the consent of the homage may make them, is not good. 3 Lev. 49.

2. All by-laws are to be reasonable; and ought to be for the common benefit, and not private advantage of any particular persons; and must be consonant to the public laws and statutes, as subordinate to them. And by stat. 19 H. 7. c. 7. by-laws made by corporations are to be approved by the lord chancellor, or chief justices, &c. on pain of 40l.

A by-law may be reasonable, though the penalty be to be paid to those who make the by-law. 1 Salk. 397. And generally it shall be reasonable, if it be for the public good of

Carth. 482. the corporation.

By-laws made in restraint of trade are not favoured, but the distinction between such as are made to restrain, and those made to regulate trade seems very nice. See tit. Corporation; and Bac. Ab. By-laws. (B.)-Under a general power to make by-laws, a by-law cannot be made to restrain trade. 1 Burr. 12.—Therefore, a by-law that no person not being free of the pewterer's company shall exercise the trade of a pewterer, within the city of London, is void without proof of a special custom to support it. Chamberlain of London v. Compton, 7 Dow. & Ry. 597: and see Clark v. Le Cren, 9 Barn. & C. 52. The custom must correspond with the by-law. See 1 B. & Adol. 92.

The common council of London have, by custom, a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they shall be licensed. A by-law was made in common council that 420 of such carts, and no more, should, by the governors of Christ's Hospital, be licensed to work within the city. Held that such by-law was supported by the custom, and that the discretionary power of licensing was rightly and ex necessitate delegated by the common council to a smaller body. 2 Barn. & Adol. 465.

A custom that no foreign tradesman shall use or exercise a trade in a town, &c. will warrant that which a grant cannot do; and where custom has restrained, a by-law may be made that upon composition foreigners may exercise a trade. Carter, 120: see 4

Burr. 1951.

So by-laws may regulate, but not totally restrain a private right, as in cases of common, &c. See Com. Dig. title By-law, (B. 2.) and

(C. 4.)

If a by-law impose a charge without any apparent benefit to the party, it will be void. R. Raym. 328.—And a by-law being entire, Claus. 38 H. 3.

be void for the whole. 2 Vent. 183.

A by-law imposing a fine on every master, warden, or assistant of a company who shall not attend all courts to be holden, is valid. 7 Barn. & C. 838.

A by-law cannot impose an oath, nor impower any person to administer it. Stra. 536.

Where by-laws are good, notice of them is not necessary; because they are presumed for the better government and benefit of all persons living in those particular limits where made, and therefore all persons therein are bound to take notice of them. 1 Lutw. 404: Cro. Car. 498: 5 Mod. 442: Salk. 142: Carth. 484.

If a by-law does not mention how the penalty shall be recovered, debt lies for it. Roll. Ab. 366. l. 48: see 5 Co. 64: Hob. 279. -Or action on the case on assumpsit. 2 Lev. 252.—It seems that a by-law to levy the penalty by distress, sale, or imprisonment, is void unless by custom. See Com. Dig. title By-law, (D. 2.) (E. 1, 2.) See 2 Maul. & S.

The Court of King's Bench will not enter into a question on the validity of a by-law, on the return of a hab. cor. eum causa, from any corporation except the city of London, where it always doth; but the plaintiff must de-clare there, and the defendant may demur if he has objections to the by-law. 2 Burr.

C.

CABALLA, from the Lat. caballus.] Belonging to a horse. Domesday.

CABBAGES. See Turnips.

CABINET COUNCIL. See Privy Coun-

CABLISH, cablicium. Brushwood, according to the writers on the forest laws; but Spelman thinks it more probably wind-fallwood, because it was written of old cadibulum, from cadere: or from the Fr. chabilis.

CABLES. For shipping; made of old or damaged materials, liable to forfeiture; and the regulations for manufacturing them set-

tled by stat. 25 G. 3. c. 56.

CACHEPOLUS, or CACHERELLUS. An inferior bailiff, a catchpole. See Consuetud. Domus de Farendon MS. fol. 23; and Thorn.

Of herrings is 500, of sprats CADE. 1000. But it is said, that anciently 600 made the cade of herrings, and six-score to the hundred, which is called Magnum Centum.

CADET. The younger son of a gentleman; particularly applied to a volunteer in

the army, waiting for some post. CAEP GILDUM. See Ceapgilde.

CAGIA. A cage or coop for birds.

CALANGIUM AND CALANGIA. A challenge, claim, dispute. Mon. Angl. tom.

2. fol. 252.

CALCETUM, CAICEA. A causey or common hard way, maintained and repaired with stones and rubbish, from the Lat. calz, chalk, Fr. chauxowhence their chaussee and our causeway, or path raised with earth, and paved with chalk-stones, or gravel. Calcearium operationes were the work and labour done by the adjoining tenants: and calcagium was the tax or contribution paid by the neighbouring inhabitants towards the making and repairing such common roads; from which some persons were especially exempted by royal charter. Kennet's Gloss.

CALEDONIA. That part of the country

CALEDONIA. That part of the country northwards of the Firths of Dunbritton and

Edinburgh. Scotland.

CALEFAGIUM. A right to take fuel

yearly. Blount.

CALENDAR. See stat. 24 G. 2. c. 23. for the establishment of the new style, and stat. 25. G. 2. c. 80, which enacts, that the opening of common lands, and other things depending on the moveable feasts, shall be according to the new calendar. See titles Bissextile, Year.

CALENDAR MONTH. Consists of 30 or 31 days, (except Feb. 28, and in Leap year 29,) according to the calendar. See stat. 16 Car. 2. c. 7: see titles Time, Month, Year.

CALENDAR OF PRISONERS. A list of all the prisoners' names, in the custody of each respective sheriff. Where prisoners are convicted at the assises, the judge may command execution to be done, without any writ. And the usage now is, for the judge to sign the calendar, which contains all the prisoner's names, with their several judgments in the margin, and this calendar is left with the sheriff. As for a capit of flow, it is written opposite to the prisoner's name, "hanged by the neck." Formerly in the days of Latin and abbreviation, "sus. per coll." for "suspendatur per collum." Staundeford, P. C. 182. See 4 Comm. 403. and tit. Trial, Pelon, Pardon.

Felon, Pardon.
CALENDS, calenda.] Among the Romans was the first day of every month, being spoken of it by itself, or the very day of the new moon, which usually happen together; and if pridie, the day before, be added to it, then it is the last day of the foregoing month; as pridie calend. Septemb. is the last day of August. If any number be placed with it, it signifies that day in the former month, which comes so much before the month named; as the tenth calends of October is the 20th day of September: for if one reckons backwards, beginning at October, the 20th day of September makes the 10th day before October. In March, May, July, and October, the calends begin at the sixteenth day, but in other months at the fourteenth; which calends

A ing, and be numbered backwards from the first day of the said following months. Hopton's Concord, p. 69. In the dates of deeds, the day of the month, by nones, ides, or ead calends, is sufficient. 2 Inst. 675: see Ides.

CALIBURNE. The famous sword of the great King Arthur. Hovedon and Brompton

in vita R.

CALLICO. No person shall wear in apparel any printed or dyed callico, on pain of forfeiting 51. And drapers selling any such callico, shall forfeit 201. But this does not extend to callicoes dyed all blue. Stat. 7 G. 1. c. 7. Persons may wear stuff, made of linen yarn and cotton wool, manufactured and printed with any colours in Great Britain: so as the warp be all linen yarn, without incurring any penalty, by stat. 9 G. 2. c. 4. By stat. 14 G. 3. c. 72. stuffs wholly made of raw cotton wool within this kingdom, are not to be considered as callicoes, and every person may use the same. These are distinguished by three blue stripes in the selvedge. For the duties on British and Irish callicoes, on their importation from either country to the other until the 5th January, 1821, see stat. 47 G. 3. st. 2. c. 47. See further tit. Linen. CALLING THE PLAINTIFF. It is

CALILING THE PLAINTIFF. It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily non-suited, or withdraw himself: whereupon the crier is ordered to call the plaintiff; when neither he nor any for him appears. See tits.

Nonsuit, Trial.

CAMALODUNUM. Maldon, in Essex. CALLIS. The king's highway mentioned in some of our ancient authors. Huntington, lib. I.

CAMBRICK. There were formerly several statutes against the importation and use of

Cambricks, or French lawns.

By stats. 4 G. 3. c. 37. and 7 G. 3. c. 43. several regulations are made concerning the manufacturing and stamping cambricks and lawns made in England: and forging or counterfeiting the stamp is felony without

clergy. See further tit. Linen.

CAMERA. From the old Gerft. Cam. Cammer, crooked; whence comes our English kembo, arms in kembo. But camera at first signified any winding or crooked plat of ground; as unam cameram terræ, i. e. a nook of land. Du Fresn. Afterwards the word was applied to any vaulted or arched building; and it was used in the Latin law proceedings for the judge's chamber, &c. Camera Stellata, the Star Chamber, &c.

the tenth calends of October is the 20th day of September: for if one reckons backwards, beginning at October, the 20th day of September makes the 10th day before October. In March, May, July, and October, the calends begin at the sixteenth day, but in other months at the fourteenth; which calends must ever bear the name of the month follow-

leader, Richard Cameron. See tit. Noncon- procession with hallowed candles in rememformists.

CAMISIA. A garment belonging to priests, called the Alb. Pet. Blesenis.

CAMOCA. A garment of silk, or something better. Mon. Angl. tom. 3. p. 81.

CAMPANA BAJULA. A small handbell, much in use in the ceremonies of the Roman church; and retained among us by sextons, parish clerks, and criers. Camb. Apud. Wharton. Angl. Sacr. par. 2. p. 637.

CAMPARTUM. Any part or portion of a larger field or ground; which would otherwise be in gross or common. Prinne. Histor.

Collect. vol. 3. p. 89. CAMPERTUM. A corn-field. Pet. in

Parl. 30 Ed. 1.

CAMP-FIGHT. The fighting of two champions or combatants in the field. 3 Inst. 221. See Acre-Fight, Battel, Cham-

CAMPUS MAII, or MARTII. An assembly of the people every year in March or May, where they confederated together to defend the country against all enemies. Leges Edw. Confessor, cap. 35. Sim. Dunelm. Anno. 1094.

CANCELLING DEEDS AND WILLS.

See those titles.

CANDLES AND CHANDLERS. If any wax-chandlers mix with their wares any thing deceitfully, &c. the candles shall be forfeited. Stat. 23 Eliz. c. 8. Tallow-chandlers and wax-chandlers are by stat. 24 G. 3. st. 2. c. 41. to take out annual licences. And by stat. 25 G. 3. c. 74. makers of candles shall be only such persons as are rated to the parish rates. These duties of excise on candles, and the various regulations to enforce them, form one of the numerous branches of the excise laws, and depend on a variety of statutes. See 27 G. 3. c. 13: 32 G. 3. c. 7. &c., and a provision in one law is not much known, though generally interesting, viz. "during the continuance of the duties upon candles, no person shall use in the inside of his house any lamp, wherein any oil or fat (other than oil made of fish within Great Britain) shall be burned for giving light, on pain of 40s." Stat. 8 Ann. c. 9. § 18. makers of candles are not to use meltinghouses without making a true entry, on pain of 100l. and to give notice of making candles to the excise officer for the duties, and of the number, &c. or shall forfeit 50l. Stats. 8 Ann. c. 5: 11 G. 1. c. 30.

CANDLEMAS-DAY. The feast of the Purification of the Blessed Virgin Mary, being the second day of February, instituted in memory and honour of the purification of the virgin in the temple of Jerusalem, and the presentation of our blessed Lord. It is called Candlemas, or a Mass of candles, because before mass was said that day, the Romish Church consecrated and set apart, for sacred use, candles for the whole year, and made a brance of the divine light, wherewith our Saviour illuminated the whole church at his presentation in the temple.

This festival is no day in court, for the judges sit not; and it is the grand day in that term of all the inns of court, whereon the judges anciently observed many ceremonies, and the societies seemed to vie with each other in sumptuous entertainments, accompanied with music, and almost all kinds

CANES OPERTIÆ. Dogs with whole feet, not lawed. Antiq. Custumar. de Sutton

Colfield.

CANESTELLUS. A basket. In the inquisition of serjeancies, and knight's fees, anno 12 & 13 of King John, for Essex and Hertford, it appears that one John of Listen held a manor by the service of making the king's baskets. Ex Libro Rub. Scacc. fol.

CANFARA. A trial by hot iron formerly

used in this kingdom. See Ordeal.

CANIPULUS. A short sword. Blount. CANA. A rod or distance in the measure of ground. Ex Registr. Walt. Giffard, Archiepisc. Ebor. f. 45.

CANON. A law or ordinance of the church, from the Greek word, canon, a rule.

THE CANON LAW consists partly of certain rules taken out of the Scripture; partly of the writings of the ancient fathers of the church; partly of the ordinance of the general and provincial councils; and partly of the decrees of the popes in former ages. And it is contained in two principal parts, the decrees and the decretals: the decrees are ecclesiastical constitutions made by the pope and cardinals, and were first gathered by Ivobishop of Carnat, who lived about the year 1114, but afterwards perfected by Gratian, a Benedictine monk, in the year 1149, and allowed by Pope Eugenius to be read in schools and alleged for law. They are the most ancient, as having their beginning from the time of Constantine the Great, the first Christian emperor of Rome.

The decretals are canonical epistles written by the pope, or by the pope and cardinals, at the suit of one or more persons for the ordering and determining of some matter of controversy, and have the authority of a law; and of these there are three volumes, the first whereof was compiled by Raymundus Barcinius, chaplain to Gregory the Ninth, and at his command, about the year 1231. The second volume is the work of Boniface the Eighth, collected in the year 1298. And the third volume, called the Clementines, was made by Pope Clement the Fifth, and published by him in the council of Vienna, about the year 1308. And to these may be added some novel constitutions of John the Twenty-second, and some other bishops of Rome.

As the decrees set out the origin of the canon law, and the rights, dignities and decrees of ecclesiastical persons with their | England," not contrary to the statutes of the manner of election, ordination, &c. so the decretals contain the law to be used in the ecclesiastical courts; and the first title in every of them is the title of the Blessed Trinity, and of the Catholic faith, which is followed 16, not being noted), perhaps because its conwith constitutions and customs, judgments and determinations, in such matters and causes, as are liable to ecclesiastical cognizance, the lives and conversation of the clergy, of matrimony and divorces, inquisition of criminal matters, purgation, penance, excommunication, &c. But some of the titles of the canon law are now out of use, and belong to the common law; and others are introduced, such as trials of wills, bastardy, defamation, &c.

Trials of tithes were anciently in all cases had by the ecclesiastical law; though at this time this law only takes place in some particular cases.

At the dawn of the Reformation, it was enacted by stat. 25 H. 8. c. 19. (revived and confirmed by 1 Eliz. c. 1.) that a review should be had of the canon law; and that until such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made and not repugnant to the law of the land or the king's prerogative, should continue to be used and exercised; and as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England. 1 Comm. 83. Introd. § 3.

A modern editor of the Commentaries observes, that it is questionable whether this is correctly stated. Sections 2 and 7 of the stat. 29 H. S. appear to relate only to such canons, constitutions, and ordinances, as had been theretofore made by the clergy of this realm; § 2. empowered the king to appoint thirty-two commissioners, to view, search and examine the said canons, &c.; and § 7. provides that such canons, &c. "being already made," which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the hurt of the king's prerogative, "shall now still be used and executed as they were before the making of this act, until such time as they be viewed, searched, or otherwise ordereded and determined" by the said thirtytwo persons. It does not appear, therefore, that this statute authorised even the temporary use of the Roman ecclesiastical law. By stat. 35 H. 8. c. 16. (not entered on the statute-roll in Chancery, printed in the authentic edition of the statutes of the realm from the original act in the Parliament Office), the provisions of the act 25 H. 8. were re-enacted to be executed during the king's life, and the commissioners were farther empowered to set in order and to establish "all such laws ecclesiastical as shall be thought convenient to be used and set forth:" and till their op doing, all canons, &c. "or other ecclesiastical laws or jurisdiction spiritual as be yet accustomed in the church of courts, see this Dict. tit. Courts. The follow-

realm or the king's prerogative, should continue in force and use.

By stat. 1 and 2 P. & M. c. 8. the act 25 H. 8. c. 19. was repealed (the act 35 H. 8. c. tinuance was limited to the king's life. But in a general clause of the act I and 2 P. & M. c. 8 & 8. (record edition above quoted), all clauses of every other act made in the 20th of H. 8. against the supreme authority of the pope, or see of Rome, or containing any other matter of the same effect only as is repealed in any of the statutes aforesaid, "shall be ntterly void, frustrate, and of none effect."

By stat. 1 Eliz. c. 1. several acts of H.8. as to ecclesiastical matters, among which the act 25 H. 8 c. 19. is specified, are revived. The act 35 H. 8. c. 16. is not specified; but the reviving clause above referred to especially provides, that the branches, sentences, and words of all the acts so revived shall extend to the queen, "her heirs and successors."

In the case of Middleton v. Croft, Str. 1060. the act 35 H. 8. c. 16. is considered as a subsisting statute.

As for the canons enacted by the clergy under Jac. 1. A. D. 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity, whatever regard the clergy may think proper to pay them. Stra. 1057.

Lord Hardwicke cites the opinion of Lord Holt, and declares it is not denied by any one, that is very plain all the clergy are bound by the canons, confirmed by the king only; but they must be confirmed by the parliament to bind the laity. 2 Atk. 605. Hence if the archbishop of Canterbury grants a dispensation to hold two livings distinct from each other more than thirty miles, no advantage can be taken of it by lapse, or otherwise, in the temporal courts; for the restriction to thirty miles was introduced by a canon made since the stat. 25 H. 8. c. 2. Black. Rep. 968.

There are four species of courts in which the canon laws (and the civil laws also, see tit. Civil Laws) are permitted, under different restrictions, to be used. 1. The courts of the archbishops and bishops, and their derivative officers; usually called in our law courts Christian or the Ecclesiastical Courts. 2. The military courts, or Courts of Chivalry. 3. The Courts of Admirality. 4. The Courts of the two Universities. In all the reception of those laws in general, and the different degrees of that reception are grounded entirely upon custom, corroborated, as to the Universities by act of parliament, ratifying those charters which confirm their customary laws. 1 Comm.

ing particulars relate to them all, and to this | word is used stat. 28 H. S. c. 3. See Mon. Angl.

subject in general.

1. The courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess; and in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces the sentence so declared to be illegal. See tits. Jurisdiction, Prohibition.

2. The common law has reserved to itself the exposition of all such statutes as concern either the extent of these courts, or the matters depending before them; and therefore, if the courts either refuse to allow those acts of parliament, or will expound them in any other sense than what the law puts on them, the courts at Westminster will grant prohibitions to restrain and controul them. See tit Stat-

3. An appeal lies from all these courts to the king in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. See stat. 25 H. 8. c. 21.

From these three strong marks and ensigns of superiority, it appears beyond a doubt that the canon (and civil) laws, though admitted in some cases by custom in some courts, are only subordinate, et leges sub gravior lege; and that thus admitted, restrained, new-modelled, and amended, they are by no means a distinct independent species of laws, but inferior branches of the customary or unwritten laws of England, properly called the King's ecclesiastical, military, maritime, or academical laws. 1 Comm. 84.

CANON RELIGIOSORUM. wherein the religious of convents had a fair transcript of the rules of their order, which were frequently held among them as their local statutes; and this book was therefore called Regula and Canon. The public books of the religious were the four following. 1. Missale, which contained all their offices of devotion. 2. Martyrologium, a register of their peculiar saints and martyrs, with the place and time of passion. 3. Canon or Regula, the institutions and rules of their order. 4. Necrologium or Obituarium, in which they entered the deaths of their founders and benefactors, to observe the days of commemoration of them. Kennet's Groff.

CANTEL, cantellum.] Seems to signify the same with what we now call lump, as to buy by measure or by the lump; but, according to Blount, it is that which is added above measure. Stat. de Pistor. cap. 9. Also a piece of any thing, as a cantel of bread and

CANTRED, antredus, a British word, from cant, or cantre, Brit. centum, and tret, a town or village. In Wales an hundred villages: for the Welsh divide their counties into cantreds, as the English do into hundreds. The of lands, and vouch to warrant another, against

part. 1. fol. 319, where it is written Kantrep.

CAPACITY, capacitas.] An ability, or fitness to receive: and in law it is where a man, or body politic, is able to give or take lands, or other things, or to sue actions. Our law allows the king two capacities, a natural and a politic; in the first, he may purchase lands to him and his heirs; in the latter, to him and his successors. An alien born hath sufficient capacity to sue in any personal action, and is capable of personal estate; but he is not capable of lands of inheritance. See title Alien. Persons attainted of treason or felony, idiots, lunatics, infants, feme coverts without their husbands, &c. are not capable to make any deed of gift, grant, or conveyance, unless it be in some special cases. Co. Lit. 171, 172. See titles Age, Infant, and other suitable titles.

CAPE, Lat. A writ judicial, touching plea of lands or tenements; so termed, as most writs are of that word in it which carries the chief intention or end thereof: and this writ is divided into cape magnum and cape parvum, both of which concern things immoveable. Terms de Ley.

This, and the three following, are now abolished, with real actions. See Limitation of

Actions, II. 1.

CAPE MAGNUM, or the grand cape. A writ that lies before appearance to summon the tenant to answer the default, and also over to the demandant: and in the Old Nat. Brev. it is defined to be, where a man hath brought a pracipe quod reddat of a thing touching plea of land, and the tenant makes default at the day to him given in the original writ, then this writ shall go for the king to take the land into his hands; and if the tenant come not at the day given him thereby, he loseth his land, &c. See Reg. Jud. fol. 1: Bract. lib. 3. tract. 3. c. 1.

CAPE PARVUM, or petit cape. Where the tenant is summoned in plea of land, and comes on the summons, and his appearance is recorded; if at the day given him he prays the view, and having it granted makes default, then this writ shall issue for the king, &c. Old Nat. Brev. 162. The difference between the grand cape and petit cape is, that the grand cape is awarded upon the tenant's not appearing or demanding the view in such real actions, where the original writ does not mention the particulars demanded; and the petit cape is after appearance or view granted: and whereas the grand cape summons tenant to answer for the default, and likewise over to the demandant, petit cape summons the tenant to answer the default only; and therefore it is called peti cape; though some it hath its name, not because it is of small force, but by reason it consists of few words. Reg. Jud. fol. 2: Fleta, lib. 2. c. 44: Terms de Ley.

CAPE AD VALENTIAM. This is a species of cape magnum, and is where I am impleaded

Vol. L-37

whom the summons ad warrantizandum hath take notice that, within eight days of the been awarded, and he comes not at the day given; then if the demandant recover against me, I shall have this writ against the vouchee, and recover so much in value of the lands of the vouchee, if he hath so much; if not, I shall have execution of such lands and tencments as shall after descend to him in fee; or if he purchases afterwards, I shall have against him a resummons, &c. And this, with his before appearance. Old Nat. Brev. 616. See farther Fine and Recovery.

CAPELLA, before the word chapel, was restrained to an oratory or depending place of divine worship: it was used also for any sort of chest, cabinet, or other repository of precious things, especially of religious relics.

Kennet's Paroch. Antiq. p. 580.

CAPELLUS. A cap, bonnet, or other covering for the head. Tenures, p. 32. Capellus ferreus, an helmet or iron head-piece. Hoveden, p. 61. Capellus Militis is likewise an helmet or military head-piece. Consuetud.

Domus de Farendon, MS. fol. 21.

CAPIAS. A writ or process formerly of two sorts; one whereof in the court of C. P. is called capias ad respondendum, before judgment, where an original is sued out, &c. to take the defendant and make him answer the plaintiff: and the other a writ of execution, after judgment, being of divers kinds, as capias ad satisfaciendum, capias utlagatum, &c. But since the Act for Uniformity of Process, 2 W. 4. c. 39., which renders the process of all courts alike, there is only one writ of capias used as mesne process, which is applicable where the defendant is to be held to bail

"In all personal actions, where it is intended to arrest and hold any person to special bail, who may not be in the custody of the marshal of the Marshalsea, of the Court of King's Bench, or of the warden of the Fleet prison, the process is required, by the fourth section of the act, to be by writ of capias, according to the form contained in the schedule, and marked No. 4." 2 W. 4. c. 39. § 4.

The writ is directed to the sheriff of the county wherein the defendant resides; or in the cinque ports, to the constable of Dover castle; or in Berwick, to the mayor and bailiffs of Berwick-upon-Tweed; commanding the sheriff, or other officer, to whom it is directed, that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take the defendant (stating the county and place of his residence, or supposed residence,) if he shall be found in his bailiwick, and him safely keep, until he shall have given the said sheriff, &c. bail, or made deposit with him, according to law, in an action on promises (or of debt, &c.), at the suit of the plaintiff, or until the defendant shall, by other lawful means, be discharged from his custody; and that, on execution thereof, the said sheriff do deliver a copy thereof to the order to give effect to the last-mentioned prodefendant; and requiring the defendant to

execution thereof on him, inclusive of the day of such execution, he shall cause special bail to be put in for him, in the court where the action is brought, to the said action: and that in default of his so doing, such proceedings may be had and taken, as are mentioned in the warning thereunder written, and indorsed thereon. And farther commanding the said sheriff, &c. that immediately after the execution thereof, he do return the writ to the said court together with the manner in which he shall have executed the same. and the day of the execution thereof; or that, if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months from the date thereof, or sooner if he should be thereto required, by order of the said court, or by any

The writ of capias, as well as the distringas, into the counties palatine of Lancaster and Durham, is required by a general rule of all the courts, to be directed to the chancellor of the county palatine of Lancaster, or his deputy, or to the bishop of Durham or his chancellor; and commands the former, that by his writ under the seal of the said county palatine, to be duly made and directed to the sheriff of the said county palatine, he command the said sheriff (or if in Durham, that the bishop, by his writ, under the seal of his bishoprick, to be duly made and directed to the sheriff of the county of Durham, cause the said sheriff to be commanded), that he omit not by reason of any liberty in his bailiwick, but that he enter the same and take the defendant, &cc. (as in common cases): and that he farther command him, that on execution thereof, he do deliver a copy thereof to the said defendant and that the said writ do require the said defendant to take notice, &c.; and that he farther command the said sheriff, that immediately after the execution thereof, he do return that writ, &c. (as in the ordinary

To the writ of capias, a memorandum, warning, and indorsements, are required to be subscribed or indorsed. See Tidd on the Act for Uniformity of Process. And so many copies thereof, together with every memorandum or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon, or served therewith, are required to be delivered therewith to the sheriff, or other officer or person to whom the same may be directed, or who may have the execution and return thereof; and who shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest: and shall indorse on such writ the true day of the execution thereof, whether by service or arrest. In vision, there is a general rule of all the courts, CAPIAS. 9K7

that "the sheriff or other officer or person to tion he must remain in custody till he does. whom any writ of capias shall be directed, or who shall have the execution and return thereof, shall, within six days at the least, after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof; and in default thereof shall be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as the court or a judge shall direct. Provided always, that it shall be lawful for the plaintiff, or his attorney, to order the sheriff or other officer or person to whom the writ shall be directed. to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others; which order shall be duly obeyed by such sheriff, or other officer or person; and such service shall be of the same force and effect as the service of the writ of summons hereinbefore mentioned, and no other. See 2 W. 4. c. 39: Tidd, ubi supra. See farther tits. Arrest, Bail, Process, Sheriff, Outlawry.

A CAPIAS is also in use in criminal cases .-The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of venire facias, which is in the nature of a summons to cause the party to appear. And if by the return to such venire, it appears that the party hath lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then upon his non-appearance a writ of capias shall issue, which commands the sheriff to take his body, and have him at the next assises; and if he cannot be taken upon the first capias, an alias and a pluries shall issue. But on indictments for treason or felony, a capias is the first process; and for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, by stat. 25 E. 3. c. 14; though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable. 2 H. P. C. 195. And so in the case of misdemeanors, it is now the usual practice for any judge of the court of K. B. upon certificate of an indictment found, to award a writ of capias immediately, in order to bring in the defendant. But in this as in civil cases, if he absconds, and it is thought proper to pursue him to an outlawry, a greater exactness is necessary. 4 Comm. . 318. See titles Arrest, Outlawry.

CAPIAS AD SATISFACIENDUM (shortly termed a CA. SA.) A judicial writ of execution which issues out on the record of a judgment, where there is a recovery in the courts at Westmin. ster, of debt, damages, &c. And by this writ the sheriff is commanded to take the body of the defendant in execution, and him safely to keep, so that he have his body in court at the return of the writ, to satisfy the plaintiff his debt and damages. Vide 1 Lill. Abr.

When the body is taken upon a ca. sa. and the writ is returned and filed, it is an absolute and perfect execution of the highest nature against the defendant, and no other execution can be afterwards had against his lands or goods; except where a person dies in execution; then his lands and goods are liable to satisfy the judgment, by stat. 21 Jac. 1. c. 24. See Roll. Abr. 904.

Properly speaking this writ cannot be sued out against any but such as were liable to be taken upon the capias mentioned in the preceding article. 3 Rep. 12: Mo. 767. The intent of it is to imprison the body of the debtor, till satisfaction be made for the debt, costs, and damages: this writ therefore doth not lie against any privileged persons, peers, or members of parliament; nor against executors or administrators; (except on a devastavit returned by the sheriff, 1 Lill. 250.) nor against such other persons as could not be originally held to bail, nor against parsons for penalties for non-residence, while they hold a benefice out of which they can be levied in three years by sequestration. 57 G. 3. c. 99.

This writ may be sued out (as may all other executory process) for costs, against a plaintiff as well as a defendant, where judgment is had against him.

In case two persons are bound jointly and severally, and prosecuted in two courts, whereupon the plaintiff had judgment, and execution by ca. sa. against one of them; if he after have an elegit against the other, and his lands and goods are delivered upon it, then he that is in prison shall have audita querela. Mob. 2. 57. Where one taken on a ca. sa. escapes from the sheriff, and no return is made of the writ, nor any record of the award of the capias; the plaintiff may bring a scire fac. against him, and on that what execution he will. Roll. 904. And if the defendant rescue himself, the plaintiff shall have a new capias, the first writ not being returned. Ib. 901.

If a defendant cannot be taken upon a ca. sa. in the county where the action is laid, there may issue a testatum ca. sa. into another county; and so of the other writs. See title

For farther matter, see titles Execution, Fieri facias, and see Tidd's Prac. 1025. et seq. (9th ed.) where the proceedings on this writ

are clearly explained.

CAPIAS UTLAGATUM is a writ that lies against a person who is outlawed in any action, by which the sheriff is commanded to apprehend the body of the party outlawed, for not appearing upon the exigent, and keep him in safe custody till the day of return, and then present him to the court, there to be dealt with for his contempt; who, in the Common Pleas, was in former times to be committed to the Fleet, there to remain till he had sued out the king's pardon, and appeared to the action. 249. And if he does not then make satisfac- And by a special capias utlagatum (against

the body, lands, and goods in the same writ) the king by knight's service, and not in cathe sheriff is commanded to seize all the defendant's lands, goods, and chattels, for the contempt to the king; and the plaintiff (after an inquisition taken thereon, and returned into the Exchequer) may have the lands extended, and a grant of the goods, &c. whereby to compel the defendant to appear; which when he doth, if the reverse be outlawry, the same shall be restored to him. Old Nat. Br. 154. When a person is taken upon a capias utlagatum, the sheriff is to take an attorney's engagement to appear for him, where special bail is not required; and his bond with sureties to appear, where it is required. Stat. 4

and 5 W. & M. c. 18. See Outlawry.

CAPIAS PRO FINE. Anciently, when judgment was given in favour of the plaintiff, in any action in the king's courts, it was considered that the plaintiff be arrested for his wilful delay of justice, or capiatur be taken till he paid a fine to the king, considering it as a public misdemeanor coupled with the private injury. But now in cases of trespass, ejectment, assault, and false imprisonment, it is provided by stat. 5 and 6 W. & M. c. 12. that no writ of capias shall issue for the fine, nor any fine be paid: but the plaintiff shall pay 6s. 8d. to the proper officer, and be allowed it against the defendant among his other costs. See tit. Judgment: also tit. Fines for Offences.

CAPIAS IN WITHERNAM. A writ lying (where a distress taken is driven out of the county, so that the sheriff cannot make deliverance in replevin) commanding the sheriff to take as many beasts of the distrainer, &c. Reg. Orig. 82. 83. See tits, Distress, Replevin, Withernam.

CAPITA, Distribution per.] i. e. to every man an equal share of personal estate, when all the claimants claim in their own rights, as in equal degree of kindred, and not jure re-

presentationis. See tit. Executor, V. 8. CAPITA, Succession per.] Where the claimants are next in degree to the ancestor, in their own right, and not by right of repre-

sentation. See tit. Descent.

CAPITAL FELONIES. By stat. 4 G. 4. c. 28. the court before whom any offender may be capitally convicted, may in all cases (except murder) abstain from pronouncing sentence of death, and may instead thereof order sentence of death to be recorded against such offender. See Felony.

CAPITE, from caput, i. e. Rex, unde tenere in capite, est tenere de rege, omnium terrarum capite.] TENURE IN CAPITE was an ancient tenure, whereby a man held lands of the king immediately as of the crown, whether by knight's service, or in socage. This tenure was likewise called tenure holding of the person of the king: and a person might hold of the king, and not in capite; that is, not immediately of the crown, but by means of some honour, castle, or manor belonging to it.

pite; because it might be held of some honour in the king's hands descended to him from his ancestors, and not immediately of the king, as of his crown. Kitch. 120: Dyer. 44: F. N. B. 5.

The very ancient tenure in capite was of two sorts; the one principal and general, and the other special or subaltern; the principal and general was of the king, as caput regni, et caput generalissimum omnium feodorum, the fountain whence all feuds and tenures have their main original: the special was of a particular subject, as caput feudi, seu tersa illius, so called from his being the first that granted the land in such manner of tenure: from whence he was stiled capitalus dominus, &c. But tenure in capite is now abolished; and by stat. 12 Car. 2. c. 24. all tenures are turned into free and common socage; so that tenures hereafter to be created by the king are to be in common socage only; and not by capite, knight's service, &cc. Blount. See tit. Tenures.

CAPITILITIUM. Poll-money. Dict.

CAPITITICM. A covering for the head. It is mentioned in the stat. 1 H. 4. and other old statutes, which prescribe what dresses shall be worn by all degrees of persons.

CAPITULI AGRI. The head-lands, lands

that lie at the head or upper end of the lands or furrows. Kennet's Paroch. Antiq. p. 137.

CAPITULA RURALIA. Assemblies, or chapters held by rural deans and parochial clergy within the precinct of every distinct deancry; which at first were every three weeks, afterwards once a month, and more solemnly once a quarter. Cowel.

CAPTAIN, capitaneus.] One that leadeth or hath the command of a company of soldiers: and is either a general, as he that hath the governance of the whole army; or special, as he that leads but one band. There is also another sort of captains, qui urbium præfecti

sunt, &c. Blount.

CAPTION, captio.] That part of a legal instrument, as a commission, indictment, &c. which shows where, when, and by what authority it is taken, found, or executed. Thus when a commission is executed, the commissioners subscribe their names to a certificate, declaring when and where the commission was executed. These kinds of captions relate chiefly to business of three kinds, i. e. to commissions to take fines of lands, to take answers in chancery, and depositions of witnesses: on the taking of a fine it is thus:-Taken and acknowledged the --- day of, &c. at, &c. The word caption is also used (rather vulgarly) for an arrest. See tit. Indictment.

CAPTIVES. An act was made for relief of captives, taken by Turkish, Moorish, and other pirates, and to prevent taking of others in time to come. Stat. 16 and 17 Car. 2. c.

24. See tits. Negro, Slavery.

CAPTURE, captura.] The taking of a According to Kitchen, one might hold land of prey, an arrest, or seizure: and it particularly relates to prizes taken by privateers, in time | of war. See tits. Admiral, Insurance, Navy, Privateer.

CAPUTAGIUM. Some think this word signifies head or poll money, or the payment of it: but it seems rather what we otherwise call chevagium.

CAPUT ANNI. New year's day, upon which of old was observed the festum stulto-

CAPUT BARONIÆ. Is the castle or chief seat of a nobleman; which descends to the eldest daughter, if there be no son, and must not be divided amongst the daughters, like unto lands, &c. See tit. Coparceners, Dower.

CAPUT JEJUNII. In our records is used for Ash-Wednesday, being the head, or first day of the beginning of the Lond Yast. Paroch. Antiq. p. 132.

CAPUT LOCI. The head or upper end of any place; ad caput ville, at the end of the

CAPUT LUPINUM. Anciently an outlawed felon was said to have caput lupinum, and might be knocked on the head like a wolf. Now the wilful killing of such a one would be murder. I Hale, P. C. 497: vide Bracton, fol. 125. See tit. Outlawry.

CAR AND CHAR. The names of places

beginning with car and char signify a city, from the Brit. caer, civitas; as Carlisle, &c.

CARCAN, is sometimes expounded for a pillory: as is carcannum for a prison. Canuti Regis.

CARCATUS. Loading; a ship freighted.

Pat. 10 R. 2.

CARDS AND DICE. Duties, under the controul of the stamp commissioners, are imposed on cards and dice. See tit. Stamps.

The duties on these have been lowered by

the 9 G. 4. c. 18.

By stat. 10 A. c. 19. no playing cards or dice shall be imported .- Selling second-hand cards incurs a penalty of 20l. stat. 29 G. 2. c. 13. § 10; and of 5l. per pack by stat. 16. G. 3. c. 34. Several other regulations are made by statute to prevent frauds in manufacturing the above articles .- If cards or dice unstamped are used in any public gaming houses, a penalty of 5l. attaches on the seller. 10 A.c. 19. § 162.—See also stat. 5 G. 3. c. 46. § 9— 17: 41 G. 3. c. 86. § 5. 8. 10. &c.

CARECTA AND CARECTATA. A cart

and cart-load. Mon. Angl. tom. 2. f. 340. CARETARIUS, or CARECTARIUS. A

carter. Blount. See Carreta.

CARITAS. Ad caritatem, poculum caritatis.] A grace-cup; or the extraordinary allowance of the best wine, or other liquor, wherein the religious at festivals drank in commemoration of their founders and benefactors. Cartular. Abat. Glaston. A. S. f. 29. See Cowel.—It is sometimes written Karite.

CARK. A quantity of wool, whereof thirty make a sarpler. Stat. 27 H. 6. c. 2.

CARLE. See Karle,

CARLISLE. By 14 H. 6. c. 3. the assises and gaol delivery for Cumberland are to be held there, and in none other place in the

CARNAL KNOWLEDGE, of females. See tit. Rape.

CARPEMEALS. Cloth made in the northern parts of England, of a coarse kind; mentioned in 7 Jac. 1. cap. 16.

CARRAT. A weight of four grains in diamonds, &c. And this word it is said was formerly used for any weight or burden.

CARRETA. A carriage, cart, or wain load; a Careta fæni is used in an old charter

for a load of hay. Kennet's Gloss.

CARRELS. Closets, or apartments for privacy and retirement.—Three pews or carrels, where every one of the old monks, after they had dined, did resort, and there study. Davies Mon. of Durham, p. 31.

CARRICK, or CARRACK, carrucha.] ship of great burden so called of the Italian word carico or carco, which signifies a burden or charge: it is mentioned in the statute 2 R. 2. c. 4. They were not only used in trade, but also in war. See Walsingh. in Hen. 5. fol. 394.

CARRIER. A person that carries goods

for others for his hire.

- I. Their Liability under stat. 1 W. 4. c.
- II. Who are to be considered as Carriers: and generally how chargeable in other Cases.
- III. For what Defaults answerable; and the Exceptions in their favour in such Cases.
- IV. What Circumstances must in such Cases concur to charge them.
- I. Their Liability under stat. 1 W. 4. c. 68.—The act 1 W. 4. c. 63. " for protection of mail coach-contractors, stage-coach proprietors, and other common carriers, against loss of parcels, the value of which shall not be declared by the owners," has put an end, in many instances, to the controverted questions on this branch of law. But it may yet be necessary to recur to the general principles and determinations on cases arising previously to that act, as operating on future cases not comprehended within its operation.

The act provides that such carriers shall not be liable for any loss or injury to any parcel containing money, or gold, or silver, or plate, jewellery, watches, trinkets, Bank notes, order or securities for money, stamps, maps, deeds, pietures, engravings, glass, china, silk, furs, or lace, carried or sent with or without any passenger, exceeding 10l. value; unless the value be declared, and an increased rate of carriage paid to the person receiving the parcels for the carrier. § 1. Notice of amount of such charge shall be put up in the carrier's warehouse; by which notice the party sending the parcel shall be bound. § 2. Receipts shall

be given by the carrier, who, on needect or plied. Cro. Jac. 262. So if a man who is refusal of notice receipt shall remain liable as at common law, and shall refund the increased charge. § 3. Carriers shall not be exempted from any liability at common law, as to any goods, except under regulations of this act. § 4. Any one proprietor or carrier is rendered personally liable § 5. Act shall not affect special contracts. § 6. Persons receiving the value of things lost shall also receive back the extra charges for carriage. § 7. The act shall not protect any felonious taking. § 8. Carriers shall not be concluded by the declared value, but the real value shall be proved in case of loss. § 9. In all actions against carriers for loss, money may be paid into court § 10.

II. Who are to be considered as Carriers, and generally how chargeable.-All persons carrying goods for hire, as masters and owners of ships, lightermen, stage-coachmen, (but not hackney coachmen in London), and the like, come under the denomination of common carriers; and are chargeable on the general custom of the realm for their faults or miscarriages. See 1 Com. Rep. 25: Bull. N. P. 70.—And as to the duty and engagement of a carrier, see tit. Bailment, 5. and V.

In an action on the case upon the custom of the realm against the defendant, master of a stage coach, the plaintiff set forth, that he took a place in the coach for such a town, and that in the journey the defendant, by negligence, lost the plaintiff's trunk; upon Not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man who drove the coach, who promised to take care of it, but lost it; and the question was, whether the master was chargeable; and adjudged that he was not, unless the master takes a price for the carriage of the goods as well as for the carriage of the person, and then he is within the custom as a carrier; that a master is not chargeable for the acts of his servant but when they are done in execution of the authority given by the master; then the act of the servant is the act of the master. 1 Salk. 282. But by the custom and usages of stages, every passenger pays for the carriage of goods above a certain weight; and there the coachman shall be charged for the loss of goods beyond such weight. 1 Com. Rep. 25.

If a common carrier loses goods he is intrusted to carry, a special action on the case lies against him, on the custom of the realm : and so of a common carrier by boat. 1 Roll. Rep. 6. An action will lie against a porter, carrier, or bargeman, upon his bare receipt of the goods if they are lost by negligence. 1 Sid. 36. Also a lighterman spoiling goods he is to carry, by letting water come to them, action on the case lies against him on the

common custom. Palm. 528.

If one be not a common carrier, and takes hire, he may be charged on a special assumpsit; for where hire is taken, a promise is im-

not a common carrier, and who is not to receive a premium, undertakes to carry goods safely, he is answerable for any damages they may sustain through this neglect or default.-This was the express point determined in Coggs v. Bernard, 1 Com. Rep. 133. &c. See tit. Bailment.

Where a carrier, entrusted with goods, opens the pack, and takes away and disposes of part of the goods, this, showing an intent of stealing them, will make him guilty of felony. H. P. C. 61. And it is the same if the carrier receives goods to carry them to a certain place, and carrieth them to some other place, and not to the place agreed. 3 Inst. 367. That is, if he do it with intent to defraud the owner of them. If a carrier, after he hath brought goods to the place appointed, take them away privately, he is guilty of felony; for the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger. 1 Hawk. P. C. c. 33. § 5. See Larceny, &c.

If a common carrier, who is offered his hire, and who has convenience, refuse to carry goods, he is liable to an action, in the same manner as an inn-keeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 2 Show. Rep. 327. But a carrier may refuse to admit goods into his warehouse at an unseasonable time, or before he is ready to take his journey. Ld. Raym, 652.

A common carrier may have action of trover or trespass for goods taken out of his possession by a stranger; he having a special property in the goods, and being liable to make satisfaction for them to the owner; and where goods are stolen from a carrier, he may bring an indictment against the felon as for his own goods, though he has only the possessory, and not the absolute property; and the owner may likewise prefer an indictment against the felon. Kel. 39.

By stat. 3 Car. 1. c. 1. carriers are not to

travel on the Lord's Day. The driver of a van for baggage is within this act. Ex parte Middleton, 3 Barn. & C. 164. But not the driver of a stage coach for passengers. Sandi-

man v. Breach, 7 Barn. & C. 96.

By the stat. 3 W. & M. c. 12. the justices are annually to assess the price of land-carriage of goods to be brought into any place within their jurisdiction, by any common carrier, who is not to take more, under the penalty of 5l. And by the stat. 21 G. 2. c. 28. § 3. a carrier is not to take more, for carrying goods from any place in London, than is settled by the justices for the carrying goods from London to such a place, under the

By stat. 24 G. 2. c. 8. § 9. commissioners for regulating the navigation of the river Thames are to rate the price of water car-

By stat. 30 G. 3. c. 22. § 3. justices of the

city of London are to assess the rates of ear- that they would not be answerable for losses rying goods between London and Westmin-

Carriers and wagoners are to write or paint on their wagons or carts their names and places of abode. See tit. Carts, Highways.

The provisions of the 3 W. & M. c. 12. and 21 G. 2. c. 28. § 3., mentioned under this title, II. for settling the rates on the carriage of goods, are repealed.

III. For what Defaults answerable; and the Exceptions in their favour .- At common law a carrier is liable by the custom of the realm to make good all losses of goods entrusted to him to carry, except such losses as arise (1.) from the act of God, or inevitable accident; or (2.) from the act of the king's enemies-to which may be added (3.) the default of the party sending them. 1 Inst. 89: Coggs v. Bernard, 2 Ld. Raym. 909: Esp. N. P.

619: 5 Term. Rep. 389.

1. Where the defendant's hoy in coming through London bridge, was by a sudden gust of wind driven against the arch and sunk, the owner of the hoy was held not to be liable, the damage having been occasioned by the act of God, which no care of the defendant could provide against or foresee .-But in this case it was held that if the hoyman had gone out voluntarily in bad weather, so that there was a probability of his being lost, he would have been liable. Amies v. Stephens, 1 Stra. 128.

Upon this ground of its being the act of God, if a bargeman in a tempest, for the safety of the lives of his passengers, throws overboard any trunks or packages of value, he is not liable for the loss. 1 Roll. Rep. 79: and see Bulst. 280. and 1 Vent. 190: 1 Wils. 281.

The defendant having lodged his wagon in an inn, an accidental fire broke out, which consumed it-he was adjudged liable; and it was held that negligence does not enter into the grounds of this action; for though the carrier uses all proper care, yet in case of a loss he is liable. Forward v. Pittard, 1 Term. Rep. 27. And though he limits his liability by a notice, yet he is liable for the value of the goods in case of gross negligence. 4 Barn. & A. 21: 4 Bing. 218: 3 Brod. & Bing. 177: 1 Moo. & Malk. 154.

But where a common carrier, between two places (Stourport and Manchester), employed to carry goods from one place to the other, to be forwarded from thence to a third place (Stockport); carried them to Stourport, there put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them; in this case the carrier was held not to be liable, the keeping them in the warehouse in this case being not for the convenience of the carrier, but of the owner. 4 Term Rep. K. B. 581.

The owners of vessels on the navigation between A. and C. having given public notice in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10 per cent. unless extra freight were paid: the master of one of the ships took on board the plaintiff's goods to be carried from A. to B. (an intermediate place between A. and C.) and to be delivered at B. The vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C. without any want of care in the master: held that the owner of the vessel was responsible for the whole loss in an action on the contract. Ellis. v. Turner, 8 Term Rep.

A carrier who undertakes for hire to carry goods is bound to deliver them at all events, except damaged or destroyed by act of God, or of the king's enemies: even though it be expressly found that the goods were destroyed without any actual negligence of the carrier.

Term Rep. 27.

2. If a carrier is robbed he shall be liable for the loss; not on the ground that he may charge the hundred under the statute of Winchester, but because if it were otherwise he might, by collusion with robbers, defraud the owner of the goods: and so in other cases, where the grounds are the same. 4 Roll. Ab. 333: 1 Salk. 143.

But if a carrier be robbed of goods, either he or the owner may bring an action against the hundred to make it good. 2 Saund.

Where in the case of a master of a ship it appeared there was a sufficient crew for the ship, but that at night eleven persons boarded the ship as pirates under the pretence of pressing, and plundered her of the goods, it was adjudged the master (the ship being infra corpus comitatus) was liable, for superior force shall not excuse him. Morse v. Slue, 1 Vent. 109: 2 Lev. 69: 1 Mod. 85: Barclay v. Higgins, E. 24 G. 3. cited 1 Term Rep. 33. Where the declaration stated that the carrier undertook to carry goods from London and safely deliver them at Dover, and the contract proved was, to carry and deliver safely (fire and robbery excepted), the variance was held fatal. Latham v. Ruttley, 2 Barn. & C.

3. In an action against a carrier, for negligently carrying a pipe of wine, which by that means burst, and the wine was spilt, it was good evidence for the defendant that the loss happened while he was driving gently, and arose from the wine being in a ferment; so that the loss was occasioned by its being sent in that state. Bull. N. P. 74. So if a carrier's wagon is full, and yet a person forces goods on him, and they are lost, the carrier is not liable. Lovert v. Hobbs, 2 Show. 127.

4. But the following exemptions by statute have been found necessary for the security of

owners of ships.

By stat. 7 G. 2. c. 15. no owners of any ship shall be liable to answer any loss by reason of embezzlement by the master or mariners, of any gold, silver, or other goods shipped on board, or for any act done by the master or mariners, without the owner's privity; beyond the value of the ship and freight.

By stat. 26 G. 3. c. 86. no owners of any ship shall be subject to make good any loss by reason of any robbery, embezzlement, secreting, or making away with any gold, silver, jewels, diamonds, precious stones, or other goods from on board; or for any act or for-iciture done or occasioned without the knowledge of such owner, beyond the value of the ship and freight, although the masters or mariners shall not be concerned in, or privy to, such robbery, &c.

These acts do not impeach any remedy for fraudulent embezzlement, and if several proprietors or freighters sustain such loss, and the value of the ship and freight is not sufficient to make full compensation, the loss

shall be averaged amongst them.

No owner shall be subject to answer for loss happening by fire on board ship. Stat. 26 G. 3. c. 86.

No master or owners shall be subject to answer for any loss of gold, silver, diamonds, &c. by reason of any robbery, &c. unless the shipper of such goods insert the true nature, quality, and value of the gold, &c. in his bills

of lading. Stat. 26 G. 3. c. 86.

Previous to this last statute it was determined, that the owner of a ship was not liable beyond the value of a ship and freight, under stat. 7 G. 2. c. 16. in the case of a robbery (of dollars) in which one of the mariners was concerned, by giving intelligence, and afterwards sharing the spoil; Sutton v. Mitchell, 1 Term Rep. 18. where it was said, the statute was made to protect the owners against all treachery in the master or mariners. And see 53 G. 3. c. 159. extending the provisions of the former acts.

A carrier by water contracting to carry goods for hire impliedly promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight." loss happening by the personal default of the carrier himself (such as the not providing a sufficient vessel) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself by a special exceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. Lyon v. Melle, 5 East, 428.

Where no lien exists at common law, it can only arise by contract with the particular party, either expressed or implied; it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably pre-sume that the parties knew of and adopted it in their dealing. But whereas in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and custom of the realm, which only gives him a lien for the carriage price of the particular goods, there ought to be very strong evidence of a general usage for such a lien to induce a jury to infer the knoweldge and adoption of it by the particular parties in the contract; and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendant and various other common carriers throughout the north for ten or twelve years before, and in one instance, so far back as thirty years, and not opposed by other evidence, the court refused to grant a new trial. Rushforth v. Hadfield, 7 East, 224.

A parcel containing Bank notes, stamps, and a letter, was sent by a common carrier from one stamp distributor to another. By 12 G. 3. c. 81. § 6. it is provided that the prohibition to send letters otherwise than by the post shall not extend to letters sent by any common carrier with the goods which the letter concerns. In an action against the carrier, the Court of King's Bench held that the circumstance of the letter accompanying the stamps was evidence that it related to them; and that the defendant, not having proved the letter to relate to any other subject, was liable for the value of the parcel. Ben-

net v. Clough, 1 Barn. & Ald. 461.

IV. What circumstances must concur in order to charge them.—In order to charge the carrier, three circumstances are to be observed.

1. The goods must be lost while in the possession of the carrier himself, or in his sole care.—Therefore where the plaintiffs, the East India Company, sent their servants with the goods in question on board the vessel, who took charge of them, and they were lost, defendant was held not to be liable. 1 Stra. 690.

2. The carrier is liable only so far as he is paid, for he is chargeable by reason of his re-

ward

One brought a box to a carrier, in which there was a large sum of money, and the carrier demanded of the owner what was in it; he answered it was filled with silks, and such like goods; upon which the carrier took it and was robbed: and adjudged, that the carrier was liable to make it good: but a special acceptance, as provided there is no charge of money, would have excused the carrier. 1 Vent. 238: 4 Rep. 83.

A person delivered to a carrier's book-keeper | against a carrier, see title Bailment, 5 .- That two bags of money sealed up, to be carried a carrier may retain goods for his hire, see from London to Exeter, and told him that it 1 Ld. Raym. 166. 752. was 2001. and took his receipt for the same, with promise of delivery for 10s. per cent. carriage and risk: though it be proved that there was 400l. in the bags, if the carrier be robbed he shall answer only for 2001., because there was a particular undertaking for the carriage of that sum and no more, and his reward, which makes him answerable, extends no farther. Carth. 486.

A. sends goods to B., who says, he will warrant they shall go safe; he is liable for any damage sustained by them, notwithstanding A. sends one of his own servants in B's cart to look after them. 2 B. & P. 416.

3. Under a special or unqualified acceptance the carrier is bound no farther than he undertakes.

For where the owner of a stage-coach puts out an advertisement "That he would not be answerable for money, plate, or jewels above the value of 5l. unless he had notice, and was paid accordingly;" all goods received by that coach are under that special acceptance; and if money or plate be sent by it without notice, and being paid for it, if lost, the coach owner is Gibbon v. Payton, 4 Burr. 2298: Izett v. Mountain, 4 East, 371: Nicholson v. Willan, 5 East, 507. Not even to the extent of the 5l. or the sum paid for booking. Clay v. Willan, H. Black. Rep. 298 .- In these cases a personal communication is not necessary to constitute a special acceptance.-Advertisements, notices in the warehouse, and handbills, which it is probable the plaintiff saw, or which he might have seen, are sufficient.

From these cases and the opinion of Lord Mansfield, it seems safest, that in all instances of sending things of value by a carrier, the carrier should have notice and be paid accordingly. See ante, II. 4. and the stat. 1 W. 4.

c. 68. ante.

4. A delivery to the carrier's servant is a delivery to himself, and shall charge him; but they must be goods, such as it is his custom to earry, not out of his line of business. Salk.

5. Where goods are lost which have been put on board a ship, the action may be brought, either against the master or against the owners. 2 Salk. 440.—If one owner only is sued, he must plead it in abatement, that there are other partners; for he shall not be allowed to give it in evidence, and nonsuit the plaintiff. 5 Burr. 2611: see ante, II. 4.

6. It is not necessary in order to charge the carrier that the goods are lost in transitu, while immediately under his care; for he is bound to deliver them to the consignee, or send notice to him according to the direction; and though they are carried safely to the inn, yet if left there till they are spoiled, and no notice given to the consignee, the carrier is liable. 3 Wils. 429: 2 Bl. Rep. 916.

As to the proof necessary in an action or plough-land, are all one. Stow says King VOL. I.-38

CART-BOTE. See title Bote.

CARTEL. See Chartel.

CARTS. By the stat. 2 W. & M. st. 2. c. 8. § 19, 20. and 18 G. 2. c. 33. the wheel of every cart or dray for the carriage of any thing from and to any place where the streets are paved, within the bills of mortality, &c. shall contain six inches in the felly, not to be shod with iron, nor be drawn with above two horses, under the penalty of 40s.—By the stat. 18 G. 2. c. 33. they may be drawn with three horses and not more, and the wheels being of six inches breadth, when worn, may be shod with iron, if the iron be of the full breadth of six inches, made flat, and not set on with roseheaded nails: and no person shall drive any cart, &c. within the limits aforesaid, unless the name of the owner, and number of such cart, &c. be placed in some conspicuous place of the eart, &c. and his name be entered with the commissioners of hackney-coaches, under the penalty of 40s.: and every person may seize and detain such cart till the penalty be paid.—By the stats. 1 G. 1. st. 2. c. 57: 24 G. 2. c. 43. the driver of any such cart, &c. riding upon such cart, &c. not having a person on foot to guide the same, shall forfeit 10s.; and by stats. 24 G. 2. c. 43. the owner so guilty shall forfeit 20s. and any person may apprehend the offender.

On changing property new owners' names to be affixed, 30 G. 2. c. 22. § 2. and to be entered with the commissioners of hackneycoaches. And see stat. 24 G. 3. st. 2. c. 27. to compel the entry of all carts driven, within five miles of Temple Bar.

CARVAGE. See post, Carucate. CARUCA, Fr. charrue.] A plough; from the old Gallic carr, which is the present Irish word for any sort of wheeled carriage; hence charl and car, a ploughman or rustic.

CARUCAGE, carucagium.] A tribute imposed on every plough, for the public service: and as hidage was a taxation by hides, so carucage was by carucates of land. Mon. Angl.

tom. 1. f. 294.

CARUCATE, or CARVE OF LAND, carucata terræ.] A plough land; which in a deed of Thomas de Arden, 19 E. 2. is declared to be one hundred acres, by which the sub jects have sometimes been taxed; whereupon the tribute so levied was called carvagium, or carucagium. Bract. lib. 2. c. 26. But Skene says, it is as great a portion of land as may be tilled in a year and a day by one plough; which also is called hilda, or hida terræ, a word used in the old British laws. And now by stat. 7 and 8 W. 3. c. 29. a ploughland, which may contain houses, mills, pasture, meadow, wood, &c. is 50l. per annum.

Littleton, in his chapter of tenure in socage, saith, that soca idem est quod carucata, a soke silver of every knight's fce, towards the marriage of his sister Isabella to the Emperor.

Stow's Annals, p. 271.

Rastal, in his exposition of words, says carvage is to be quit, if the king shall tax all the land by carves; that is, a privilege whereby a man is exempted from carvage. The word carve is mentioned in the stat. 28 Ed. 1. of wards and reliefs, and in Magna Charta, c. 5. And A. D. 1200, on peace being made between England and France, King John lent the King of France thirty thousand marks; for which carvage was collected in England, viz. 3s. for each plough. Spelm. v. Carua. Kennet's Gloss.: 2 Inst. 69. and n.

CARUCATARIUS. He that held lands in carvage, or plough-tenure. Paroch. Antiq. p.

354.

CASK. Action on. See title Action.

CASK. An uncertain quantity of goods; and of sugar contains from eight to eleven hundred weight. There are also casks for liquors, of divers contents; and by stat. 25 Eliz. c. 11. none were to transport any wine casks, &c. except for victualling ships, under a certain penalty.

CASSOCK, or CASSULA. A garment belonging to the priest, quasi minor cassa. See

Tassale.

CASTEL, or CASTLE, castellum.] A fortress in a town; a principal mansion of a nobleman. In the time of Hen. 2. there were in England 1115 castles; and every castle belonged to a manor; but during the civil wars in this kingdom these castles were demolished, so that generally there are only the ruins

or remains of them at this day. 2 Inst. 31. CASTELLAIN, castellanus.] The lord, owner, or captain of a castle, and sometimes the constable of a fortified house. Bract. lib. 5. tract. 2. c. 16: 3 Ed. 1. c. 7. It hath likewise been taken for him that hath the custody of one of the king's mansion houses, called by the Lombards curtes, in English courts; though they are not castles or places of defence. 2 Inst. 31. And Manwood, in his Forest Laws, says, there is an officer of the forest called castellanus.

CASTELLARIUM, CASTELLARII.-The precinct or jurisdiction of a castle.—Et unum toftum juxta castellarium. Mon. Angl.

tom. 2. f. 402. CASTELLORUM OPERATIO. Castlework, or service and labour done by inferior tenants, for the building and upholding of castles of defence; towards which some gave their personal assistance, and others paid their contributions. This was one of the three necessary charges, to which all lands among our Saxon ancestors were expressly subject. And after the conquest an immunity from this burthen was sometimes granted. As King Hen. 2. granted to the tenants within the honour of Wallingford.—Ut sunt quieti de operationibus castellorum. Paroch, Antiq. p. 114. It was unlawful to build any castle without leave holdings. Scotch Dict.

Hen. III. took carvage, that is, two marks of of the king, which was called castellatic. Du Fresne.

> CASTIGATORY for scolds. A woman indicted for being a common scold, if convicted. shall be sentenced to be placed on a certain engine of correction, called the tre bucket. tumbrel, tymborella, castigatory, or, cucking stool, which in the Saxon language signifies the scolding stool; though now it is frequently corrupted into ducking stool, because the residue of the judgment is, that when she is so placed therein, she shall be plunged in the water for her punishment. 3 Inst. 219: 4 Comm. 169.-It is also termed goginstole and cokestole, and by some is thought corrupted from choaking stool. Though this punish-ment is now disused, a former editor of Jacob's Dict. (Mr. Morgan) mentions that he remembers to have seen the remains of one, on the estate of a relation of his in Warwickshire, consisting of a long beam, or rafter moving on a fulcrum, and extending to the centre of a large pond, on which end the stool used to be placed.

At Banbury in Oxfordshire, this punishment has been used towards common whores, within the memory of persons now (1793) living; and the pool for the purpose yet retains the name of the cucking pool, but the engine was not long since removed. See Lamb. Eiren.

lib. 1. c. 12.

In Domesday-book it is called Cathedra Stercoralis, and was used by the Saxons for the same purpose, and by them called scealfing stole. It was anciently also a punishment inflicted on brewers and bakers transgaessing the laws, who were ducked in ster-

core, in stinking water. CASTING VOTE. See Parliament, VII. CASTLE-WARD. Castlegardum, vel wardum castri.] An imposition laid upon such persons as dwelled within a certain compass of any castle, towards the maintenance of such as watch and ward the castle. Magna Charta, c. 15. 20: 32 Hen. 8. c. 48. It is sometimes used for the circuit itself, which is inhabited by those that are subject to this service. Castle guard rents were paid by persons dwelling within the liberty of any castle for the maintaining of watch and ward within the same. By stat. 22 and 23 Car. 2. c. 24. § 2. these and other rents in the Duchy of Lancaster, payable to the king, were vested in trustees to be sold.

CASTER, and CHESTER. The names of places ending in these words are derived from the Lat. Castrum; for this termination at the end was given by the Romans to those

places where they built castles.

CASUAL EJECTOR. In In ejectment, Richard Roe or other nominal defendant, who continues such until appearance by or for the tenant in possession. See title Eject-

CASUALTY OF WARDS. Are the mails and duties due to the superiors in ward-

CASU CONSIMILI. Is a writ of entry granted where tenant by the courtesy, or tenant for life, aliens in fee or in tail, or for another's life; and is brought by him in reversion against the party to whom such tenant so aliens to his prejudice, and in the tenant's life-time. It takes its name from this, that the clerks of the Chancery did, by their common assent, frame it to the likeness of the writ called in casu proviso, according to the authority given them by the stat. Westm. 2. (13 E. 1.) c. 24. which statute, as often as there happens a new case in Chancery something like a former, yet not specially fitted by any writ, authorises them to frame a new form, answerable to the new case, and as like the former as they may. 7 Rep. 4: see Fitz. Nat. Br. fo. 206: Terms de Ley: see 3 Comm. 51.

CASU PROVISO. A writ of entry, given by the statute of Gloucester, c. 7. where a tenant in domer aliens in fee or for life, &c. and it lies for him in reversion against the alienee. F. N. B. 205. This writ, and the writ of casu consimili, supposes the tenant to have aliened in fee, though it be for life only: and a casu proviso may be without making any title in it, where a lease is made by the demandant himself to the tenant that doth alien; but if an ancestor lease for life, and the tenant alien in fee, &c. the heir in reversion must have this with the title included therein. F. N. B. 206, 207.

These two writs are now abolished. See

Limitations of Actions, II. 1.

CASUS OMISSUS. Is where any particular thing is omitted out of, and not provided against by a statute, &c.

CATALS. Catalla. Goods and chattels.

See Chattels.

CATALLIS CAPTIS NOMINE DISTRICTIONIS. Anciently a writ that lay where a house was within a borough, for rent going out of the same; and which warranted the taking of doors, windows, &c. by way of distress for rent. Old. Nat. Br. 66. This writ is now obsolete.

CATALIS REDDENDIS. An ancient writ which lay where goods being delivered to any man to keep till a certain day, are not, upon demand, delivered at the day. It may be otherwise called a writ of detinue; and is answerable to actio depositi in the civil law. See Reg. Orig. 139: and Old Nat. Br. 63.

CATAPULTA. A warlike engine to shoot

darts; or rather a cross-bow.

CATASCOPUS. An archdeacon. Du

Cange.

CATCHLAND. In Norfolk there are some grounds which it is not known to what parish they certainly belong, so that the minister who first seizes the tithes does by that right of pre-occupation enjoy them for that year; and the land of this dubious nature is there called catchland, from this custom of seizing the tithes. Cowel.

CATCHPOLE. See Cachepollus. Sheriff's officers are commonly so called.

CATHEDRAL, ecclesia cathedralis.] The church of the bishop, and head of the diocese: wherein the service of the church is performed with great ceremony. See title Church.

CATHEDRATICK, cathedraticum.] A sum of 2s. paid to the bishop by the inferior clergy, in argumentum subjectionis et ob honorem cathedræ. Hist. procurat. et Synodals, p. 82.

CATHOLICS; usually termed ROMAN CATHOLICS. See title Roman Catholics.

CATZURUS. A hunting horse. Tenures,

p. 68. Vide Chacurus.

CATTLE. As to buying and selling cattle, &c .- No person shall buy any ox, cow, calf, &c. and sell the same again alive in the same market or fair, on pain of forfeiting double the value. Stats. 3 and 4 E. 6. c. 19: 3 C. 1. c. 49. § 8.—And the said act 3 and 4 E. 6. c. 19. is not repealed by stat. 12 Geo. 3. c. 71. which repeals the general forestalling act of 5 and 6 E. 6. c. 14. and other subsequent acts enforcing the same, but hath no reference to any preceding act.—By stat. 31 Geo. 2. c. 40. no salesman, broker, or factor employed in buying cattle for others, shall buy and sell for himself, in London, or within the bills of mortality, on penalty of double the value of the cattle bought or sold.

By stat. 3 Car. 1. c. 1. no drovers are to travel with cattle on Sundays, on penalty of 20s.

By stat. 21 Geo. 3. c. 67. several wholesome regulations are made, to prevent the cruelties of drovers and others, in driving cattle in London, Westminster, and the bills of mortality, by which a fine from 20s. to 5s. is imposed on them for misbehaviour; or one month's imprisonment; and power is given to the lord mayor and aldermen of London, to make regulations to further the purposes of the act, and which was accordingly done.

As to killing, maining, and stealing cattle.

—By 7 and 8 Geo. 4. c. 29. § 25. any person who shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, ram, heifer, or calf, or any ram, ewe, sheep, or lamb, or wilfully killing any such cattle, with intent to steal the carcase or skin, or any part of the animal, shall be guilty of a capital felony.

By 7 and 8 Geo. 4. c. 30. § 16. any person who unlawfully and maliciously shall kill, maim, or wound any cattle, shall be guilty of felony, punishable by transportation for life, or years, or imprisonment, whipping, &c.

By the 3 G. 4. c. 71., wantonly or cruelly abusing cattle renders the offender liable, on conviction before a magistrate, on the oath of one witness, to a penalty not exceeding 5l. or less than 10s., or in default of payment three month's imprisonment.

By § 2. the complaint must be made within ten days after the offence; and by § 3. the order of the magistrate is final.

By § 5. if the justice be of opinion that the

order the complainant to pay not exceeding 20s. to the other party for his trouble and ex-

And by 7 Geo. 4. c. 64. § 28. the court may order compensation to persons who have been active in the apprehension of persons charged with horse-stealing, bullock-stealing, or sheep-stealing, or accessaries before the fact thereto.

The stat. 26 Geo. 3. c. 71. provides that every person keeping a slaughter-house for cattle not killed for butcher's meat, shall take out licenses and be subject to an inspector; and shall not slaughter, but at certain times.

&c. &c. See title Horses.

CAVEAT. A process in the spiritual court to stop the institution of a clerk to a benefice, or probate of a will, &c. When a caveat is entered against an institution, if the bishop afterwards institutes a clerk, it is void; the caveat being a supersedeas: but a caveat has been adjudged void when entered in the life-time of the incumbent. Though if it is entered "dead or dying," it will last good one month; and if the incumbent dies, till six months after his death. So a caveat entered against a will, stands in force for three months; and this is for the caution of the ordinary, that he do no wrong: though it is said the temporal courts do not regard these sorts of caveats. 1 Roll. Rep. 191: 1 Nels. Abr. 416, 417.

CAVERS. Offenders relating to the mines in Derbyshire, who are punishable in the berg-

mote, or miners' court.

CAULCEIS. See stat. 6 H. 6. c. 5. respecting sewers. Ways pitched with flint or other

stones. See Calcetum.

CAURCINES, Caursini.] Italians that came into England about the year 1235, terming themselves the Pope's merchants, but driving no other trade than letting out money; and having great banks in England, they differed little from Jews, save, (as history says) that they were rather more merciless to their debtors. Cowel says they have their name from Caorsium, Caorsi, a town in Lombardy, where they first practised their arts of usury and extortion; from whence spreading themselves, they carried their cursed trade through most parts of Europe, and were a common plague to every nation where they The then bishop of London excommunicated them: and King Hen. 3. banished them from this kingdom in the year 1240. But being the pope's solicitors and money changers, they were permitted to return in the year 1250; though in a very short time after, they were driven out of the kingdom again for their intolerable exactions. Mat. Paris, 403.

CAUSA MATRIMONII PRÆLOCUTI, is a writ which lies where a woman gives land to a man in fee simple, &c. to the intent he should marry her, and he refuseth to do it in any reasonable time, being thereunto

complaint is frivolous or vexatious, he may required. Reg. Orig. 66. If a woman make a feofiment to a stranger of land in fee to the intent to infeoff her, and one who shall be her husband; if the marriage shall not take effect, she shall have the writ of causa matrimonii prælocuti, against the stranger, notwithstanding the deed of feoffment be absolute. New Nat. Br. 456. A woman infeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment; and afterwards, the woman for not performing the condition, entered again into the land; and her entry was adjudged lawful, though upon a second feoffee. Lib. Ass. anno 40 Ed. 3. The husband and wife may sue the writ causa matrimonii pralocuti against another who ought to have married her; but if a man give lands to a woman to the intent to marry him, although the woman will not marry him, &c. he shall not have his remedy by writ causa matrimonii prælocutis. New Nat. Br. 455.

CAUSAM NOBIS SIGNIFICES QUARE. A writ directed to a mayor of a town, &c. who was by the king's writ commanded to give seisin of lands to the king's grantee, on his delaying to do it, requiring him to show cause why he so delays the performance of

CAUTIONE ADMITTENDA. A writ that lies against a bishop, who holds an excommunicated person in prison for contempt, notwithstanding he offers sufficient caution or security to obey the orders and commandment of the church for the future. Reg. Orig. 66. And if a man be excommunicated, and taken by a writ of significavit, and after offers caution to the bishop to obey the church, and the bishop refuseth it; the party may sue out this writ to the sheriff to go against the bishop, and warn him to take caution, &c.; but if he stands in doubt whether the sheriff will deliver him by that writ, the bishop may purchase another varit directed to the sheriff reciting the case and the end thereof; Tibi præcipimus, quod ipsum A. B. a prisona prædict. nisi in præsenti tua cautionem pignorat ad minus eidem episc. de satisfaciend. obtulerit nullatenus deliberas absqua mandato nostro seu ipsius episcopi in hac parte, speciali, &c. When the bishop hath taken caution, he is to certify the same in the Chancery, and thereupon the party shall have a writ unto the sheriff to deliver him. New Nat. Br. 142.

CEAPGILDE. From Saxon ceap pecus, cattle; and gild, i. e. solutio.] Hence it is solutio pecudis; from this Saxon word gild, it is very probable we have our English word yield; as yield or pay. Cowel. CELER LECTI. The top, head, or tester

of a bed. Hist. Elien. apud Whartoni, Angl.

Sax. par. 1. p. 673.

CELLERARIUS. The butler in a monastery: in the Universities they are sometimes called manciple, and sometimes caterer, and steward.

CENDULÆ. Small pieces of wood laid in of the staple to certify to the lord chancellor form of tiles, to cover the roof of a house.

Pat. 4 Hen. 3. p. 1. m. 10.

CENEGILD. An expiatory mulct, paid by one who killed another, to the kindred of the

deceased. Spelm.

CENELLÆ. Acorns from the oak. In our old writings persona cenellarum is put for the pannage of hogs, or running of swine, to feed on acorns.

CENNINGA. Notice given by the buyer to the seller, that the thing sold was claimed by another, that he might appear and justify the sale: it is mentioned in the laws of Athelstan, apud Brompton, cap. 4.

CENSARIA. A farm, or house and land, let ad censum at standing rent; it comes from the Fr. cense, which signifies a farm.

CENSARII. Farmers. Blount.

CENSUALES. A species or class of the oblati, or voluntary slaves of churches or monasteries, i. e. those, who to procure the protection of the church, bound themselves to pay an annual tax or quit-rent out of their estates to a church or monastery. Besides this, they sometimes engaged to perform certain services. Robert. Hist. Emp. C. vol. 1. 271, [272: Potgiesserus de Statu Servorum, lib. 1. c. 1. § 6, 7.

CENSURE, from Lat. census.] A custom

CENSURE, from Lat. census.] A custom called by this name, observed in divers manors in Cornwall and Devon, where all persons residing therein above the age of sixteen are cited to swear fealty to the lord, and to pay 11d. per poll, and 1d. per ann. ever after; and these thus sworn are called censers. Survey

of the Duchy of Cornwall.

CENTENARII. Petty judges, under-sheriffs of counties, that had rule of an hundred, and judged smaller matters among them. 1 Vent. 211.

There were anciently inferior judges, so called in France, who were set over every hundred freemen, and were themselves subject to the count or comes. 1 Comm. 115.

CEPI CORPUS. A return made by the sheriff, upon a capias, or other process to the like purpose, that he hath taken the body of the party. F. N. B. 26.

CEPPAGIUM. The stumps or roots of trees which remain in the ground after the trees are felled. Fleta, lib. 2. cap. 41.

CERTAINTY, is a plain, clear, and distinct setting down of things so that they may be understood. 5 Rep. 121. A convenient certainty is required in writs, declarations, pleadings, &c. But if a writ abate for want of it, the plaintiff may have another writ: it is otherwise if a deed become void, by uncertainty, the party may not have a new deed at his pleasure. 11 Rep. 25. 121: Dyer, 84. That has certainty enough, that may be made certain; but not like what is certain of itself. 4 Rep. 97. See generally tit. Pleading—and particularly tits. Deed; Will:

CERTIFICANDO DE RECOGNITIONE STAPULÆ. A writ commanding the mayor

of the staple to certify to the lord chancellor a statute staple taken before him, where the party himself detains it, and refuseth to bring in the same. Reg. Orig. 152. There is the like writ to certify a statute merchant; and in divers other cases. Ibid. 148. 151, &c.

CERTIFICATE. A writing made in any court to give notice to another court of any thing done therein; which is usually by way of transcript, &c. And sometimes it is made by an officer of the same court, where matters are referred to him, or a rule of court is obtained for it; containing the tenor and effect of what is done.

By 7, 8 G. 4. c. 28. § 11. persons convicted of felony, having been previously convicted of felony, may be transported for life, &c. upon a certificate of the clerk of the court or other officer, having the custody of the records of the court when the offender was first convicted; and the uttering a false certificate is made felony, and the offender subjected to seven years' transportation.

By 7 G. 4. c. 64. § 22. the expences of attending (in cases of felony) before the magistrates, and a compensation for trouble and loss of time therein may be allowed, and are to be ascertained by the magistrate's certifi-

cate granted before the trial in court.

If a question of mere law arises in the course of a cause in chancery (as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator, shall operate as a remainder, or an executory devise), it is the practice of that court to refer it to the opinion of the judges of the court of K. B. or C. P. upon a case stated for the purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate, the decree is usually founded. 3 Comm. 453.

It is much to be regretted that in these cases the judges give no reasons for their certificate, which much lessens the value of the judgments in such cases.

The Trial by Certificate, is allowed in such cases, where the evidence of the person certifying is the only proper criterion of the point in dispute. Thus, 1. The question whether one were absent with the king in his army out of the realm, in time of war, might be tried by the certificate of the marshal of the king's host under seal. Litt. § 102.—2. If in order to avoid an outlawry it be alleged the defendant was in prison, &c. at Bourdeaux or Calais, this, when those places belonged to the crown of England, was allowed to be tried by the certificate of the mayor. 9 Rep. 31: 2 Ro. Ab. 583. And therefore by parity of reason, it should now hold that in similar cases arising at Jamaica, &c. the trial should be by certificate from the governor. 3 Comm. 334.

toms of the city of London shall be tried by tices or others, and obtained letters-patent to the certificate of the mayor and aldermen, certified by the mouth of the recorder, upon a surmise from the party alleging it, that it should be so tried; else it must be tried by the country, as it must also if the corporation of London be a party, or interested in the suit. 1 Inst. 74: 4 Burr. 248: Bro. Ab. 1: Trial, pl. 96; Hob. 85. But see 1 Term Rep. 423. If the recorder has once certified a custom, the court are in future bound to take notice of it. Doug. 380.

4. In some cases the Sheriff of London's certificate shall be the final trial; as if the issue be whether the defendant be a citizen of London, or a foreigner, in case of privilege pleaded to be sued only in the city courts. 1 Inst. 74. Of a nature somewhat similar to which is the trial of the privilege of either University when the chancellor claims cognizance of the cause; in which case the charters confirmed by parliament, allow the question to be determined by the certificate of the chancellor under seal. But in case of an issue between two parties themselves, the trial shall be by jury. 2 Ro. Ab. 583.—3 Comm.

5. In matters of ecclesiastical jurisdiction, as marriage, general bastardy, excommunication, and orders, these and other like matters, shall be tried by the bishop's certificate. See tits. Bastardy, &c. Ability of a clerk presented, admission, institution and deprivation of a clerk shall also be tried by certificate from the ordinary or metropolitan. 2 Inst. Show. P. C. 88: 2 Ro. Ab. 583, &c. But induction shall be tried by a jury; being the corporal investiture of the temporal profits. Dy. 229. Resignation of a benefice may be tried either way, but seems most properly to fall within the bishop's cognizance. 2 Ro. Ab. 583: 3 Comm. 336.

6. The trial of all customs and practices of the courts shall be by certificate from the proper officer of those courts respectively; and what return was made on a writ by a sheriff or under-sheriff, shall be only tried by his own certificate. 9 Rep. 31: 3 Comm. 336.

As to certificates in cases of Costs, of Bankrupts, or relative to the settlement of the Poor, see those titles in this Dict.

CERTIFICATION, i.e. Assurance. Scotch Dict.

CERTIFICATION, is when the judge doth ascertain the party called, and not comparing what he will do in that case. Scotch

CERTIFICATE OR CERTIFICATION OF ASSISE, certificatio assisæ novæ disseisinæ, &c.] A writ anciently granted for the re-examining or re-trial of a matter passed by assise before justices: used where a man appearing by his bailiff to an assise, brought by another, lost the day; and having something more to plead for himself, which the bailiff did not, or might

3. For matters within the realm; the cus- | tion of the cause, either before the same justhem to that effect; whereupon he brought a writ to the sheriff to call both the party for whom the assise passed, and the jury that was impannelled on the same, before the said justices at a certain day and place to be reexamined. It was called a certificate, because therein mention is made to the sheriff. that upon the party's complaint of the defective examination, as to the assise passed, the king had directed his letters-patent to the justices for the better certifying of themselves. whether all points of the said assise were duly examined. Reg. Orig. 200: F. N. B. 181. Bracton, lib. 4. c. 13: Horn's Mirr. lib. 3.—This writ is now entirely superseded by the remedy afforded by means of new trials. See 3 Comm. 389.

CERTIORARI. This is an Original Writ. issuing out of the court of Chancery or K. B. directed in the king's name to the judges or officers of the inferior courts, commanding them to certify, or to return the records of a cause depending before them; to the end the party may have the more sure and speedy justice before the king, or such justices as he shall assign to determine the cause. See F.

N. B. 145, 242,

This writ is either returnable in the King's Bench, and then hath these words, "send to us;" or in the Common Bench, and then has "to our justices of the bench;" or in the Chancery, and then hath "in our Chancery,"

On this subject we may briefly consider, I. In what cases this writ is grantable, or not. -2. In what manner.-3. The effect of it when granted: and,-4. Of the return, with the form of that and the writ.

1. A writ of certiorari may be had at any time before trial, to certify and remove indictments, with all the proceedings thereon from any inferior court of criminal jurisdiction, into the court of K. B. the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of four purposes: 1. To consider and determine the validity of appeals and indictments, and the proceedings thereon; and to quash or confirm them accordingly.-2. To have the prisoner or defendant tried at the bar of the courts, or before justices of Nisi Prius where it is surmised that a partial or insufficient trial will probably be had in the inferior court.—3. To plead the king's pardon in the court of K. B. 4. To issue process of outlawry against the offender in those countries or places where the process of inferior judges will not reach him. 2 H. P. C. 210. 4 Comm. 430.

Such certiorari is granted of course on the application of the crown; but the defendant must lay some ground for it. R. v. Eaton, 2 Term Rep. 89.

A certiorari lies in all judicial proceedings, in which a writ of error does not lie; and it is not plead for him, desired a farther examina- a consequence of all inferior jurisdictions, erected by act of parliament to have their prosecution be malicious or attended with opproceedings returnable in K. B. Ld. Raym. 469. 580.

But without laying a special ground before the court, it cannot be sued out to remove proceedings in an action from the courts of the counties palatine. Doug. 749 .- It does not lie to judges over and terminer to remove a recognizance of appearance. Lucas, 278.-Nor to remove a poor's rate. Sira. 932. 975: See Leach's Hawk. P. C. ii. c. 27. § 23. in n.

A certiorari will lie to remove an ejectment from an inferior court. Doe d. Sadler, v. Dring. 1 B. & C. 253.

An ejectment brought in an inferior court

on a lease executed and sealed on the premises which were within the jurisdiction of that court, may be removed into K. B. by certiorari, if there be any ground for believing that it cannot be impartially tried in the inferior court. Patterson v. Eades, 3 B. & C. 550.

A certiorari lies to justices of the peace and others, even in such cases, which they are empowered by statute finally to hear and determine; and the superintendancy of the court of K. B. is not taken away without express words. 2 Hawk. P. C. c. 27, § 22, 23.

If an order of removal be confirmed at the sessions, and both orders be removed into B. R. by certiorari on a case reserved, and that court disapprove of the orders, for want of jurisdiction of the removing magistrates, appearing on the face of the original order; the court will quash both orders, without remitting back to the sessions to quash the original order, for the purpose of enabling them to give maintenance according to stat. 9 G. 1. c. 7. § 9. and at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. Rex v. Moor-Chrichell Parish, 2 East, 222.

The court refused to grant a certiorarl to a defendant pending an appeal to the sessions

by him. 2 Term. Rep. 196. n.

That a certiorari does not lie to remove any other than judicial acts. See Cald. 309: Say. 6.

Where a certiorari is by law grantable for an indictment at the suit of the king, the court is bound to award it, for it is the king's prerogative to sue in what court he pleases; but it is at the discretion of the court to grant or not, in case of private prosecutions, and at the prayer of the defendant: and the court will not grant it for the removal of an indictment before justices of gaol-delivery, without some special cause; or where there is so much difficulty in the case, that the judge desires it may be determined in B. R., &c. Burr. 2456. Also on indictments of perjury, forgery, or for heinous misdemeanors, the court will not generally grant a certiorari to remove at the instance of the defendant. 2 Hawk. P. C. c. 27. § 27, 28. But see 2 Ld. Raym. 1452.

But in particular cases, the court will use

pressive circumstances. Leach's Hawk. P. C. ii. c. 27. § 28. n.

Where issue is joined in the court below, it is a good objection against granting a certiorari; and if a person doth not make use of this writ till the jury are sworn, he loses the benefit of it. Mod. Ca. 16. Stat. 43 Eliz. c. After conviction, a certiorari may not be had to remove an indictment, &c. unless there be special cause; as if the judge below is doubtful what judgment is proper to be given when it may. See Stra. 1227: Burr. 749. And after conviction, &c. it lies in such cases where writ or error will not lie. 1 Salk. 149. The court, on motion in an extraordinary case, will grant a certiorari to remove a judgment given in an inferior court; but this is done where the ordinary way of taking out execution is hindered in the inferior court. 1 Lill. Abr. 253.

In common cases a certiorari will not lie to remove a cause out of an inferior court, after verdict. It is never sued out after a writ of error. but where diminution is alleged: and when the thing in demand does not exceed 5l. a certiorari shall not be had, but a writ of error or attaint. Stat. 21 Jac. 1. cap. 23. See stat. 12 G. 1. c. 29. A certiorari is to be granted on matter of law only; and in many cases there must be a judge's hand for it. I Lill. Certioraris to remove indictments, &c. are to be signed by a judge; and to remove orders, the fiat for making out the writ must be signed by some judge. 1 Salk. 150.

Certiorari lies to the courts of Wales; and the cinque ports, counties, palatine, &c. 2 Hawk. P. C. c. 27. § 24, 25. The courts of Wales and the county palatine of Chester are now abolished by 1 W. 4. c. 70. § 14.

Things may not be removed from before justices of peace, which cannot be proceeded in by the court where removed; as in case of refusing to take the oaths, &c. which is to be certified and inquired into, according to the statute. 1 Salk. 145. And where the court which awards the certiorari cannot hold plea on the record, there but a tenor of the record shall be certified; for otherwise, if the record was removed into B. R. as it cannot be sent back, there would be a failure of right afterwards. 1 Danv. Ab. 792. But a record sent by certiorari into C. R. may be sent after by mittimus into B. B. Ibid. 789. And a record into B. R. may be certified into chancery, and from thence be sent by mittimus into an inferior court, where an action of debt is brought in an inferior court, and the defendant pleads that the plaintiff hath recovered in B. R. and the plaintiff replies Nul tiel record, &c. 1 Saund. 97. 99.

The court of B. R. will grant a new certiorari to affirm a judgment, &c. though generally one person can have but one certiorari. Cro. Jac. 369.

A certiorari may not be had to a court sutheir discretion to grant a certiorari; as if perior, or that has equal jurisdiction, in which the defendant be of good character, or if the case day is given to bring in the record, &c. perior, or that has equal jurisdiction, in which Besides the statutes hereafter mentioned, there are several which restrain, and many which absolutely prohibit a certiorari; in order to avoid frivolous and unfounded delays in justice. For a complete list of these, if needed, the student should consult the statutes. The following seem to have deserved a short mention in this place.

By stat. 12 Car. 2. cc. 23, 24. no certiorari shall be allowed in certain cases of transgres-

sion of the Excise Laws.

Certiorari granted to remove an indictment against an excise officer from the sessions, on the motion of the attorney-general, without

any affidavit. 4 T. R. 161.

By stat. 13 G. 3. c. 78. (which see at large tit. Highways) no presentment, &c. of any lighway shall be removed from the sessions, until it be traversed, except the right to repair be the question.—Or by stat. 5 and 6. W. & M. c. 11. may come in question—but this means on the part of the defendant only, for on the part of the prosecution it lies before.—No other proceedings under the highway act may be removed by certiorari. See 3 Barn. & C. 698: 5 Barn. & C. 816. But if the sessions manifestly exceed their authority in making orders, they may be removed into K. B. by certiorari and quashed. Leach's Hawk, P. C. ii. c. 27. § 37. and n.

Also by stat. 1 Ann. c. 18. concerning the repair of bridges no certiorari shall be allowed: but it may, at the instance of the prosecutor notwithstanding the general words. 6 T. R. 194.—Nor by stat. 12 G. 2 c. 29. for assessing county rates. Nor on stat. 19 G.2. c. 21. against cursing and swearing.—Nor on stat. 25 G. 2. c. 36. against bawdy-houses; but this does not restrain the crown from removing the indictment by certiorari. 5 T. R. 626.—Nor on 29 G. 2 c. 40. against stealing lead, iron, &c .- Nor on 30 G. 2. c. 21. for preserving fish in the Thames. Nor on 30 G.2. c. 24. for restraining gaming in public-houses.—Nor on 31 G. 2.c. 29. for regulating bread.—Nor on 2 G. 3. c. 30. for preventing thefts in bumb-boats.-Nor to remove any conviction or adjudication under stat. 7, 8 G. 4. c. 29. (See § 73.)

For a long detail of further matter on the subject of certiorari, see 2 Hawk. P. C. c. 27.

By stats. 5 and 6 W. & M. c. 11. and 8 and 9 W. 3. c. 33. certiorari may be granted in vacation-time by any of the judges of B. R. and security is to be found before it is allowed. No certiorari is to be granted out of B. R. to remove an indictment, or presentment, before justices of peace at the sessions before trial, unless motion be made in open court, and the party indicted find security by two persons in 201. each to plead to the indictment in B. R. &c. And if the defendant prosecuting the certiorari be convicted, the court of B. R. shall order costs to the prosecutor of the indictment. In case af certiorari granted in vacation, the name of the judge and party applying to be indorsed on the writ. See tit. Habeas Corpus.

Convicted in the forgoing acts means con-

Besides the statutes hereafter montioned, victed by judgment, and therefore, if after a reseveral which restrain, and many nich absolutely prohibit a certiorari; in der to avoid frivolous and unfounded delays | R. 570.

If on a certiorari to remove an indictment the party do not find manucaptors in the sum of 20l. to plead to the indictment and try it according to the statute, it is no supersedeas Mod. Ca. 33. And a procedendo may be granted where bails not put in before a judge, on a certiorari. As to costs, see 1 Wils. 139. 1 Burr. 54: 2 Term Rep. 47.

No judgment or order to be removed by certiorari, without sureties found to the amount

of 50l. Stat. 5 G. 2. c. 19.

The 12th section of the stat. 38 G. 3.c.52. providing that no indictment shall be removed into the next adjoining county, except the person applying for such removal shall enter into a recognizance in 40l. for the extra costs, and does not relate to indictments sent by B. R. to be tried in the next adjoining county, after a removal thither by certiorari. Rex v. Not-

tingham, 4 East, 208.

Certiorari, to remove convictions, orders or proceedings of justices, to be applied for within six calendar months, and upon six days' notice to the justices. Stat. 13 G. 2. c. 18. See Stra. 991: 4 T. R. 211: 8 T. R. 219. And the six days' notice must be given before making the motion for a rule to show cause why such certiorari should not be granted. 5 T. See further 1 Maul. & Selw. Rep. R. 279. 631. 734. The provisions of this statute do not apply to indictments at the sessions, but only to proceedings of a lower denomination; therefore a certiorari to remove an indictment from the sessions may be sued out without giving the six days' previous notice. 1 E.R. See also this Dict. tit. Sessions.

The certiorari to remove a conviction of a glass-maker, by stat. 13 G. 2. c. 18. § 5. is not taken away from the crown, though it is from the defendant; the act being levelled against vexatious delays. 15 E. R. 339.

It is said, a certiorari to remove an indictment is good, although it bear date before the taking thereof: but on a certiorari the very record must be returned, and not a transcript of it; for if so, then the record will still remain in the inferior court. 2 Lill. 253. B. R. the very record itself of indictments is removed by certiorari; but usually in chancery, if a certiorari be returnable there, it removes only the tenour of the record; and therefore, if it be sent from thence into the King's Bench, they cannot proceed either to judgment or execution, because they have but such tenour of the record before them. 2 Hale's Hist. P. C. 215. In London a return of the tenour only is warranted by the city charters. 2 Hawk. P. C. c. 27. § 26.76. Where justices, to whom a certiorari was directed, signed the return, but did not seal it, or add their description as justices, the court sent back the return to be amended. 6 Barn. § C. 640.

On a certiorari to remove a record out of

an inferior court, the style of their court, and, against a magistrate for returning to a writ of power to hold plea, and before whom ought to certiorari, a conviction of a party in another be shown on their certificate. Jenk. Cent. 114. 232.

A certiorari to remove an order of bastardy should be applied for in six months. Rex v. Howlett, 1 Wils. 35.

If a certiorari be prayed to remove an indictment out of London or Middlesex, three days' notice must be given the other side, or the certiorari shall not be granted. Raym.

3. After a certiorari is allowed by the inferior court, it makes all the subsequent proceedings, on the record that is removed by it, erroneous. 2 Hawk. P. C. c. 27. § 62. 64. But if a certiorari for the removal of an indictment before justices of peace be not delivered before the jury be sworn for the trial of it, the justices may proceed. 2 Hawk. P. C. c. 27. § 64.—And the justices may set a fine to complete their judgment after a certiorari delivered. Ld. Raym. 1515. See ante 1.

A certiorari removes all things done between the teste and return. Ld. Raym. 835. 1805. -And as it removes the record itself out of the inferior, court, therefore, if it remove the record against the principal, the accessary cannot be tried there. 2 Hawk. P. C. c. 29. 8 54.—And if the defendant be convicted of a capital crime, the person of the defendant must be removed by habeas corpus, in order to be present in court, if he will move in arrest of judgment.-And herein the case of a conviction differs from that of a special verdict. Burr. 930.

Although on a habeas corpus to remove a person, the court may bail or discharge the prisoner, they can give no judgment upon the record of the indictment against him, without a certiorari to remove it; but the same stands in force as it did, and new process may issue upon it. 2 H. H. P. C. 211. If an indictment be one, but the offences several, where four persons are indicted together, a certiorari to remove this indictment against two of them, removes it not as to the others; but as to them the record remains below. 2 Hale's Hist. 214.

If a cause be removed from an inferior court by certiorari, the pledges in the court below are not discharged; because a defendant may bring a certiorari, and thereby the plaintiff may lose his pledges. Skin. Rep. 244. 246. A certiorari from K. B. is a supersedeas to restitution in a forcible entry. 1 Hawk. P. C. c. 64. § 62.

4. The return of a certiorari is to be under seal: and the person to whom a certiorari is directed may make what return he pleases, and the court will not stop the filing of it, on affidavit of its falsity, except where the public good requires it: the remedy for a false return is action on the case, at the suit of the party injured; and information, &c. at the suit of seal up, and send them both together with the the king. 2 Hawk. P. C. c. 27. § 70.

The court refused a criminal information

and more formal shape, than that in which it was first drawn up, and of which a copy had been delivered to the party convicted; the conviction returned being warranted by the facts. 1 E. R. 186.

If the person to whom the certiorari is directed do not make a return, then an alias, then a pluries, vel causam nobis significes quare, shall be awarded, and then an attachment. Cromp. 116.

FORM OF A CERTIONARI, TO CERTIFY THE RE-CORD OF A JUDGMENT.

GEORGE the Third, &c. To the Mayor and Sheriffs of our city of E. and to every of them, in our court at the Guildhall there, greeting: Whereas A. B. hath lately in our said court in the said city, according to the custom of the same court, impleaded C. D. late of, &c. in an action of debt upon demand of thirty pounds; and thereupon, in our said court before you, obtained judgment against the said C. for the recovery of the said debt: and we, being desirous for certain reasons, that the said record should by you be certified to us, Do command you, that you send under your seals the record of the said recovery, with all things touching the same, into our court before us at Westminster, on the day, &c. plainly and distinctly, and in as full and ample manner as it now remains before you, together with this writ, so that we on the part of the said A. may be able to proceed to the execution of the said judgment, and do what shall appear to us of right ought to be done. Witness, &c.

The return of certiorari may be thus-First, on the back of the writ indorse these or similar words " The execution of this writ appears in a schedule to the same writ annexed." Which schedule may be in the following form, on a piece of parchment (not paper, 1 Barn. K. B. 113.), by itself, and filed to the

Middlesex .- I, A. B. one of the keepers of the peace and justices of our lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed by virtue of this writ to me delivered, do under my seal certify unto his Majesty in his court of King's Bench, the indictment, of which mention is made in the same writ, together with all matters touching the said indictment. In witness whereof I, the said A. B. have to these presents set my seal. Given at --- in the said county, the - day of -, in the - year of the reign of -

Then take the record of the indictment. and close it within the above schedule, and certiorari.

CERT-MONEY, quasi certain money.]

Head-money paid yearly by the resiants of year's rent in arrear, and shall descrt the deseveral manors to the lords thereof, for the mised premises, leaving the same uncultivated certain keeping of the leet; and sometimes to the hundred: as the manor of Hook, in Dorsetshire, pays cert-money to the hundred of Egerdon. In ancient records this is called certum letæ. See Common Fine.

CERVISARII. The Saxons had a duty called drinclean that is retributio potus, payable by their tenant; and such tenants were in Domesday called cervisarii, from cervisia, ale, their chief drink: though cervisarius vulgarly signifies a beer or ale brewer.

CERURA. A mound, fence, or inclosure. Cart. priorat. de Thelesford, MS.

CESSAT EXECUTIO. In trespass against two persons, if it be tried and found against one, and the plaintiff takes his execution against him, the writ will abate as to the other; for there ought to be a cessat executio till it is tried against the other defendant. 10

E. 4. 1. See tit. Execution, &c.

CESSAVIT. A writ which lies (by the stats. of Gloucester, 6 E. 1. c. 4. and Westm. 2. 13 E. 1. c. 21. 41.) when a man who holds lands by rent or other services, neglects or ceases to perform his services for two years together; or where a religious house hath lands given it, on condition of performing some certain spiritual service, as reading prayers, or giving alms, and neglects it; in either of which cases if the cesser or neglect shall have continued for two years, the lord or donor and his heirs shall have a writ of cessavit to recover the land itself. F. N. B. 208.—In some instances relating to religious houses, called Cessavit de Cantaria.

By the stat. of Gloucester, the cessavit does not lie for lands let upon fee farm rents, unless they have lain fresh and uncultivated for two years, and there be not sufficient distress upon the premises, or unless the tenant hath so inclosed the land, that the lord cannot come upon it to distrain. F. N. B. 209. 2 Inst. 298. For the law prefers the simple and ordinary remedies, by distress, &c. to this extraordinary one of forfeiture; and therefore the same statute has provided farther, that on tender of arrears and damages before judgment, and giving security for the future performances of the services (that he will no more cease), the process shall be at an end, and the tenant shall retain his land, to which the stat. of Westm. 2. conforms so far as may stand with convenience and reason of law. 2 Inst. 401, 460.

The stats. 4 G. 2. c. 28. and 11 G. 2. c. 19. seem evidently borrowed from the above ancient writ of cessavit .- The former of these statutes permits landlords who have a right of re-entry for non-payment of rent, to serve an ejectment on their tenants when half a year's rent is due, and no sufficient distress on the premises. See tit. Ejectment. And the same remedy is in substance adopted by the stat. 11 G. 2. c. 16. which enacts, that

or unoccupied, so that no sufficient distress can be had, two justices of the peace (after notice affixed on the premises for fourteen days) may give the landlord possession thereof; and the lease shall be void. See tits. Distress, Lease, Rent.

By stat. Westm. 2. § 2. the heir of the demandant may maintain a cessavit against the heir or assignee of the tenant. But in other cases, the heir may not bring this writ for cessure in the time of his ancestor: and it lies not but for annual service, rent, and such

like; not for homage or fealty. Termes de la Ley: New Nat. Br. 463. 464. The lord shall have a writ of cessavit against tenant for life, where the remainder is over in fee to another: but the donor of an estate-tail shall not have a cessavit against the tenant in tail: though if a man make a gift in tail, the remainder over in fee to another, or to the heirs of the tenant in tail, there the lord of whom the lands are held immediate, shall have a cessavit against the tenant in tail, because that he is tenant to him, &c. Ibid. If the lord distrains pending the writ of cessavit against his tenant, the writ shall abate. The writ cessavit is directed to the sheriff, To command A. B. that, &c. he render to C. D. one messuage, which he holds by certain services, and which ought to come to the said C. by force of the statute, &c. because the said A. in doing those services had ceased two years, &c. Dict.

CESSE. An assessment or tax. Stat. 22 H. S. c. 3. In Ireland, it was anciently applied to an exaction of victuals, at a certain rate, for soldiers in garrison. Antiq. Hibernia.

CESSIO BONORUM. A process in the law of Scotland, similar in effect to that under the statutes relating to Bankruptcy in

England. See Bankrupt.

ČESSION, Cessio.] A ceasing, yielding up, or giving over. When an ecclesiastical person is created bishop, or a parson of a parsonage takes another benefice, without dispensation or being otherwise not qualified, &c., in both cases their first benefices are become void, and are in the law said to be void by cession: and to those benefices that the person had who was created bishop, the king shall present for that time, whoever is patron of them; and in the other case, the patron may present. Cowel.

But cession in the case of bishops does not take place till consecration. Dyer, 223. See

tit. Commendam, Advowson, II.

No person is entitled to dispensation, but chaplains of the king and others mentioned in the stat. 21 H. 8. c. 13.; the brethren, and the sons of lords and knights (not of baronets), and doctors and bachelors of divinity and law in the universities of this realm. 1 Comm. 392. See tit. Chaplain.

Both the livings must have cure of souls; where any tenant at rack rent shall be one and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerships, as a declaration, &c. Termes de la Ley. chanterships, prebends and sinecure rectories.

See tit. Chaplain, Parson.

In case of a cession under the statute, the church is so far void upon institution to the second living, that the patron may take notice of it, and present if he pleases; but it seems that a lapse will not incur from the time of instituiton against the patron, unless notice be given him; but it will from the time of induction. 2 Wils 200. 3 Burr. 1504. See tit. Advowson, II.

CESSOR, Lat.] He who ceaseth, or negleets so long to perform a duty, that he thereby incurs the danger of the law. Old

Nat. Br. 136 .- See tit. Cessavit.

CESSURE, OR CESSOR. Ceasing, giving over; or departing from. Stat. Westm.

2. c. 1. See tit. Cessavit.

CESTUI QUE TRUST, or, cestui a que trust.]-Is he in trust for whom, or to whose use or benefit, another man is enfeoffed or seized of lands or tenements. By stat. 29 Car. 2. c. 3. lands of cestui que trust may be delivered in execution. See tits. Trusts, Uses. CESTUI QUE USE, more accurately as

in old law tracts, cestui à que use, Fr. cestui a l'use de qui. He to whose use any other man is enfeoffed of lands or tenements. 1 Rep. 133. Fcoffees to uses were formerly deemed owners of the lands; but now the possession is adjudged in cestui que use, and without any entry he may bring assise, &c. Stat. 27 H. S. c. 10. Cro. Eliz. 46. See tit. Use.

CESTUI [a] QUE VIE. He for whose life any lands or tenements are granted. Perk.

97. See tit. Occupant.

CHACEA. A station of game more extended than a park, and less than a forest; and is sometimes taken for the liberty of chasing or hunting within such a district. And according to Blount it hath another signification, i. e. the way through which cattle are drove to pasture, commonly called in some places a drove way. Bracton, lib. 4. c. 44.

CHACEARE ad lepores, vel vulpes. To hunt hare or fox. Cartular. Abbat. Glaston.

MS. 87.

CHACURUS, from the Fr. chasseur.] A horse for the chase: or rather a hound or dog,

a courser. Rot. 7 Johan.

CHAFEWAX. An officer in Chancery, that fitteth the wax for sealing of the writs, commissions, and such other instruments as are there made to be issued out.

CHALDRON OR CHALDER of coals.

See tit. Coals.

CHALKING. The merchants of the staple require to be eased of diverse new impositions, as chalking, ironage, wharfage, &c. Rot. Parl. 50 E. 3.

CHALLENGE. Calumnia, from the Fr. challenger.] An exception taken either against persons or things. Persons as to jurors, or any one or more of them: or in cases of felony, by the prisoner at the bar against things,

109. The former is the most frequent signification in which this term is used, and which shall here be shortly mentioned; referring for further matter to tits. Jury, Trial, in this Dictionary.

There are two kinds of challenge; either to the array, by which is meant the whole jury as it stands arrayed in the panel, or little square pane of parchment, on which the jurors' names are written; or to the polls: by which are meant the several particular persons or heads in the array. 1 Inst. 156. 8: 4 B. & A. 471.

Challenge to jurors is also divided into challenge principal or peremptory; and challenge per cause, i. e. upon cause or reason alleged: challenge principal or peremptory, is that which the law allows without cause alleged, or further examination; as a prisoner at the bar, arraigned for felony, may challenge peremptorily the number allowed him by law, one after another, alleging no cause but his own dislike; and they shall be put off, and new taken in their places; but yet there is a difference between challenge principal, and challenge peremptory; the latter being used only in matters criminal, and barely without cause alleged; whereas the former is in civil actions for the most part, and by assigning some such cause of exception, as being found true the law allows. Staundf. P. C. 124. 157. Lamb. Eiren. lib. 4. c. 14.

Challenge to the favour, which is a species of challenge for cause, is where the plaintiff or defendant is tenant to the sheriff; or if the sheriff's son hath married the daughter of the party, &c. and is also when either party cannot take any principal challenge, but showeth cause of favour, and causes of favour are infinite. If one of the parties is of affinity to a juror, the juror hath married the plaintiff's daughter, &c. If a juror hath given a verdict before in the cause, matter, or title; if one labours a juror to give his verdict; if after he is returned, a juror eats and drinks at the charge of either party; if the plaintiff, &c. be his master, or the juror hath any interest in the thing demanded, &c. these are challenges to the favour. 2 Rol. Abr. 636. Hob. 294. See

tit. Jury.

CHALLENGE TO FIGHT.—It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c. 1 Hawk. P. C. c. 63. § 3.

Though slanderous words are not generally indictable as such, they are indictable if spoken with intent to provoke a duel. 6 E. R. 471. But they are not indictable merely because they may produce a challenge. 4 Oust.

By stat. 9 An. c. 14. § 8. (see tit. Gaming;) "whoever shall [assault and beat,] or challenge,

or provoke to fight, any other person or per-, Exchequer; and the standards of money, and sons whatsoever, upon account of any money won by gaming, playing, or betting at any of the games mentioned in that act, shall, on conviction by indictment or information, forfeit all their goods, chattels, and personal estate, and suffer imprisonment, without bail, in the county prison for two years."

The eighth section of the 9 Anne, c. 14. here mentioned, was repealed by the 9 G. 4. c.

31. See Gaming.

It is now every day's practice for the court of King's Bench to grant informations against persons sending challenges to justices of the peace, and in other heinous cases, and also to indict the party guilty of such acts. For further matter, see tit. Murder.

CHAMBERDEKINS, or Chamber deacons, were certain poor Irish scholars, clothed in mean habit, and living under no rule; or rather beggars banished England by stat. 1 H

5. c. 7. 8.

CHAMBERLAIN, Camerarius.] Is variously used in our laws, statutes, and chronicles; as first, there is Lord Great Chamberlain of England, to whose office belongs the goremment of the palace at Westminster; and upon all solemn occasions the keys of Westminster-Hall and the court of Requests are delivered to him; he disposes of the sword of state to be carried before the king when he comes to the parliament, and goes on the right hand of the sword next to the king's person: he has the care of providing all things in the House of Lords in the time of parliament; to him belongs livery and lodgings in the king's court, &c. And the gentleman usher of the black rod, yeoman usher, &c. are under his authority.

The office of Lord Great Chamberlain of England is hereditary; and where a person dies seized in fee of this office, leaving two sisters, the office belongs to both sisters, and they may execute it by deputy: but such deputy must be approved of by the king, and

must not be of a degree inferior to a knight. 2 Bro. P. C. 146. Svo. ed.

The Lord Chamberlain of the Household has the oversight and government of all officers belonging to the king's chamber (except the bed-chamber, which is under the groom of the stole), and also of the wardrobe; of artificers retained in the king's service, messengers, comedians, revels, music, &c. The serjeants at arms are likewise under his inspection; and the king's chaplains, physicians, apothecaries, surgeons, barbers, &c. And he hath under him a vice-chamberlain, both being always privy counsellors.

There were formerly chamberlains of the king's courts. 7 E. 6. c. 1. And there are chamberlains of the Exchequer, who keep a controlment of the pells, of receipts and exitus, and have in their custody the leagues and treaties with foreign princes, many ancient records, the two famous books of antiquity called Domesday, and the Black Book of the been adjudged that under the word covenant,

weights and measures are kept by them. There are also under-chamberlains of the Exchequer, who make searches for all records in the treasury; and are concerned in making out the tallies, &c. The office of chamberlain of the Exchequer is mentioned in the stat. 34 and 35 H. 8. c. 16. Besides these we read of a chamberlain of North Wales. Stowe, p. 641.

A chamberlain of Chester, to whom it belongs to receive the rents and revenues of that city; and when there is no Prince of Wales, and Earl of Chester, he hath the receiving and returning of all writs coming thither out of any of the king's courts. See tit. Counties

Palatine.

The chamberlain of London, who is commonly the receiver of the city rents payable into the chamber; and hath great authority in making and determining the rights of freemen; as also concerning apprentices, orphans, &c. See tit. London.

CHAMBERS OF THE KING, Regiæ cameræ.] The havens or ports of the kingdom are so called in our ancient records. Mare Claus. fol. 242.

CHAMBRE DEPEINTE. Anciently St. Edward's chamber, now called the painted

chamber. See tit. Parliament.

CHAMPARTY, or CHAMPERTY, campi partitio, because the parties in champerty agree to divide the land, &c. in question.] A bargain with the plaintiff or defendant in any suit, to have part of the land, debt, or other thing sued for, if the party that undertakes it prevails therein. Whereupon the Champertor is to carry on the party's suit at his own expense. See 4 Comm. 135: 1 Inst. 368. It is a species of maintenance, and punished in the same manner. This seems to have been an ancient grievance in our nation; for notwithstanding the several statutes of Westm. 1. 3 E. 1. c. 25: Westm. 2. 13 E. 1. c. 49: 28 E. 1. stat. 3. c. 11: and 33 E. 1. stat. 3, &c. and a form of a writ framed to them; yet stats. 4 E. 3. c. 11. and 32 H. 8. c. 9. enacted, that whereas former statutes provided redress for this evil in the King's Bench only, from henceforth it should be lawful for justices of the Common Pleas, justices of assize, and justices of peace in their quarter sessions, to inquire, hear and determine this and such like cases, as well at the suit of the king, as of the party: and this offence is punishable by common law and statute; the stat. 33 E. 1. stat. 3. makes the offenders liable to three years' imprisonment, and a fine at the king's pleasure. By the stat. 28 E. 1. c. 11. it is ordained, that no officer, nor any other, shall take upon him any business in suit, to have part of the thing in plea; nor none upon any covenant, shall give up his right to another; and if any do, and be convicted thereof, the taker shall forfeit to the king so much of his lands and goods as amounts to the value of the part purchased.

In the construction of these statutes, it hath

all kinds of promises and contracts are in- | or purchase any pretended right or title to cluded, whether by writing or parol: that rent | land, unless the vendor hath received the progranted out of lands in variance, is within the statute of champerty: and grants of part of the thing in suit made merely in consideration of the maintenance, or champerty, are within the meaning of this statute; but not such as are made in consideration of a precedent honest debt, which is agreed to be satisfied with the thing in demand when recovered. F. N. B. 172: 2 Inst. 209: 2 Rol. Abr. 113.

An agreement for sale, in which it was declared that the purchaser should be at liberty to continue actions, before then commenced, to recover rent then due, and damages for injuries done, upon the purchase, the purchaser paying the costs, and being to receive the damages, held not to be within the acts against champerty more especially (as the court said), where the purchaser is not an officer of the king. Williams v. Protheroe, 5 Bing. 309. Affirmed, 3 Y. & J. 179.

It is said not to be material, whether he

who brings a writ of champerty, did in truth suffer any damage by it; or whether the plea wherein it is alleged be determined or not. 1 Hawk. P. C. c. 84. A conveyance executed pending a plea, in pursuance of a bargain made before, is not within the statutes against champerty; and if a man purchase land of a party, pending the writ, if it be bona fide, and not to maintain, it is not champerty, F. N. P. 272; 2 Rol. Abr. 113. But it hath been held, that the purchase of land while a suit of equity concerning it is depending, is within the purview of the statute 28 E. 1. stat. 3. c. 11: Moor, 665. A lease for life, or years, or a voluntary gift of land, is within the statutes of champerty; but not a surrender made by a lessee to his lessor; or a conveyance relating to lands in suit, made by a father to his son, &c. 1 Hawk. P. C. c. 84.

The giving part of the lands in suit, after the end of it, to a counsellor for his reward, is not champerty, if there be no precedent bargain relating to such gift; but if it had been agreed between the counsellor and his client before the action brought, that he should have part of his reward, then it would be champerty. Bro. Champert. 3. And it is dangerous to meddle with any such gift, since it carries with it a strong presumption of champerty. 2 Inst. 564. If any attorney follow a cause to be paid in gross, when the thing in suit is recovered, it hath been adjudged that this is champerty. Hob. 117. An agreement to communicate such information as shall enable a party to recover money by action, and to exert influence for procuring evidence to substantiate the claim, on condition of receiving a portion of the money recovered, is illegal. Stanley v. Jones, 7 Bing. 369. Every champerty implies maintenance; but every maintenance is not champerty. Crom. Jur. 39: 2 Inst. 108.

To this head may be referred the provision of the stat. 32 H. 8. c. 9. that no one shall sell fits thereof for one whole year before such grant; or hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. But an equitable interest under a contract of sale may be the subject of sale; the sub-contract converts the original vendee into a tender of his equitable interest for his vendor, who acquires the same rights which he had to the benefits to be derived under the primary contract. Such sub-contracts are not within the doctrines of champerty and maintenance. 1 Swans. 56. See tit. Maintenance.

CHAMPERTORS. Are defined by statute to be those who move pleas or suits, or cause them to be moved, either by their own procurement, or by others, and sue them at their proper costs, to have part of the land in variance, or part of the gain. 33 E. 1. stat. 2.

See the preceding article.

CHAMPION, campio.] Is taken in the law not only for him that fights a combat in his own cause, but also for him that doth it in the place or quarrel of another. Bract. lib. 3. tract. 2 cap. 21. And in Sir Edward Bishe's notes on Upton, fol. 36. it appears that Henry de Ferneberg, for thirty marks fee, did by charter covenant to be champion to Roger abbot of Glastenbury, An. 42 Hen. 3. These champions, mentioned in our law books and histories, were usually hired; and any one might hire them except parricides, and those who were accused of the highest offences: before they came into the field, they shaved their heads, and made oath that they believed the persons who hired them were in the right, and that they would defend their cause to the utmost of their power; which was always done on foot, and with no other weapon than a stick or club, and a shield; and before they engaged, they always made an offering to the church, that God might assist them in the battle. When the battle was over, the punishment of a champion overcome, and likewise of the person for whom he fought, was various; if it was the champion of a woman for a capital offence, she was burnt, and the champion hanged; if it was a man, and not for a capital crime, he not only made satisfaction, but had his right hand cut off; and the man was to be close confined in prison, till the battle was over. Brac. lib. 2. c. 35. See tits. Battel, Appeal of Death.

Victory in the trial by battle is obtained, if either champion proves recreaut; that is, yields and pronounces the horrible word craven; a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished champion: since as a punishment to him for forfeiting the land of his principal, by pronouncing that shameful word, he is condemned as a recreant, to become infamous,

and not to be accounted liber et legalis homo; he is the chief administrator of justice next being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause. 3 Comm. 340.

CHAMPION OF THE KING, campio regis.] An ancient officer, whose office it is at the coronation of our kings, when the king is at dinner, to ride armed cap-a-pie into Westminster Hall, and by the proclamation of a herald, make a challenge, That if any man shall deny the king's title to the crown, he is there ready to defend it in single combat, &c. Which being done, the king drinks to him, and sends him a gilt cup with a cover full of wine, which the champion drinks, and hath the cup for his fee. This office, ever since the coronation of King Richard II. when Baldwin Freville exhibited his petition for it, was adjudged from him to Sir John Dymocke his competitor, (both claiming from Marmion,) and hath continued ever since in the family of the Dymockes; who hold the main Lincolnshire, hereditary from the Marmions, by grand serjeanty, viz. That the lord thereof shall be the king's champion, as abovesaid. Accordingly Sir Edward Dymocke performed this office at the coronation of King Charles II. And a person of the name of Dymocke performed it at the coronation of George the Third.

CHANCE. Where a man commits an unlawful act, by misfortune, or chance, and not by design, it is a deficiency of the will; as here it observes a total neutrality, and doth not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, as it affects the life of another, see tit. Murder.-It is to be observed however generally, that if any accidental mischief happens to follow from the performance of a lawful act, the party stands excused from all guilt; but if a man be doing any thing unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour. 1 Hal. P. C. 39. See tit. Chance, Medley.

CHANCELLOR, Cancellarius.] Was at first only a chief notary or scribe under the emperor, and was called cancellarius, because he sate intra cancellos, to avoid the crowd of the people. This word is by some derived from cancello, and by others from cancellis, an inclosed or separated place, or chancel, encompassed with bars, to defend the judges and other officers from the press of the pub-And cancellarius originally, as Lupanus thinks, signified only the register in court; Grapharios, scil qui conscribendis et excipendis judicum actis dant operam : but this name and officer is of late times greatly advanced, though he was dismissed from that office, and

to the Sovereign, who anciently heard equitable causes himself.

All other Justices in this kingdom are tied to the strict rules of the law in their judg. ments; but the Chancellor hath power to moderate the written law, governing his judgment by the law of nature and conscience. and ordering all things juxta æquum et bo. num; and having the king's power in these matters, he hath been called the keeper of the king's conscience. It has been suggested. that the Chancellor originally presided over a political college of secretaries, for the writing of treaties, grants, and other public business, and that the court of equity under the old constitution was held before the king and his council in the palace, where one supreme court for business of every kind was kept: and at first the Chancellor became a judge to hear and determine petitions to the king, which were referred to him; and in the end, as business increased, the people entitled their suits to the Chancellor, and not the king; and thus the Chancellor's equitable power had by degrees commencement by prescription. Hist. Cham. p. 3. 10. 44, &c.

Staunford says, the Chancellor hath two powers; one absolute, the other ordinary: meaning, that although, by his ordinary power, in some cases, he must observe the form of proceeding as other inferior judges; in his absolute power he is not limited by the law, but by conscience and equity, according to the circumstances of things. See post tit.

And though Polydore Virgil, in his Hiscalled the Conqueror, the founder of our Chancellors, yet Dugdale has shown that there were many Chancellors of England long before that time, which are mentioned in his Origines Juridicales, and catalogues of Chancellors; and Sir Edward Coke, in his fourth Institute saith, it is certain, that both the British and Saxon kings had their Chancellors, whose great authority under their kings were in all probability drawn from the reasonable custom of neighbouring nations and the civil law.

He that bears this chief magistracy, is styled the Lord High Chancellor of Great Britain, which is the highest honour of the long robe. There is also a Lord High Chancellor of Ireland. But the Lord Chancellor of Great Britain is to certain purposes keeper of the great seal of the United Kingdom. See stat. 53 G. 3. c. 24. for appointing the Vice-Chancellor of England.

A Chancellor may be made so at will, by patent, but it is said not for life; for being an ancient office, it ought to be granted as hath been accustomed. 2 Inst. 87. But Sir Edward Hyde, afterwards Earl of Clarendon, had a patent to be Lord Chancellor for life, not only in this, but in other kingdoms; for the patent declared void. 1 Sid. 338.

By the English stat. 5 Eliz. cap. 18. (not, offices; and it seems that the Lord Keeper extended to Ireland) the Lord Chancellor and Keeper have one and the same power; and therefore since that statute, there cannot be a Lord Chancellor and Lord Keeper at the same time; before there might and had been. 4 Inst. 78. King Henry V. had a great seal of gold, which he delivered to the Bishop of Durham, and made him Lord Chancellor, and also another of silver, which he delivered to the Bishop of London to keep. But the Lord Bridgman was Lord Keeper, and Lord Chief Justice of the Common Pleas, at the same time; which offices were held not to be inconsistent. Ibid.

By stat. 1 W. & M. c. 21. commissioners appointed to execute the office of Lord Chancellor, may exercise all the authority, jurisdiction, and execution of laws, which the Lord Chancellor or Lord Keeper, of right ought to use and execute, &c. since which statute this high office hath been several times in commission. Although this stat. 1 W. & M. c. 21. is not expressly extended to Ireland, yet see stat. 42 G. 3. c. 105. which increases the salary of the Lord Chancellor of Ireland to 10,000l. a year, by which it is provided that when the great seal there is in commis-

sion, the salary may be apportioned.
With respect to the LORD CHANCELLOR or LORD KEEPER (with reference to Great Britain, except where special mention is made of Ireland), the office is now created by the mere delivery of the King's great seal into his custody; whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord .- And the act of taking away this seal by the king, or of its being resigned or given up by the Chancellor, determines his office. (See 1 Sid. 338.) He is a privy counsellor by his office; and according to Lord Chancellor Ellesmere, prolocutor of the House of Lords by prescription.—To him belongs the appointment of all justices of peace throughout the kingdom.—Being formerly usually an Ecclesiastic (for none else were then capable of an office so conversant in writings) and presiding over the Royal Chapel, he became keeper of the King's conscience; ne became keeper of the king's conscience; visitor in right of the king of all hospitals and colleges of the king's foundation, and patron of all the king's livings under the value of twenty marks a year in the king's books. (38 Ed. 3. c. 3. F. N. B. 35. though Hob. 214, extends this value to twenty pounds.)—He is the general guardian of all infants idiots and livestics; and has the general contents. infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery. 3 Comm. 47.

The stat. 25 E. 3. c. 2. declares it to be

treason to slay the Chancellor (and certain

and Commissioners of the great seal are within this statute by virtue of stats. 5 Eliz. c. 18. and 1 W. & M. c. 21. already mentioned. See tit. Treason.

The Lord Chancellor, when there is no Lord High Steward, is accounted the first officer of the kingdom; and he not only keeps the king's great seal, but all patents, commissions, warrants, &c. from the king, are perused and examined by him before signed; and Lord Coke says the Lord Chancellor is so termed a cancellando from cancelling the king's letters patent, when granted contrary to law; which is the highest point of his jurisdiction. 4 Inst. 88. He by his oath swears well and truly to serve the king, and to do right to all manner of people, &c. In his judicial capacity, he hath divers assistants and officers, viz. the Vice-Chancellor of England, the Master of the Rolls, the Masters in Chancery, &c. in England and Ireland. In matters of difficulty, the Chancellor frequently calls one or more of the chief justices and judges to assist him in making his decrees; though in such cases they only give their advice and opinion, and have no share whatever of the judicial authority. See stat. 1 G. 3. c. 1. § 6. whereby his Majesty is empowered to grant 5000l. a year out of the Post-office

revenue to the Lord Chancellor.
By 2 & 3 W.4.c. 111. the King may grant an annuity of 5000l. per annum to the Lord Chancellor, or Lord Keeper, on his resignation of his office.

The Master of the Rolls in England has judicial power, and is an assistant to the Lord Chancellor when present, and his deputy when absent; but he has certain causes assigned him to hear and decree, which he usually doth on certain days appointed at the chapel of the Rolls, being assisted by one or more masters in chancery: he is, by virtue of his office, chief of the masters of chancery, and chief of the petty-bag office. See 3 G. 2. c. 30. tit. Decree.

The power of the Master of the Rolls in-Ireland is assimilated to that of the like officer in England, and his salary, &c. ascertained by stats. 41 G. 3. c. 25. 55 G. 3. c. 114.

The power of the Vice-Chancellor was introduced and established by stats. 53 G. 3. c. 24. (See also 6 G. 4. c. 84. and as to his secretary, &c. 55 G. 3. c. 64. p. 2.) The Crown is empowered to appoint by letters patent, some barrister of fifteen years' standing to be an additional Judge and Assistant to the Lord Chancellor Lord Kapper or Torde County Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal of the United Kingdom, in the discharge of their respective offices, to be called Vice-Chancellor of England, to hold such office during his good behaviour.

Such Vice-Chancellor is empowered to hear and determine all causes depending in the treason to slay the Chancellor (and certain court of chancery in England, either as a other judges) being in their places doing their court of law or equity, or incident to any

ministerial office of the said court, or submitted to such court or to the Lord Chancellor, &c. by any act of parliament, as the Chancellor, &c. shall direct; and all decrees, orders, &c. made by the Vice-Chancellor shall be valid, as acts of the court, but subject to be reversed or altered by the Lord Chancellor, &c. and no such decree, &c. shall be enrolled till signed by the Chancellor, &c. It is expressly provided that the Vice-Chancellor shall not have the power to reverse or alter any decree, &c. made by the Chancellor, &c. unless authorised by the Chancellor, &c. so to do; nor to reverse any decree or order of the Master of the Rolls.

Vice-Chancellor shall sit for the Chancellor, &c. when required, and while the Chancellor is also sitting, and have a separate court, and shall rank next to the Master of the Rolls, and have a secretary, train-bearer, usher, &c. He may be removed by address of both houses. His salary 5000l. per ann. to be paid out of the interest of unclaimed suitors' money. See

further tit. Chancery.

The Twelve Masters in Chancery sit some of them in court, and take notice of such references as are made to them, to be reported to the court, relating to matters of practice, the state of the proceedings, accounts, &c. and they also take affidavits, acknowledge deeds and recognizances, &c. See tit. Chan-

The Six Clerks in chancery transact and file all proceedings by bill and answer; and also issue out some patents that pass the great seal: which business is done by their under clerks, each of whom has a seat there, and whereof every six clerk has a certain number in his office, usually about ten; the whole body being called the sixty clerks. See tit. Chancery.

By 55 G. 3. c. 114. & 3—6. the Six Clerks in Ireland are allowed to sell their offices with the consent of the Master of the Rolls, &c.

The Cursitors of the court, four and twenty in number, make out all the original writs in chancery, which are returnable in C. B. &c. and among these the business of the several counties is severally distributed.

The Registrar is a place of great importance in this court, and he hath several deputies under him, to take cognizance of all orders and decrees, and enter and draw them up, &c. See tit. Chancery.

The Master of the Subpana Office issues

out all writs of subpæna.

The Examiners are officers in this court, who take the depositions of witnesses, and are to examine them and make out copies of the depositions.

The Clerk of the Affidavits files all affidavits used in court, without which they will

not be admitted.

The Clerk of the Rolls sits constantly in the rolls to make searches for deeds, offices, &c. and to make out copies.

The Clerks of the Petty-Bag Office, in

number three, have great variety of business that goes through their hands, in making out writs of summons to parliament, conge d'elires for bishops, patents for customers; liberates upon extent of statute-staple, and recovery of recognizances forfeited, &c. And also relating to suits for and against privileged persons, &c. And the clerks of this office have several clerks under them.

The Usher of the Chancery had formerly the receiving and custody of all money ordered to be deposited in court, and paid it back again by order: but this business was afterwards assumed by the masters in chancery, till by stat. 12 G. 1. c. 32. a new officer was appointed, called The Accountant General, to receive the money lodged in court, and convey the same to the Bank, to be there kept for the suitors of the court. See tit. Accountant General.

There is also a Serjeant at Arms, to whom persons standing in contempt are brought up by his substitute as prisoners.

A Warden of the Fleet, who receives such prisoners as stand committed by the court,

Besides these offices, there is a clerk of the crown in Chancery; clerk and controller of the hanaper; clerk for inrolling letters patent. &c. not employed in proceedings of equity, but concerned in making out commissions, patents, pardons, &c. under the great seal, and collecting the fees thereof. A clerk of the faculties, for dispensations, licences, &c.; clerk of the presentations, for benefices of the crown in the chancellor's gift; clerk of appeals, on appeals from the courts of the archbishop to the court of chancery: and divers other officers, who are constituted by the chancellor's commission.—By the 2 & 3 W. 4. c. 111. the offices of Keeper, or Clerk of the Hanaper, the Patentee of the Subpœna Office, the Registrar of Affidavits, the Clerk of the Crown in Chancery, the Clerk of the Patents, the Clerk of the Custodies of Lunatics and Idiots, the Prothonotary of the Court of Chancery, the Chaff Wax, the Sealer, the Clerk of the Presentations, the Clerk of Emoluments in Bankruptcy, the Clerk of Dispensations and Faculties, and the Patentee for the execution of the laws and statutes concerning Bankrupts, are abolished after 20th August, 1833, provided that nothing in the act shall determine any of the aforesaid officers then holding in possession or revenue, by any person appointed thereto, on or before the 1st June next, until the demise or resignation of such person. See further, tits. Chancery, Judges.

CHANCELLOR OF A DIOCESE; Or, OF A BISHOP. A person appointed to hold the Bishop's courts, and to assist him in matters of ecclesiastical law. This officer, as well as all other ecclesiastical ones, if lay or married, must be a doctor of the civil law, so created in some university. Stat. 87 H. 8. c. 17.

CHANCELLOR OF THE DUCHY OF LANCASTER.

An officer before whom, or his deputy, the berate intention of doing any mischief at all. court of the Duchy Chamber of Lancaster is This is a special jurisdiction concerning all manner of equity relating to lands holden of the king in right of the Duchy of Lancaster. Hob. 77. 2 Lev. 24. This is a thing very distinct from the county palatine, which hath also its separate chancery for sealing of writs and the like. 1 Ventr. 257. This Duchy comprises much territory which! lies at a vast distance from the county, as particularly a very large district surrounded by the City of Westminster. The proceedings in this court are the same as on the equity side of the courts of Exchequer and Chancery. 4 Inst. 206. So that it seems not to be a court of record: and it has been holden that those courts have a concurrent jurisdiction with the Duchy Court, and may take cognizance of the same causes. 1 C. R. 55. Toth. 145. Hard. 171. See tit Equity.

This court is held in Westminster-hall, and was formerly much used. Under the chan-cellor of the Duchy are an attorney of the court, one chief clerk or register, and several auditors, &c. See further tit. Counties Pa-

latine.

CHANCELLOR OF THE EXCHEQUER. Is likewise a great officer, who, it is thought by many, was originally appointed for the qualifying extremities in the Exchequer: he sometimes sits in court, and in the Exchequer Chamber; and, with the judges of the court, orders things to the king's best benefit. He is mentioned in stat. 25 H. 8. c. 16. and hath by the stat. 33 H. 8. c. 39. power with others, to compound for the forfeitures upon penal statutes, bonds and recognizances entered into to the king: he hath also great authority in the management of the royal revenue, &c. which seems of late to be his chief business, being commonly the first commissioner of the treasury. And though the court of equity in the Exchequer-Chamber was intended to be holden before the treasurer, chancellor, and barons, it is usually before the barons only. When there is a lord-treasurer, the Chancellor of the Exchequer is under treasurer.

As to the Chancellor of the Order of the Garter, see Stow's Annals, page 706.—Čhancellor of the Universities, see tit. Courts of the Universities .- The office of Chancellor in Cathedral Churches is thus described in the Monasticon. "Lectiones legendas in ecclesia per se vel per suum vicarium auscultare, male legentes emendare, scholas conferre, sigilla ad causas conferre literas capituli facere et consignare, libros servare, quotiescunque voluerit prædicare, prædicationis in ecclesia vel extra ecclesiam predicare, et cui voluerit prædicationis officium assignare." See Mon. Angl.

tom. 3. p. 24. 339.

CHANCE-MEDLEY. From the Fr. chance, lapsus, and meler, miscere.] Such killing of a man as happens either [in self de- | therefore, to maintain a suit in chancery, it is fence] on a sudden quarrel; or in the com-lalways alleged that the the plaintiff is incapamission of an unlawful act, without any deli- ble of obtaining relief at common law; and

1 Hawk. P. C. c. 30. § 1.

The self-defence here meant is that whereby a man may protect himself from an assault or the like in the course of a sudden brawl or quarrel, by killing him who assaults him. And that is what the law expresses by this word chance-medley, or as some rather choose to write it, chaud-medley; the former of which, in its etymology, signifies a casual affray, the latter an affray in the heat of blood or passion; both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by stat. 24 H. 8. c. 5. and in ancient law books, that it is properly applied to such killing as happens to self-defence, in a sudden rencounter. 4 Comm. 183. cites Stamf. P. C. 16: 3 Inst. 55.7: Foster, 275, 6. This being in fact a species of excusable homicide, comes more properly under the division of murder, and is therefore treated of in that place. See tit. Homicide. By 9 G. 4. c. 31. § 10. no punishment or forfeiture shall be incurred by any peron killing another by misfortune or in self-defence, or in any other manner without felony.

CHANCERY. CANCELLARIA.] The highest court of judicature in this kingdom next to the parliament, and of very ancient institution. The jurisdiction of this court is of two kinds; ordinary and extraordinary. The ordinary jurisdiction is that wherein the Lord Chancellor, Lord Keeper, &c. in his proceedings and judgments is bound to observe the order and method of the common law; and the extraordinary jurisdiction is that which this court exercises in cases of equity.

The Ordinary Court holds plea of recognizances acknowledged in the Chancery, writs of scire facias for repeal of letters patent, writs of partition, &c. and also of all personal actions, by or against any officer of the court; and by acts of parliament of several offences and causes. All original writs, commissions of bankrupt, of charitable uses, and other commissions, as idiots, lunacy, &c. issue out of this court, for which it is always open; and sometimes a supersedeas, or writ of privilege, hath been here granted to discharge a person out of prison. An habeas corpus, prohibition, &c. may be had from this in the vacation; and here a subpæna may be had to force witnesses to appear in other courts, where they have no power to call them. 4 Inst. 79: 1 Danv. Abr. 776.

The Extraordinary Court, or Court of Equity, proceeds by the rules of equity and conscience, and moderates the rigour of the common law, considering the intention rather than the words of the law. Equity being the correction of that wherein the law, by reason of its universality, is deficient. On this ground,

Vol. I.-40

by having lost his bond, &c. chancery never acting against, but in assistance of the common law, supplying its deficiencies, not contradicting its rules. A judgment at law not being reversable by a decree in chancery. Cro. Eliz. 220. But a bill in chancery may be brought to compel the discovery of the contents of a letter which would discharge the plaintiff of an action at law, before verdict obtained. 3 C. Rep. 17.

A modern writer, (Mr. Mitford, afterwards Lord Chancellor of Ireland, with the title of Lord Redesdale) remarks, that it is not a very casy task accurately to describe the jurisdiction of our courts of equity. They who have

attempted it have generally failed.

Early in the history of our jurisprudence, the administration of justice by the ordinary courts appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment; assuming the power of enforcing the principles, upon which the ordinary courts also decide when the powers of those courts or their modes of proceeding are insufficient for the purpose; -of preventing those principles, when enforced by the ordinary courts, from becoming, contrary to the purpose of their original establishment, instruments of injustice ; -and of deciding on principles of univeral justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. The courts of equity also administer to the ends of justice, by removing impediments to the fair decision of a question in the other courts; by providing for the safety of property in dispute, pending a litigation; by restraining the assertion of doubtful rights, in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigations and preventing unnecessary multiplicity of suits; and, without pronouncing any judgment on the subject, by compelling a discovery which may enable other courts to give their judgment; and by preserving testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. This establishment has obtained throughout the whole system of our judicial policy; most of the inferior branches of that system having their peculiar courts of equity: [e. g. the Court of Exchequer, courts of Wales, the counties palatine, cinque ports, &c.] and the Court of Chancery assuming a general jurisdiction in cases which are not within the bounds, or which are beyond the powers, of other jurisdictions. Mitford's Treatise on the Pleadings in Chancery, 8vo. 1787. 2d edition. See further as to the origin and jurisdiction of Courts of Equity in general, this Dictionary, tit. Equity.

this must be without any fault of his own, as; can be enumerated with any degree of accuracy in such a work as this.

There are in England two supreme courts of Equity, the High Court of Chancery, and the Exchequer; in the latter, except tithe suits, little business of importance is transacted.

The former is composed of three tribunals, respectively presided over by the LORD CHAN-CELLOR, the MASTER OF THE ROLLS, and the VICE CHANCELLOR. Before either of these judges may be brought any cases, except such as relate to lunatics, which must be heard by the Chancellor. The Vice Chancellor is compelled to hear all matters which the Chancellor may direct, in addition to those originally set down in his own court. The decrees, orders, and acts of the former are liable to be reversed, discharged, or altered in the latter.

The subordinate officers of the court are, the Masters, Six-Clerks, Registrars. The Masters are twelve in number, including the Master of the Rolls and Accountant General, or superintendant of the funds in court. The duties of these officers (who formerly had a seat on the woolsack in the House of Lords, and are still employed there, chiefly in carrying messages to the Commons,) are-to inquire into alleged impertinence or scandal in any bill or answer, and into the sufficiency of any answer or examination, -to take accounts of executors, trustees, and others,-to inquire into and decide upon the claims of creditors, legatees, and next of kin,—to appoint receivers of the proceeds of estates in litigation, fix their salaries, and examine their accounts,-to sell estates,-to appoint guardians and allow proper sums for the maintenance of infants,-to appoint Committees of the persons and estates of lunatics,-to decide upon the sufficiency of titles and tax the costs of all proceedings in court: they are always chosen from the bar. The Six Clerks are the only recognised attornies for conducting equitable suits, and by one of them every party in court must be represented. They file bills, answers, and other records; each of them is allowed twelve assistants, that is, ten sworn (sworn not to pillage the records), and two waiting clerks; and by these all the business of the court was transacted previous to the year 1729, when attornies in general were admitted, since which, their numbers have decreased from seventy-two to eighteen. There are four Registrars, two entering Registrars, and eight clerks, from whom vacancies are supplied. The four Registrars sit in turn before the three Judges, and take notes of all orders and decrees, which are afterwards entered in the general register kept in the office; they also make and sign copies of decrees for parties who may require them.

A suit in chancery is commenced by bill in the nature of a petition, praying relief, and a subpæna to compel the defendant to appear It is not therefore to be expected that all and answer. The bill having been filed, a the cases within the jurisdiction of this court writ of subpoena issues commanding the de-

fendant, under penalty of 100l. to appear per-, glish bill, by way of distinction from the prosonally on a certain day, wherever the court ceedings in suits within the ordinary jurisshall be, " to answer those things which shall be then and there objected to him." On it is endorsed, "at the suit of A. B." If the defendants are numerous, it is usual to insert three names in each subpæna; service being effected by leaving a label, and showing the body of the subpæna to the two first, and leaving it with the last. Having appeared, the defendant may demur, plead, or answer; all or any of them. If he answers, the plaintiff may file exceptions, that is, object to the sufficiency of the answer. To these exceptions the defendant either submits, or he suffers them to be referred to the Master, who hears the parties by their counsel, and reports his opinion upon the question to the court; from this decision an appeal lies to the court itself. The second answer, which may also be excepted to, having been put in, the plaintiff is allowed to amend. Amendments generally require a further answer, and a repetition of the proceedings. The cause being at issue, witnesses are examined upon interrogatories prepared by counsel, the answers to which are delivered orally, and immediately reduced to writing. The depositions are afterwards made public, and copies given out to the parties interested. The cause having been heard upon statements of the bill, answer, interrogatories, and depositions, the court pronounces judgment, from minutes of which, taken at the time, and from the senior counsel's brief, the Registrar draws up the decree, prefacing it by an abstract of such parts of the pleadings as have reference to the directions of the

The following is a general and comprehensive view of the nature and reason of the pleadings in chancery, extracted and abridged from Mr. Mitford's Treatise. See also 3 Comm. 446, &c.

Previous to entering on the subject it should be remembered, that chancery will not retain a suit for any thing under 10l. value, except in cases of charity, nor for lands under 40s.

A suit to the extraordinary jurisdiction of the court of chancery, on behalf of a subject merely, is commenced by preferring a bill (signed by counsel) in the nature of a petition to the lord chancellor, lord keeper, or lords commissioners of the great seal; or to the king himself, in his Court of Chancery, in case the person holding the seal is a party, or the seal is in the king's hand. But if the suit is instituted on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection, as the objects of a public charity, the matter of complaint is offered by way of information, given by the proper officer [usually the attorney-general.] Except in some few instances, bills and informations have been always in the English language; and a suit thus preferred

diction of the court, which, till the statute of 4 G. 2. c. 26. were entered and enrolled more anciently in the French or Roman tongue. and afterwards in the Latin; in the same manner as the pleadings in the other courts of common law.

Every bill must have for its object one or more of the grounds upon which the jurisdiction of the court is founded; and as that jurisdiction sometimes extends to decide on the subject, and in some cases is only ancillary to the decision of another court, or a future suit, the bill may-1, either complain of some injury which the person exhibiting it suffers, and pray relief, according to the injury; or, 2, without praying relief, may seek a discovery of matter necessary to support or defend another suit; or, 3, although no actual injury is suffered, it may complain of a threatened wrong; and, stating a probable ground of possible injury, may pray the assistance of the court to enable the plaintiff, or person exhibiting the bill, to defend himself against the injury whenever it shall be attempted to be committed.

· As the Court of Chancery has general jurisdiction in matters of equity which are not within the bounds, or which are beyond the powers, of inferior jurisdictions, it assumes a control over those jurisdictions, by removing from them suits which they are incompetent to determine. To effect this it requires the party injured to institute a suit in the Court of Chancery, the sole object of which is, the removal of the former suit, by means of the writ of certiorari; and the prayer of the bill used for this purpose is confined to that ob-

The bill except it merely prays the writ of certiorari [in which case it does not require any defence, nor can there be any pleading beyond the bill, requires the answer of the defendant or party complained of, upon oath; unless the party is entitled to privilege of peerage, or as a lord of parliament, or, unless a corporation aggregate is made a party. In the first case the answer is required upon the honor of the defendant, and in the latter under the corporation seal.

In the case of exhibiting a bill against a peer, the Lord Chancellor writes a letter to him, called a letter missive, and if he does not put in his answer, a subpæna issues, and then an order to show cause why a sequestration should not issue; and if he still stands out, then a sequestration is granted; for there can be no process of contempt against the person of a peer: the process is the same against a member of the House of Commons, except the letter missive.] See tit. Privilege, III.

An answer is thus required in the case of a bill, seeking the decree of the court on the subject of the complaint, with a view-1. To obtain an admission of the case made by the is therefore commonly termed a suit by En- bill either in aid of proof; or-2. To supply

the want of it—8. To obtain a discovery of the points in the plaintiff's case, controverted by the defendant, and—4. Of the grounds on which they are controverted—5. To gain a discovery of the case on which the defendant relies; and—6. Of the manner in which he means to support it.

If the bill seeks only the assistance of the court to protect the plaintiff against a future injury, the answer of the defendant, upon oath, may be required to obtain an admission of the plaintiff's title, and a discovery of the claims of the defendant, and the grounds on which those claims are intended to be sup-

ported.

When the sole object of the bill is a discovery of matter necessary to support or defend another suit, the oath of the defendant is required to compel that discovery; which oath, however, the plaintiff may, if he thinks proper, dispense with, by consenting to, or obtaining an order of court for the purpose; and this is frequently done for the convenience of parties.

To the bill thus preferred (unless it is merely for a certiorari) it is necessary for the person or persons complained of to make defence, or to disclaim all rights to the matters

in question.

As the bill calls upon the defendant to answer the several charges it contains, he must do so, unless he can dispute the right of the plaintiff to compel such answer; either, 1. From some impropriety in requiring the discovery sought; or, 2. From some objection to the proceeding to which the discovery is proposed to be assistant; or, 3. Unless by disclaiming all right to the matters in question, he shows a further answer from him to

be unnecessary.

The grounds on which defence may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel such answer, are various. 1. The subject of the suit may not be within the jurisdiction of a court of equity; 2. Some other court of equity may have the proper jurisdiction. 3. The plaintiff may not be entitled to sue, by reason of some personal disability. 4. The plaintiff may not be the person he pretends to be. 5. He may have no interest in the subject; or, 6. Though he has such interest he may have no right to call upon the defendant concerning it. 7. The defendant may not be the person he is alleged to be by the bill; or, 8. He may not have that interest in the subject to make him liable to the claims of the plaintiff .-- And notwithstanding all these requisites concur.-9. Still the plaintiff may not be entitled in the whole, or in part, to the relief or assistance he prays; or, 10. Even if he is so entitled, the defendant may also have rights in the subject which may require the attention of the court, and call for its interference to adjust the rights of all parties.-The effecting complete justice, and finally determining, as far as possible, all questions concerning the subject being the constant aim of courts of equity.

Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill; and may not be sufficient to protect him from making the discovery sought by it: and where there is no ground for disputing the plaintiff's right to relief, or if no relief is prayed, the impropriety or immateriality of the discovery may protect the defendant from making it.

The form of making defence varies according to the foundation on which it is made, and the extent in which it submits to the judge ment of the court.-If it rests on the bill, and, on the foundation of the matter there apparent, demand the judgment of the court, whether the suit shall proceed at all, it is termed A Demurrer. If on the foundation of new matter offered, it demands judgment whether the defendant shall be compelled to answer further, it assumes a different form, and is termed A Plea. If it submits to answer generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides, it is offered in shape still different, and is simply called An Answer. If the defendant disclaims all interest in the matters in question, his answer to the complaint made is different from all the others, and is termed A Disclaimer. And these several forms, or any of them, may be used together, if applied to separate and distinct parts of the bill.

A Demurrer, being founded on the bill itself, necessarily admits the truth of the facts contained in the bill, or in that part of it to which the demurrer extends; and therefore, as no fact can be in question between the parties, the court may immediately proceed to pronounce its definitive judgment on the demurrer: which, if favourable to the defendant, puts an end to so much of the suit as the demurrer extends to. A demurrer thus allowed consequently prevents any further proceed-

ing.

A Plea is also intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea: and it therefore admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence, the court will also give immediate judgment, supposing the facts stated in it to be true: but the judgment, if favourable to the defendant, is not definitive; for the truth of the plea may be denied by A Replication, and the parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea. The replication in this case concludes the pleadings, though if the truth of the plea is not supported, further proceedings may be had, which will be noticed presently.

An Answer generally controverts' the fact stated in the bill, or some of them; and states other facts to show the rights of the defendant, in the subject of the suit; but sometimes it admits the truth of the case made by the bill, and either with or without stating additional facts, submits the questions arising upon the case, thus made, to the judgment of the court. If an answer admits the facts stated in the bill, or such of them as are material to the plaintiff's case; and states no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary; the court will decide on the answer, considering it as true. So if the sole object of the suit is to obtain a discovery, there can be no proceeding beyond an answer by which the discovery is obtained. But if necessary to maintain the plaintiff's case, the truth of the answer, or of any part of it may be denied, and the sufficiency of the bill may be asserted by a replication, which in this case also concludes the pleadings according to the present practice of the court.

If a Demurrer or Plea is overruled upon argument, the defendant must make a new defence. This he cannot do by a second demurrer of the same extent with that overruled; for although, by a standing order of the court, a cause of demurrer must be set forth in the pleading, yet if that is overruled, any other cause appearing on the bill may be offered on argument of the demurrer, and, if valid, will be allowed, the rule of court affecting only the costs. But after a demurrer has been overruled, new defence may be made by a demurrer less extended, or by plea or answer.-And after a plea has been overruled, defence may be made by demurrer, by a new plea, or by an answer, and the proceeding upon the new defence will be the same as if it had been originally made.

A Disclaimer neither asserting any fact, nor denying any right sought by the bill, ad-

mits of no further pleading.

Suits thus instituted are sometimes imperfect in their frame, or become so by accident before their end has been obtained; and the interests in the property in litigation may be changed, pending the suit, in various ways .--To supply the defects arising from any such circumstances, new suits may become necessary, to add to, or continue, or obtain the benefit of, the original suit. A litigation commenced by one party, sometimes renders necessary a litigation by another party, to operate as a defence, or to obtain a full decision on the rights of all parties. [And bills filed for this purpose are termed cross bills.]-Where the court has given judgment on a suit, it will in some cases permit that judgment to be controverted, suspended, or avoided by a second suit; and sometimes a second suit becomes necessary to carry into execution a judgment of the court. Suits instituted for any of these purposes are also commenced by bill; and hence arises a variety of distinctions of the kinds of bills necessary to answer the several purposes; as bills of review (which among other causes may be brought, where new matter is discovered, in time, after subpana, in order to answer, upon affidavit of

3 Comm. 448. &c. and tits. Review, Revivor ;] and on all the different kinds of bills there may be the same pleadings as on a bill used for instituting an original suit.

It frequently happens, that pending a suit, the parties discover some error or defect in some of the pleadings; and if this can be rectified by amendment of the pleadings, the court will in many cases permit it. This indulgence is most extensive in the case of bills: which being often framed upon an inaccurate state of the case, it was formerly the practice to supply their deficiencies, and avoid the consequences of errors by special replications: but this tending to long and intricate pleading, the special replication, requiring a rejoinder in which the defendant might in like manner supply defects in his answer, and to which the plaintiff might sur-rejoin, the special replication is now disused for this purpose: and the court will in general permit a plaintiff to rectify any error or supply any defect in his bill, either by amendment or by a supplemental bill, and will also permit, in some cases, a defendant in like manner to complete his answer, either by amendment or by a further answer.

If the plaintiff conceives a defendant's answer to be insufficient to the charges contained in the bill, he may take exceptions against it, on which it is referred to a Master to report, whether it be sufficient or not; to which report exceptions may be also made. The answer, replication, and rejoinder, &c. being settled, and the parties come to issue, witnesses are examined upon interrogatories, either in court, or by commission in the country, wherein the parties usually join; and when the plaintiff and defendant have examined their witnesses, publication is made of the depositions, and the cause is set down for hearing, after which follows the decree.

If however in the process of the cause the parties come to an issue of fact, which by the common law is triable by a jury, the Lord Chancellor, in this case, delivers the record into the King's Bench to be tried there; and after trial had, the record is remanded into Chancery, and judgment given there. Trials and issues at law are frequently directed by the court, which in that case makes an interlocutory decree or order, that after trial the parties shall resort to the court on the equity reserved.

Interlocutory orders and decrees are also made on other occasions; as for injunctions till a hearing, where the injury sustained by the plaintiff requires such immediate inter-

ference. See tit. Injunction.

If the plaintiff dismisses his own bill, or the defendant obtains the dismissal of it for want of prosecution, or if the decree is in behalf of the defendant, the bill is dismissed with costs to be taxed by a master. Stat. 4 and 5 An. c. 16. If the defendant does not appear, on being served with the process of the decree made), bills of revivor, &cc. [See the service of the writ, an attachment issues

out against him; and if a non est inventus is waste, or to stay suits at law commenced), returned, an attachment with proclamation and a certificate thereof brought to the subgoes forth against him: and if he stands further out in contempt, then a commission of rebellion may be issued, for apprehending him, and bringing him to the Fleet prison; in the execution whereof the persons to whom directed may justify breaking open doors. If the defendant stands further in contempt, a serjeant at arms is to be sent out to take him; and if he cannot be taken, a sequestration of his land may be obtained till he appears. And if a decree, when made, is not obeyed, being served upon the party under the seal of the court, all the aforementioned processes of contempt may issue out against him, for his imprisonment till he yields obedience to it.— The Court of Chancery, notwithstanding its very extensive power binding the person only, and not the estate or effects of the defendant. And in this sense, we presume, it is said that it is no court of record. 1 Danv. Ab. 749. and Chan. Rep. 193. Howard v. Suffolk. See Treatise of Equity—and tit. Costs.

Where there is any error in a decree in matter of law, there may be a bill of review, which is in nature a writ of error; an appeal to the House of Lords. Old authorities have been quoted, that a writ of error lies returnable in B. R .- and that a judgment of Chancery may be referred to the twelve judges. 4 Inst. 80: 3 Bulst. 116. But it is now usual to appeal to the House of Lords; which appeals are to be signed by two counsel of eminence, and exhibited by way of petition; the petition of appeal is lodged with the clerk of the House of Lords, and read in the house, whereon the appellee is ordered to put in his answer, and a day fixed for hearing the cause; and after counsel heard, and evidence given on both sides, the Lords affirm or reverse the decree of the Chancery, and finally determine the cause by a majority of votes, &c. Though it is to be observed on an appeal to the Lords from a decree in Chancery, no proofs will be permitted to be read as evidence, which were not made use of in the Chancery. Preced. Canc. 212.

For further matter as to the jurisdiction of the court, its modes of proceeding, and the various cases wherein it relieves, &c. vide Comm. Dig. (2 v.) tit. Chancery, and Mr. Mitford's treatise before quoted.

There are several statutes relating to the Court of Chancery. By stat. 28 E. 1. c. 5. the Court of Chancery is to follow the king. By stat. 18 E. 3. stat. 5. the oaths of the clerks in Chancery are appointed. The chancellor and treasurer may correct errors in the Exchequer. Whosoever shall find himself grieved with any statute, shall have his remedy in Chancery. 36 E. 3. c. 9: 31 E. 3. stat. 1. c. 12. And see 15 R. 2. c. 12: 17 R. 2. c. 6. & 4 H. 8. c. 9.

No subpæna, or other process of appearance, shall issue out of Chancery, &c. till after a pana office. Stat. 4 and 5 Ann. c. 16. Persons in remainder, or reversion of any estate, after the death of another, on making affidavit in the Court of Chancery, that they have cause to believe such other person dead, and his death concealed by the guardian, trustees, or others, may move the Lord Chancellor to order such guardian, trustees, &c. to produce the person suspected to be concealed; and if he be not produced, he shall be taken to be dead, and those in reversion, &c. may enter upon the estate; and if such person be abroad, a commission may be issued for his being viewed by commissioners. Stat. 6 Ann. c. 18.

Infants under the age of twenty-one years, seised of estates in trust, or by way of mortgage, are enabled by statute to make conveyances thereof; or they may be compelled thereto, by order of the Court of Chancery, &c. upon petition and hearing of the parties concerned. See tits. Infant, Lunatic.

By 12 G. 1. c. 32 and 33. the power of the Masters in Chancery in England was abridged, with respect to the suitors' money, which is now to be paid into the Bank of England: and an additional stamp duty, on writs, processes, &c. is granted for relief of the suitors, and as a common stock of the Court of Chan-

All orders and decrees made and signed by the Master of the Rolls shall be deemed and taken to be good and valid orders and decrees of the Court of Chancery; but not to be inrolled till signed by the Lord Chancellor, and subject to reversal, &c. by him. Stat. 3 G. 2. c. 30.

Where a defendant does not appear after subpæna issued, but keeps out of the way to avoid being served with the process; on affidavit that he is not to be found, and suspected to be gone beyond sea, or to abscond, &c. the Court of Chancery will make an order for his appearance at a certain day; a copy of which order is to be published in the London Gazette, &c. and then, if he do not appear, the plaintiff's bill shall be taken pro confesso, and the defendant's estate sequestered, &c. But persons out of the kingdom, returning in seven years, may have a rehearing in six months, and be admitted to answer; otherwise to be barred by final decree. See stat. 1 W. & M. 4. c. 36.

By 12 G. 2. c. 24. part of the suitor's cash is to be placed out at interest, for defraying the charge of the Accountant General's office, in England. And see 23 G. 2. c. 25. for making good deficiencies to the clerk of the Hanaper, and for augmenting the income of the

Master of the Rolls.

By 1 G. 3. c. 1. § 6. the king is empowered to grant a sum not exceeding 5000l. per annum to the Chancellor.

By 4 G. 3. c. 32. part of the suitor's cash bill is filed (except bills for injunctions to stay unclaimed to be placed at interest, to be applied to the Accountant General's third clerk, and other purposes.

By 5 G. 3. c. 28, 80,000l, of the suitors' cash was placed at interest; and 200l. per annum paid thereout half-yearly, to each of the eleven masters of the court, and 400l. per annum additional, under 46 G. 3. c. 128.

By 9 G. 3. c. 19. 20,000l. more of the suitors' money was placed at interest: out of which 460l. per annum is paid in salaries, viz. 250l. to the Accountant General; 50l. to his first clerk; 40l. to his second clerk: and 1201. to his fourth clerk, in lieu of all fees. The residue being brought to account. By 46 G. 3. c. 129. further claims and allowances are given out of the same fund, viz. to the first and second clerk, 100l.; third clerk 2001.; fourth clerk, 2501.; fifth and sixth clerks, 1801.; seventh clerk, 2001.; and also 180l. per annum each to four additional clerks; and 200l. per annum to the Accountant-General for furniture, books, and stationary. By 14 G. 3. c. 43. 50,000l. more was in like manner placed out; and out of the interest thereof, and the surplus interest under 12 G. 2. c. 24: 5 G. 3. c. 28: and 9 G. 3. c. 19. the Chancellor is by his order to direct the rebuilding of the Six Clerk's Office, and apply 10,000l. (and by 20 G. 3. c. 33. 3000l. more) for building the Registrar's and Accountant

ant General and his successors. By 15 G. 3. c. 22. part of Lincoln's Inn garden was vested in the Accountant General, in trust, for the purposes in the last act, as to the Registrar's and Accountant General's office.

General's offices; to be vested in the Account-

By 15 G. 3. c. 56. the Lord Chancellor may apply certain sums to be raised, as mentioned in 14 G. 3. for the purposes of this and that act; the Six Clerk's Office to be built on part of Lincoln's-Inn gardens and the same vested in the Six Clerks.

The stat. 17 G. 3. c. 59. regulates the leases to be made from time to time, by the Master of the Rolls for the time being.

By stat. 32 G. 3. c. 42. 300,000l. further is to be employed in building offices for the

Masters in Chancery, &c.
By 46 G. 3. c. 128. § 2. the Lord Chancel. lor, in Great Britain, is empowered to order an annuity of 1500l. to be paid (out of the suitor's money unapplied) to Masters in Chancery on their resigning after 20 years' standing: or in case of permanent infirmity.

See 36 G. 3. c. 90: 6 G. 4. c. 74: 7 G. 4. c. 43: 1 W. 4. cc. 36. 60. 65. as to transfer and application of funds of infants and other incapacitated persons, &c. under the authority

of Courts of Equity.

For other parts of this subject, see tits. Accountant-General, Equity, Infants, Incapacitated Persons, Mortgages, Injunction, Interrogatories, Lunatics, Trustees, &c. &c.

CHANGER. An officer belonging to the king's mint, whose office consists chiefly in exchanging coin for bullion, brought in by merchants or others; it is written after the old way; chaunger. Stat. 6 H. 2. c. 12.

CHANTER, cantator.] A singer in the choir of a cathedral church: and is usually applied to the chief of the singers. This word is mentioned in 13 Eliz. c. 10. At St. David's cathedral in Wales, the chanter is next to the bishop; for there is no dean. Cam. Britan.

CHANTRY, or CHAUNTRY, cantaria.] A little church, chapel, or particular altar, in some cathedral church, &c. endowed with lands, or other revenues, for the maintenance of one or more priests, daily to sing mass, and officiate Divine service for the souls of the donors, and such others as they appointed. See stat. 1 E. 6. c. 14. which in effect put an end to these chantries, by declaring it not to be lawful for any person to enter for non-performance of the conditions on which they were founded.

Of these chantries, mention is made of fortyseven belonging to St. Paul's church in London, by Dugdale, in his history of that church.

CHAPEL, capella, Fr. chapelle.] Is either adjoining to a church, for performing Divine service; or separate from the mother-church, where the parish is wide, which is commonly called a chapel of ease. And chapels of ease are built for the ease of those parishioners who dwell far from the parochial church, in prayer and preaching only; for the sacraments. [marriages,] and burials, ought to be performed in the parochial church. 2 Rol. Abr. 340. But see tit. Marriage as to marriages in chapels, and as to building churches and chapels in populous parishes. See 7 and 8 G. 4. c. 72.

These chapels are served by inferior curates, provided at the charge of the rector. &c. And the curates are therefore removeable at the pleasure of the rector or vicar; but chapels of ease may be parochial, and have a right to sacraments and burials, and to a distinct minister, by custom; (though subject in some respect to the mother-church:) and parochial chapels differ only in name from parish churches, but they are small, and the inhabitants within the district are few. In some places chapels of ease are endowed with lands or tithes, and in other places by voluntary contributions: and in some few districts there are chapels which baptize and administer the sacraments, and have chapel wardens; but these chapels are not exempted from the visitation of the ordinary, nor the parishioners who resort thither from contributing to the repairs of the mother-church, especially if they bury there; for the chapel generally belongs to, and is, as it were, a part of the mother-church; and the parishioners are obliged to go to the mother-church, but not to the chapel. 2 Rol. Abr. 289. And hence it is said, that the offerings made to any chapel are to be rendered to the mother-church; unless there be a custom that the chaplain shall have them.

Public chapels annexed to parish churches shall be repaired by the parishioners, as the church is; if any other persons be not bound to do it. 2 Inst. 589. Besides the beforementioned chapels, there are free chapels, perpetually maintained and provided with a minister, without charge to the rector or parish; or that are free and exempt from all ordinary jurisdiction; and these are where some lands or rents are charitably bestowed on them. Stat. 37 H. 8. c. 4: 1 E. 6. c. 14. There are also private chapels, built by noblemen and others, for private worship, in or near their own houses, maintained at the charge of those noble persons to whom they belong, and provided with chaplains and stipends by them; which may be erected without leave of the bishop, and need not be consecrated, though they anciently were so, nor are they subject to the jurisdiction of the ordinary.

There are likewise chapels in the Universities belonging to particular colleges, which, though they are consecrated, and sacraments are administered there, yet they are not liable to the visitation of the bishop, but of the founder. 2 Inst. 363.—See tits. Churches,

Marriage.

By stats. 7, 8 G. 4. c. 30. § 2. (9 G. 4. c. 56. § 2. Ireland.) persons unlawfully and maliciously setting fire to any church or chapel, or to any dissenting chapel duly registered, are guilty of felony, and shall suffer death as felons. And by § 8. persons riotously and tumultuously assembling, and by force demolishing, pulling down, or destroying, or beginning so to do, any such buildings, are also guilty of felony, punishable in like manner.

guilty of felony, punishable in like manner. CHAPELRY, capellania.] Is the same thing to a chapel, as a parish to a church;

being the precinct and limits thereof.

CHAPÉRON, Fr.] A hood or bonnet, anciently worn by the knights of the garter, as part of the habit of that noble order: but in heraldry it is a little escutcheon fixed in the forehead of the horses that draw a hearse at a funeral.

CHAPITRES, Lat. capitula, Fr. Chapitres, i. e. chapters of a book.] Signify in our common law a summary of such matters as are to be inquired of, or presented before justices in eyre, justices of assize, or of peace, in their sessions. *Britton*, cap. 3. useth the word in this signification: and chapiters are now most commonly called articles, and delivered by the mouth of the justice in his charge to the inquest; whereas, in ancient times (as appears by Bracton and Britton), they were, after an exhortation given by the justices for the good observation of the laws and the king's peace, first read in open court, and then delivered in writing to the grand inquest, for their better observance; and the grand jury were to answer upon their oaths to all the articles thus delivered them, and not put the judges to long and learned charges to little or no purpose, for want of remembering the same, as they do now, when they think their duty well enough performed, if they only present those few of many misdemeanors which are brought before them by way of indictment.

It is to be wished that this order of delivering written articles to grand juries were still observed, whereby crimes would be more effectually punished: in some inferior courts, as the court leet, &c. in several parts of England, it is usual at this day for stewards of those courts to deliver their charges in writing to the jurors sworn to inquire of offences. Horn, in his mirror of Justices, expresses what those articles were wont to contain. Lib. 3. cap. des Articles in Eyre. And an example of articles of this kind, may be found in the book of assises, F. 138.

CHAPLAIN, capellanus.] Is most commonly taken for one that is depending upon the king, or other moble person, to instruct him and his family, and say Divine service in his house, where there is usually a private chapel for that purpose. The king, queen, prince, princess, &cc. may retain as many chaplains as they please; and the king's chaplains may hold such number of benefices of the king's gift, as the king shall think fit

to bestow upon them.

An archbishop may retain eight chaplains; a duke, or a bishop, six; marquis or earl, five; viscount, four; baron, knight of the garter, or lord chancellor, three; a duchess, marchioness, countess, baroness (being widows), the treasurer, and controller of the king's house, the king's secretary, dean of the chapel, almoner, and Master of the Rolls, each of them two; the Chief Justice of the King's Bench, and Warden of the Cinque Ports, one; all of which chaplains may purchase a licence or dispensation, and take two benefices with cure of souls. Stat. 21 H. 8. c. 13.

But both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurcrships, chanterships, prebends, and sinecure rectories. A dispensation in this case can only be granted to hold one benefice more, except to clerks who are of the privy council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice, without a dispensation: and in that case, if the first is under 8l. per annum [in the king's book], it is so far void that the patron may present another clerk, or the bishop may deprive: but till deprivation, no advantage can be taken by lapse. See tit. Advowson.—But independent of the statute, a clergyman by dispensations may hold any number of benefices, if they are all under 81. per annum, except the last, and then by a dispensation under the statute, he may hold one more. 1 Comm. 392 in n. See Plurality.

By the 41st canon of 1603, the two benefices must not be further distant from each other than thirty miles: and the person obtaining the dispensation, must at least be a Master of Arts in one of the Universities. But the provisions of this canon are not enforced or regarded in the temporal courts. 2 Bl. Rep. 278. See ante tit. Canon Law.

Also every Judge of the King's Bench and Common Pleas; and Chancellor and Chief Baron of the Exchequer, and the King's Attor- | large, and may hold their livings during their ney and Solicitor-General, may each of them I have one chaplain, attendant on his person, having one benefice with cure, who may be non-resident on the same by stat. 25 H. S. c.

And the Groom of the Stole, Treasurer of the King's Chamber, and Chancellor of the Duchy of Lancaster, may retain each one chaplain. Stat. 33 H. 8. c. 28. But the chaplains under these two last statutes are not entitled to dispensations under stat. 21 H. 8. If a nobleman hath his full number of chaplains allowed by law, and retains one more, who has dispensation to hold plurality of livings, it is not good. Cro. Eliz. 723.

If one person has two or more of the titles or characters mentioned in stat. 21 H. 8. c. 13. united in himself, he can only retain the number of chaplains limited to his highest degree. 4 Co. 90. The king may present his own chaplains, i. e. waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject without dispensation; but a king's chaplain, being beneficed by the king, cannot after-wards take a living from a subject, but by a dispensation according to the stat. § 29. 1 Salk. 161.

A person retaining a chaplain, must not only be capable thereof at the time of granting the instrument of retainer, but he must continue capable of qualifying till his chaplain is advanced; and therefore if a duke, earl, &c. retain a chaplain, and die; or if such a noble person be attainted of treason; or if an officer, qualified to retain a chaplain, is removed from his office, the retainer is determined: but where a chaplain hath taken a second benefice before his lord dieth, or is attainted, &c. the retainer is in force to qualify him to enjoy the benefices.

And if a woman that is noble by marriage, afterwards marries one under the degree of nobility, her power to retain chaplains will be determined; though it is otherwise where a woman is noble by descent, if she marry under degree of nobility; for in such case her retainer before or after marriage is good. A Baroness, &c. during coverture, may not retain chaplains: if she doth, the lord, her husband, may discharge them, as likewise her former chaplains, before their advancement.

4 Rep. 118.

A chaplain must be retained by letters testimonial under hand and seal, or he is not a chaplain within the statute; so that it is not enough for a spiritual person to be retained by word only to be a chaplain, by such person as may qualify by the statutes to hold livings, &c. although he abide and serve as chaplain in the family. And where a nobleman hath retained and thus qualified his number of chaplains, if he dismisses them from their attendance upon any displeasure, after they are preferred, yet they are his chaplains at Vol. I.—41

lives; and such nobleman, though he may retain other chaplains in his family, merely as chaplains, he cannot qualify any others to hold pluralities whilst the first are living: for if a nobleman could discharge his chaplain when advanced, to qualify another in his place, and qualify other chaplains, during the lives of chaplains discharged, by these means he might advance as many chaplains as he would, whereby the statutes would be evaded. 4 Rep. 90.—See further tits. Advowson, Parson, 3 Comm. 392. n.

CHAPTER, capitulum.] A congregation of clergymen under the dean in a cathedral church: congregatio clericorum in ecclesia cathedrali, conventuali, regulari, vel collegiata. This collegiate company is metaphorically termed capitulum, signifying a little head, it being a kind of head, not only to govern the diocese in the vacation of the bishoprick, but also in many things to advise and assist the bishop when the see is full, for which, with the dean, they form a council. Co. Lit. 103. The chapter consists of prebendaries or canons, which are some of the chief men of the church, and therefore are called capita ecclesiæ: they are a spiritual corporation aggregate, which they cannot surrender without leave of the bishop, because he hath an interest in them; they, with the dean, have power to confirm the bishop's grants: during the vacancy of an archbishoprick, they are guardians of the spiritualities, and as such have authority, by the stat. 25 H. 8. c. 21. to grant dispensations; likewise as a corporation they have power to make leases, &c.

When the dean and chapter confirm grants of the bishop, the dean joins with the chapter, and there must be the consent of the major part; which consent is to be expressed by their fixing of their seal to the deed, in one place, and at one time, either in the chapter house, or some other place; and this consent is the will of many joined together. Dyer, 233. They had also a check on the bishop at common law; for till stat. 32 H. S. c. 28. his grant or lease would not have bound his successors, unless confirmed by the dean and

chapter. 1 Inst. 103.

A chapter is not capable to take by purchase or gift, without the dean, who is the head of the body; but there may be a chapter without a dean, as a chapter of the collegiate church of Southwell; and grants by, or to them, are as effectual as other grants by dean and chapter. Yet where there are chapters without deans, they are not properly chapters; and the chapter in a collegiate church, where there is no episcopal see, as at Westminster and Windsor, is more properly called a col-

Chapters are said to have their beginning before deans; and formerly the bishop had the rule and ordering of things without a dean and chapter, which were constituted afterwards: and all the ministers within his dio-

cese were as his chapter, to assist him in a remainder or reversion of land may charge spiritual matters. 2 Rol. Rep. 454. 3 Co. 75. it; because of the possibility that the land The bishop hath the power of visiting the dean and chapter: but the dean and chapter have nothing to do with what the bishop land for life, and grants the reversion or retransacts as ordinary. 3 Rep. 75. the bishop and chapter are but one body, yet and dies, and the tenant for life is heir to the their possessions are for the most part divided : as the bishop hath his part in right of his for he had the possession by purchase, though bishoprick; the dean hath a part in right of he had the fee by descent. Bro. 11. 15. his deanery; and each prebendary hath a certain part in right of his prebend; and each too is incorporated by himself.

Deans and chapters have some of them ecclesiastical jurisdiction in several parishes (besides that authority they have within their own body,) executed by their officials: also temporal jurisdiction in several manors belonging to them, in the same manner as bishops, where their stewards keep courts, &c. 2. Rol. Abr. 229. It has been observed, that though the chapter have distinct parcels of the bishop's estate assigned for their maintenance, the bishop hath little more than a power over them in his visitations, and is scarce allowed to nominate half of those to their prebends, who were originally of his family: but of common right it is said he is their patron. Rol. Ibid .- They are now sometimes appointed by the king, sometimes by the bish-

op, and sometimes elected by each other. 1 Comm. 383. See further tits. Dean, Prebend. CHARGE AND DISCHARGE. A charge is said to be a thing done that bindeth him that doth it, or that which is his, to the performance thereof: and discharge is the removal, or taking away of that charge. Termes de Ley. Land may be charged divers ways; as by grant of rent out of it, by statutes, judgments, conditions, warrants, &c. Lands in fee-simple may be charged in fee: and where a man may dispose of the land itself, he may charge it by a rent, or statute, one way or other. Lit. sect. 648. Moor Ca. 129. Dyer, 10. If one charge land in tail, and land in fee-simple, and die; the land in fee only shall be chargeable. Bro. Cha. 9.

Lands intailed may be charged in fee, if the estate-tail be cut off by recovery: if tenant in tail charge the land, and after levy a fine or suffer a recovery of the lands, to his own use; this confirms the charge, and it shall continue. 1 Rep. 61. A tenant for life charges the land, and then makes a feoffment to a stranger, or doth waste, &c. whereby it is forfeited, he in reversion shall hold it charged during his (the tenant's) life: and if one have a lease for life or years of land, and grant a rent out of it; if after he surrenders his estate, yet the charge shall continue so long as the estate had endured, in case it had not been surrendered. 1 Rep. 67. 145. Dyer, 10.

If one jointenant charge land, and after release to his companion and die, the survivor shall hold it charged: but if it had come to him by survivorship, it would be otherwise,

will come into possession, and then the possession shall be charged. But where one leases Though mainder over to A. B. who charges the land, fee; in this case he shall hold it discharged, Rep. 62.

If a rent be issuing out of a house, &c. and it falls down, the charge shall remain upon the soil. 9 E. 4.20. But when the estate is gone upon which the charge was grounded. there, generally, the charge is determined. Co. Lit. 349. And in all cases where any executory thing is created by deed, there by consent of all the parties it may be by deed defeated and discharged. 10 Rep. 49. See tits. Estate, Limitations, Mortgage, &c.

CHARITABLE CORPORATION. A 80ciety of persons in the late reign obtained a statute to lend money to industrious poor, at 51. per cent. interest on pawns and pledges, to prevent their falling into the hands of the pawn-brokers, and therefore they were called the Charitable Corporation; but they likewise took 51. per cent. for the charge of officers, warehouses, &c. And in the fifth year of King G. 2. the chief officers of this corporation, by connivance of the principal directors, absconded and broke, and defrauded the public proprietors of great sums; for the relief of the sufferers wherein, as to part of their losses, several statutes were made and enacted. See stats. 5 G. 2. cc. 31, 32. 7 G. 2. c. 11. CHARITABLE USES. The laws against

devises in mortmain (see that title) do not extend to any thing but superstitious uses; it is therefore held, that a man may give lands for maintenance of a school, an hospital, or any other charitable uses. But as it was apprehended, from recent experience, that persons on their death-beds might make large and improvident dispositions, even for these good purposes, and defeat the political end of the statutes of mortmain, it is therefore enacted by stat. 9 G. 2. c. 36. that no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any charitable uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calender months before the death of the donor; and enrolled in the Court of Chancery within six months after its execution (except Stock in the public funds, and which must be transferred at least six calender months previous to the donor's death;) and unless such gift be made to take effect immediately and be without power of revocation; and that all other gifts shall be void. The Two Universities, their colleges, and the scholars on the foundation of the colleges of Eton, Winchester, and Westminster, are exempted out of this act; but with the proviso, that no college 6 Rep. 76. 1 Shep. Abr. 325. He that hath shall be at liberty to purchase more advowsons than are equal in number to one moiety decree the respondent to pay all the costs, of the fellows or students on their foundations.

A grant of lands in trust perpetually to repair, and if need be, rebuild a vault and tomb standing on the land, and permit the same to be used as a family vault, is not within the abovementioned statute. 6 Taunt. 359. 3 M. § S. 407. S. C. 2. Marsh. 61.

If there be a deed one limitation in which is within the above stat, the other limitations in the same deed, which are not within that act, are not therefore avoided. *Id. Ibid.*

A conveyance of copyhold lands to charitable uses in the life-time of the party, is within the stats. 3 B. & A. 149. and therefore must

be made pursuant to that act.

Corporations are excepted out of the statutes of Wills (32 H. 8. c. 1. 34 H. 8. c. 5. See tits. Devise, Wills,) to prevent the extension of gifts in mortmain; but now by construction of stat. 43 Eliz. c. 4. (see the next paragraph) it is held that a devise to a corporation for a charitable use is valid, as operating in the nature of an appointment, rather than of a bequest. And indeed the piety of judges hath formerly carried them great lengths in supporting charitable uses (Pre. Ch. 272); it being held that the stat. of Eliz. which favours appointments to charities, supersedes and repeals all former statutes; (Gilb. Rep. 45.1 P. Wms. 248.) and supplies all defects of insurances. (Duke, 84.) And therefore not only a devise to a corporation, but a devise by a copyhold tenant, without surrender, to the use of his will, and a devise, nay even a settlement by tenant in tail without either fine or recovery, if made to a charitable use, is good by way of appointment. Moor, 890. 2 Vern. 453. Pre. Ch. 16. 2 Comm. 375.

The king as parens patriæ has the general superintendance of all charities, which he exercises by the Lord Chancellor. And therefore whenever it is necessary, the Attorney General, at the relation of some informant, who is usually called the relator, files ex officio, an information in the Court of Chancery, to have the charity properly established. Also by stat. 43 Eliz. c. 4. authority is given to the Lord Chancellor or Lord Keeper, and to the Chancellor of the Duchy of Lancaster, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree: which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the Petty Bag Office in the Court of Chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may

decree the respondent to pay all the costs, though no such authority is given by the statute. An appeal lies from the chancellor's decree to the House of Peers, notwithstanding any loose opinion to the contrary. 3 Com. 427.

By the act abolishing the Welsh courts of judicature, and those of the county palatine of Chester, the Lord Chancellor, &c. may appoint trustees for charitable uses in lieu of the

judges abolished by the act.

CHARITY. Whenever a charitable object fails, from whatever cause, the crown has a right to interfere, and direct to what charitable purpose the fund shall be applied. Simon v. Barber. Danger v. Druce. I Tamlyn 14. 32. The Court will not administer the funds of a foreign Charity. Id. 79. Charitable Funds in Ireland are administered by certain commissioners appointed by the Irish act. 40 G. 3. c. 75.

Lands given to alms and aliened, may be recovered by the donor. 13 Ed. 1. c. 41.

Lands, &c. may be given for the maintenance of houses of correction, or of the poor, stat. 35. Eliz. c. 7. § 27. See tit. Prisoners.

Money given to put out apprentices, either by parishes or public charities, to pay no duty. 8 Ann. c. 9. § 40. See tit Apprentices.

A bequest of money to put out children as apprentices, is a public Charity within this statute. Burr. S. C. 697.

See this subject treated at length under tit. Mortmain.

The stat. 52 G. 3. c. 101. provides that in all cases of breach, or supposed breach, of any trust created for charitable purposes, or whenever the order of a court of equity may be necessary for the administration of any such trust, any two persons may present a petition to the Lord Chancellor, Lord Keeper, &c. Master of the Rolls or Court of Exchequer, praying relief, and which shall be heard in a summary way upon affidavits, &c.; and the order made thereupon shall be conclusive, unless appeal be made within two years to the House of Lords. Every petition shall be signed by the party, and attested by the solicitor, and allowed by the Attorney or Solicitor General.

The stat. 52 G. 3. c. 102. for registering and securing of charitable donations, directs a memorial or statement of all real and personal estates, and of the annual income, investment, and general and particular objects of all charities, and charitable donations for the benefit of poor persons in England and Wales, which shall have been or may hereafter be founded, with the names of the founders or benefactors, and of the person in whose custody the deeds relating thereto may be, and the trustees, feoffees, and possessors of the estates, shall be registered by such trustees, &c. in the office of the clerk of the peace, within which such poor persons shall be.

CHARITIES. By 58 G. 3, c. 91. his Majesty is empowered to appoint commissioners to inquire into the nature and management of

charities in England and Wales, connected with education, and to report thereon half yearly'to his Majesty and Parliament. stat. 59 G. 3. c. 81. the powers of this act are extended to all charities and charitable donations, and institutions whatever, in England and Wales; and by c. 91. of the same session, the commissioners are authorised to make application to Courts of Equity regarding the management of the states and funds belonging to any such Charities. The two Universities and the Colleges therein, the Colleges of Eton, Westminster, and Winchester, the Charter House, Harrow, and Rugby Schools, all cathedrals, colleges, and free schools, having special visitors, and all Jewish, Quaker, or Roman Catholic places of education, are exempted from the operation of the act.

The powers of the above acts continued by several acts, and expired 1st July, 1830. By 1 and 2 W. 4. c. 34. his Majesty may appoint twenty commissioners to examine and investigate all funds destined for education of the poor, or for charities, in England and Wales; and to investigate all frauds and abuses, or misconduct in their management: the commissioners, or five of them, to report half yearly. No remuneration to be made to any commissioner who is a member of Parliament, nor to any more than ten commissioners, but their travelling expences to be allowed. If the estates or funds cannot be applied to the purpose for which they were destined, the com-missioners are to report specially. The commissioners have power to require trustees and managers of Charities, &c. to render an account of the funds, but no such person is to be obliged to travel more than ten miles from his abode. The commissioners may examine on oath: all examinations taken before them are to be transmitted to the secretary of the commissioners, at their office in Westminster. Persons summoned and wilfully omitting to appear, or produce deeds, papers, &c. shall be liable to be fined by the Courts of King's Bench or Exchequer. The Universities and Schools above-mentioned are exempted from the act, as are also Charities and Institutions supported by voluntary contribution. The act is to continue in force till 1st Sept. 1833, and the end of the next session of Parliament: and see the 2 and 3 W. 4. c. 57. continuing and extending the provisions of 59 G. 3. c. 91. for facilitating applications to Courts of Equity regarding the management of Estates of Charities.

CHARRE OF LEAD. A quantity of lead consisting of thirty ptgs, each pig containing six stone wanting two pounds, and every stone being twelve pounds. Assisa de ponderibus. Rob. 3. R. Scot, cap. 22.

CHARTA. A word made use of not only for a charter, for the holding an estate; but

also a statute. See Magna Charta.

CHARTE. A cart, chart, or plan which mariners use at sea, mentioned in stat. 14

Car. 2. c. 33.

CHARTEL, Fr. cartel.] A letter of defiance, or challenge to a single combat: in use heretofore to decide difficult controversies at law, which could not otherwise be determined. Blount. A cartel is now used for the instrument or writing for settling the exchange of prisoners of war: and a cartel ship, for the ship used on such occasion, which is privileged from capture.

CHARTER, Lat. charta, Fr. chartres, i. e. instrumenta.] Is taken in our law for written evidence of things done between man and man; whereof Bracton, lib. 2. cap. 26. says thus, Fiunt aliquando donationes in scriptis, sicut, in chartis, ad perpetuam rei memoriam, propter breven hominum vitam, &c. And Briton, in his 39th chapter, divides charters into those of the king, and those of private persons. Charters of the king are those whereby the king passeth any grant to any person or body politic; as a charter of exemption, of privilege, &c. See tit. King.

Charter of Pardon, whereby a man is for-

Charter of Pardon, whereby a man is forgiven a felony, or other offence committed against the king's crown and dignity; and of these there are several sorts. See tit. Par-

Charter of the forest, wherein the laws of the forest are comprised, such as the charter of Canutus, &c. Kitch. 314: Fleta, lib. 3. c.

Charters of private persons are deeds and instruments for the conveyance of lands, &c. And the purchaser of lands shall have all the charters, deeds, and evidences as incident to the same, and for the maintenance of his title. Co. Lit. 6. Charters belong to a feoffee, although they be not sold to him, where the feoffer is not bound to a general warranty of the land; for there they shall belong to the feoffer, if they be sealed deeds or wills in writing; but other charters go to the tertenant. Moor. Ca. 687. The charters, belonging to the feoffer in case of warranty the heir shall have, though he hath no land by descent, for the possibility of descent after. 1 Rep. 1. See tit. Magna Charta.

CHARTERER. In Cheshire, a freeholder is called by this name. Sir P. Ley's Antiq. fol. 356. It is commonly used for the person who charters a ship for a voyage.

CHARTER-PARTY, Lat. charta partita, Fr. chartre parti, i. e. a deed of writing divided.] Is what among merchants and seafaring men is commonly called a pair of indentures, containing the covenants and agreements made between them, touching their merchandize and maritime affairs. 2 Inst. 673. Charter parties of affreightment settle agreements, as to the eargo of ships, and bind the master to deliver the goods in good condition at the place of discharge, according to agreement; and the master sometimes obliges himself, ship, tackle and furniture, for performance. See the subject fully treated. Abbott on Shipping, part 3. cap. 1. tit. of the Contract of Affreightment by Charter-party: and see Bac. Ab. Merchant (H) of Charter- if he dies in the voyage, his executors are to be answered are rate. Mallon de Jur. Mari-

The common law construes charter parties, as near as may be, according to the intention of them, and not according to the literal sense of traders, or those that merchandize by sea; but they must be regularly pleaded. In covenant by charter-party, that the ship should return to the river of Thames, by a certain time, dangers of the sea excepted, and after, in the voyage, and within the time of the return, the ship was taken upon the sea by pirates, so that the master could not return at the time mentioned in the agreeement; it was adjudged that this impediment was within the exception of the charter-party, which extends as well to any danger upon the sea by pirates and men of war, as dangers of the sea by shipwreck, tempest, &c. Stile, 132. 2 Rol. Ab. 248. So where a charter-party of affreightment, provided that in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such abatement out of the freight as they should think reasonable: held, that an inability of the ship to proceed to sea for want of men to navigate her, was within the proviso; although such want of men proceeded from the ravages of the small-pox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room. Beatson v. Shank. 3 East, 233.

Whether a Charter-party is under Seal or not, an action grounded on it must be in the name of the party, and not of another to whom he may have assigned his interest. 10 East, 279: 2 Taunt. 407: 2 New. Rep. 411. By a Charter-party on a voyage from Liver-pool to the West Indies, and from thence to London or Liverpool, it was agreed that a brig should be made staunch, and during the voyage kept tight, staunch, and strong, at the owner's expence, and that the freighter should pay freight at 200l. per month, for any time beyond six months that she might be employed, the pay to commence from the day of sailing until her arrival into dock at the homeward port of discharge. The vessel was obliged to remain 28 days at St. Domingo, for the purpose of repairs, being done at the expence of the owner; it was held that during these days the vessel was employed by the freighter within the terms of the Charterparty. 5 Barn. & C. 167: 7 Dow. & Ry.

A ship is freighted at so much per month that she shall be out, covenanted to be paid after her arrival at the port of London; the ship is cast away coming up from the Downs, but the lading is all preserved, the freight shall in this case be paid; for the money becomes due monthly by the contract, and the place mentioned is only to ascertain where the money is to be paid, and the ship is entitled to wages, like a mariner, that serves by the month, who

if he dies in the voyage, his executors are to be answered pro rata. Molloy de Jur. Maritim. 260. If a part owner of a ship refuse to join with the other owners in setting out of the ship, he shall not be entitled to his share of the freight; but by the course of the Admiralty, the other owners ought to give security if the ship perish in the voyage, to make good to the owner standing out, his share of the ship. Sir L. Jenkins, in a case of this nature, certified that by the Law Marine and course of the Admiralty, the plaintiff was to have no share of the freight; and that it was so in all places; for otherwise there would be no navigation. Lex Mercat. See tits. Admiralty, Freight, Insurance: and see the subject learnedly discussed, Ld. Tenterden on Shipping, part 3. chap. 1: Bac. Ab. Merchant, Charter-parties. (7th cd.)

CHARTIS REDDENDIS. An ancient writ which lay against one that had charters of feoffment entrusted to his keeping, and refused to deliver them. Rev. Oriv. 159.

fused to deliver them. Reg. Orig. 159. CHASE, Fr. chasse.] In its general signification is a great quantity of woody ground lying open, and privileged for wild beasts and wild fowl: and the beasts of chase properly extend to the buck, doe, fox, martin, and roe; and in common and legal sense to all the beasts of the forest. Co. Lit. 233.

A chase differs from a park in that it is not inclosed; and also in that a man may have a chase in another man's ground, as well as in his own: being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. 2 Comm. 38.

But if one have a chase within a forest, and he kill or hunt any stag or red deer, or other beast of the forest, he is fineable. 1 Jones's Rep. 278.

A chase is of a middle nature between a forest and a park, being commonly less than a forest, and not endowed with so many liberties, as the courts of attachment, swainmote, and justice-seat; though of a larger compass, and stored with greater diversity both of keepers, and wild beast or game, than a park.

A chase differs from a forest in this, because it may be in the hands of a subject, which a forest in its proper and true nature cannot; and from a park, in that it is not enclosed, and hath a greater compass, and more variety of game, and officers likewise. Crompt. in his Jurisd. fol. 148. says a forest cannot be in the hands of a subject, but it forthwith loseth its name, and becomes a chase; but, fol. 197. he says, a subject may be lord and owner of a forest, which though it seems a contradiction, yet both sayings are in some sort true; for the king may give or alienate a forest to a subject, so as when it is once in the subject, it loseth the true property of a forest, because the courts called the justice-seat, swainmote, &c. do forthwith vanish, none being able to make a Lord Chief Justice in Eyre of the forest, but the king; yet it may be granted in

so large a manner, as there may be attach-; tends to all moveable and immoveable goods: ment, swainmote, and a court equivalent to a justice-seat. Manwood, part 2. c. 3, 4.

A forest and a chase may have different officers and laws: every forest is a chase & quiddam amplius; but any chase is not a forest. A chase is ad communem legem, and not to be guided by the forest laws; and it is the same of parks. 4 Inst. 314. A man may have a free chase as belonging to his manor in his own wood, as well as a warren and a park in his own grounds; for a chase, warren, and park, are collateral inheritances, and not issuing out of the soil; and therefore if a person hath a chase in other men's grounds, and after purchaseth the grounds, the chase remaineth. Ibid. 318. If a man have freehold in a free chase, he may cut his timber and wood growing upon it, without view or licence of any; though it is not so of a forest; but if he cut so much that there is not sufficient for covert, and to maintain the game, he shall be punished at the suit of the king; and so if a common person hath a chase in another's soil, the owner of the soil cannot destroy all the covert, but ought to leave sufficient thereof, and also browsewood, as hath been accustomed. 11 Rep. 22. And it has been adjudged, that within such chase, the owner of the soil by prescription may have common for his sheep, and warren for his coneys, but he cannot surcharge with more than has been usual, nor make coney-burrows in other places than hath been used. Ibid. If a free chase be enclosed, it is said to be a good cause of seizure into the king's hands.

It is not lawful to make a chase, park, or warren, without licence from the king under

the broad seal. See tits. Forest, Game, Park. CHASTITY. The Roman law (Ff. 48. 8. 1.) justifies homicide in defence of the chastity either of one's self or relations; and so also, according to Selden (de Legib. Hebræor. l. 4. c. 3.) stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her. (Bac. Elm. 34: 1 Hawk. P. C. 71.) So the husband or father may justify killing a man, who at-tempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. 1 Hal. P. C. 485, 6.

And without doubt the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle, that runs through our own and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. 4 Comm. 181.

See tits. Murder, Adultery.

CHATTELS, or CATALS, catalla.] All goods, moveable and immoveable, except such as are in nature of freehold, or parcel of it. The Normans call moveable goods only, chat- over, see tit. Devise. tels; but this word by the common law ex-

and the civilians denominate not only what we call chattels, but also land, bona. But no estate of inheritance or freehold can be termed in our law goods and chattels; though a lease

for years may pass as goods.

Chattels are either personal or real: personal, as gold, silver, plate, jewels, household stuff, goods and wares in a shop, corn sown on the ground, carts, ploughs, coaches, saddles, &c. Cattle, &c. as horses, oxen, kine, bullocks, sheep, pigs, and all tame fowls and birds, swans, turkeys, geese, poultry, &c.; and these are called personal in two respects; one, because they belong immediately to the person of a man; and the other, for that being any way injuriously withheld from us we have no means to recover them but by personal action.

Chattels real, saith Coke (1 Inst. 118.), are such as concern or savour of the realty; as terms for years of land, the next presentation to a church, estates by a statute merchant, statute staple, elegit, or the like. And these are called real chattels, as being interests issuing out of, or annexed to, real estates; of which they have one quality, viz. immobility, which denominates them real; but want the other, viz. a sufficient, legal, indeterminate duration; and this want it is that constitutes them chattels. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life. 2 Comm.

But deeds relating to a freehold, obligations, &c. which are things in action, are not reckoned under goods and chattels; though if writings are pawned, they may be chattels; and by the stats. 7 and 8 G. 4. c. 29. § 5. the larceny of certain specified securities for money and deeds is made punishable in like manner as the larceny of any chattel of like value, &c.; and by § 23, 4. the stealing of any paper, parchment, &c. evidencing the title to any real estate, is created a misdemeanor, punishble by fine and imprisonment.

Money hath been accounted not to be goods or chattels; nor are hawks or hounds, such being feræ naturæ. 8 Rep. 33: Terms de Ley, 103: Kitch. 32. By 7 and 8 G. 4. c. 29. § 3. stealing any dog, or any bird or beast, ordinarily kept in confinement, and not the subject of larceny, subjects the party to pay the value of the animal, and a penalty not exceeding 201. Trover lies for any reclaimed ani-

mal. 1 Saund. 84. 2. (b.)

A collar of SS. garter of gold, buttons, &c. belonging to the dress of a knight of the garter, are not jewels to pass by that name in personal estate, but ensigns of honour. Dyer 59. As to devises of chattels with remainder

Chattels personal are, immediately upon

the death of the testator, in the actual posses. | Nor selling gum of one denomination for sion of the executor, as the law will adjudge, though they are at never so great a distance from him; chattels real, as leases for years of houses, lands, &c. are not in the possession of the executor till he makes an entry, or hath recovered the same; except in case of a lease for years of tithes, where no entry can be made. 1 Nels. Abr. 437.

Leases for years, though for a thousand years, leases at will, estate of tenants by elegit, &c. are chattels, and shall go to the executor; all obligations, bills, statutes, recognizances, and judgments, shall be as a chattel in the executors, &c. Bro. Obl. 18. F. N. B. 120.

But if one be seised of land in fee on which trees and grass grow, the heir shall have these, and not the executor; for they are not chattels till they are cut and severed, but parcel of the inheritance. 4 Rep. 63: Dyer, 273. The game of a park, with the park, fish in the pond, and doves in the house, with the house, go to the heir, &c. and are not chattels: though if pigeons, or deer, or tame, or kept alive in a room; or if fish be in a tank, &c. they go to the executors as chattels. Noy. 124: 11 Rep. 50: Keilw. 88. See tits. Heir, Executor.

An owner of chattels is said to be possessed of them: as of freehold the term is, that a person is seised of the same.

CHAUD-MEDLEY. See tit. Chance-Med-

CHAUMPERT. A kind of tenure mentioned Pat. 35 Ed. 3. To the hospital of Bowes, in the isle of Guernsey. Blount. CHAUNTRY-RENTS, are rents paid to

the crown by the servants or purchasers of chauntry-lands. See stat. 22 Car. 2. c. 6.

CHEATS, are deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 Hawk. P. C. c. 71. See tit. False Pretences.

Changing corn by a miller, and returning bad corn in the stead, is punishable by indictment, being an offence against the public. Sess. Ca. 217. So to run a foot race fraudulently, and by a previous understanding with the seeming competitor to win money. Mod. 42. So if an indented apprentice enters for a soldier, and, having received the bounty, is discharged on his master's demanding him, he may be indicted. 1 Hawk. P. C. c. 71. § 3. n. But selling beer short of the just and due measure, is not indictable as a cheat. 1

that of another. Sayer, 205. Nor selling wrought gold, as and for gold of the true standard; the offender not being a goldsmith. Cowp. 323.

The distinction laid down as proper to be attended to in all cases of the kind is this .-That in such impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable; but the party is left to his civil remedy for redress of the injury done him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable. Burr. 1125. See Rex v. Robson, Russ. & Ry. 413.

As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound), so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally. Thus, if a minor goes about the town, and pretending to be of age, defrauds many persons, by taking credit for a considerable quantity of goods, and then insisting on his nonage; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. 1 Hawk. P. C. c. 71. \S 6. n.

CHECKROLL. A roll or book containing the names of such as are attendants on, and in pay to the king or other great personages, as their household servants. Stat. 19. Car. 2. c. 1. It is otherwise called the chequer-roll, and seems to take its etymology from the Ex-

chequer. Stat. 14 H. 8. c. 13.

CHESTER. See tit. County-Palatine. By stat. 1 W. 4. c. 70. it is enacted that (after the 12th Oct. 1830) the king's writ shall be directed and obeyed, and the jurisdiction of the Courts of King's Bench, Common Pleas, and Exchequer, shall extend and be exercised over and within the county of Chester, and the county and the city of Chester (and the several counties in Wales), in like manner, to the same extent, and to and for all intents and purposes whatsoever, as in and over the counties of England (not being counties palatine); and all original writs for Chester, &c. shall be issued by the cursitor for London and Middlesex; and the proofs thereon, &c. shall be issued, &c. by officers of K. B. and C. P. to be named by the chief justices of those courts for that purpose. See § 13 & 15 of the act.

CHEVAGE, chevagium, from the Fr. chef, caput.] A tribute or sum of money formerly paid by such as held land in villenage to their lords in acknowledgment, and was a kind of head or poll money. Of which Bracton, lib. 1. c. 10. says thus: Chevagium dicitur recognitio in signum subjectionis et domini de capite suo. Lambard writes this word chi-Wils. 301: Say. 146: 1 Black. Rep. 274. vage; but it is more properly chiefage; and

anciently the Jews, whilst they were admitted to live in England, paid chevage or poll money to the king, as appears by Pat. 8 Ed. 1. par. 1. It seems also to be used for a sum of money yearly given to a man of power for his protection, as a chief head or leader: but Lord Coke says, that in this signification it is a great misprision for a subject to take sums of money, or other gifts yearly of any, in name of chevage, because they take upon them to be their chief heads or leaders. Co. Lit. 140. Spelman in v. Chevagium says, it is a duty paid in Wales, pro filiabus maritandis.

CHEVANTIA. A loan or advance of money upon credit; Fr. chavarice. Goods,

stock. Mon. Ang. tom. 1. p. 629.

CHEVISANCE, from the Fr. chevir, i. e. Venir à chef de quelque chose, to come to the head or end of a business.] An agreement or composition made; an end or order set down between a creditor or debtor; or sometimes an indirect gain in point of usury, &c. In some ancient statutes it is often mentioned, and seems commonly used for an unlawful bargain or contract.

CHIEF-RENTS. The rents of freeholders of manors often so called, i. e. reditus capitales. They are also denominated quitrents, quieti reditus; because thereby the tenant goes quit and free of all other services.

2 Comm. 42. See tit. Rents. CHIEF (TENANTS IN). Tenants in capite, holding immediately under the king, in right of his crown and dignity. See tits.

Capite, Tenure.

CHILDREN. As to devises to, see tit. Devise. See also tits. Descent, Heir, Limitation, Poor, Posthumous Child, &c. As to the murder or concealing the death of infants, see tit. Bastards. As to injuries to female children, see 9 G. 4. c. 31. § 17. making it a misdemeanor to carnally know and abuse any girl above ten and under twelve years of age; and further, tit. Rape, and as to carry-

ing them off, see tit. Abduction.

By 9 G. 4. c. 31. § 21. any person who by force or fraud shall take or detain any child under ten years of age, with intent to deprive the parents (or other persons having the lawful care of such child) of the possession of such child, or with intent to steal any article upon or about the child's person; and any person harbouring any child so taken, and all abettors in such offence are declared guilty of felony, punishable by transportation, or imprisonment, whipping, &c. A proviso is added in favour of the fathers of illegitimate children; and see 10 G. 4. c. 34. § 23. 25. as to like offences in Ireland.

By § 14. a woman by secretly burying or otherwise endeavouring to conceal the birth of a child, is made guilty of a misdemeanor, and punishable by imprisonment, with or without hard labour not exceeding two years; and by § 31. persons counselling, aiding, or abetting, the commission of any misde-

meanor, punishable under this act, shall be proceeded against and punished as a principal offender.

CHILDWIT. Sax.] A fine or penalty of a bond-woman unlawfully begotten with child. Cowel says it signifieth a power to take a fine of your bond-woman gotten with child without your consent; and within the manor of Writtle in Com. Essex, every reputed father of a base child pays to the lord for a fine 3s. 4d. where it seems to extend as well to free as bond-women; and the custom is there called childwit to this day. See tit. Bastard.

CHIMIN, Fr. chemin; via.] In law phrase is a way; which is of two sorts; the king's

highway, and a private way.

The king's highway (chiminus regius) is that in which the king's subjects and all others under his protection, have free liberty to pass, though the property of the soil where the way lies, belongs to some private person.

A private way is that in which one man or more have liberty to pass, through the ground of another, by prescription or charter; and this is divided into chimin in gross and chimin appendant.

Chimin in gross is where a person holds a

way principally and solely in itself.

Chimin appendant is that way which a man hath as appurtenant to some other thing: as if he rent a close or pasture, with covenant for ingress and egress through some other ground in which otherwise he might not pass. Kitch. 117: Co. Lit. 56. See tits. Highway, Trespass, Way.

CHIMINAGE, chiminagium. Toll due by custom for having a way through a forest; and in ancient records it is sometimes called pedagium. Cromp. Jurisd. 189: Co. Lit. 56.

See Chart. Forest. cap. 14.

CHIMNEY-MONEY, otherwise called hearth-money. A duty to the crown imposed by stat. 14 Car. 2. c. 2. of 2s. for every hearth in a house. Now long since repealed.

CHIMNEY-SWEEPERS. By the 4 and 5 W. 4. c. 45. the 28 G. 3. c. 48. is repealed. By § 2. no child under ten years of age is to be apprenticed to a chimney-sweeper. By § 4. indentures of boys under ten years of age are to be void. But by § 5. indentures executed previous to the act, are to remain in force. By § 3. chimney-sweepers taking apprentices are to be householders. By § 6. apprentices under fourteen years of age are to be so designated by a brass plate on a leathern cap. § 7. imposes a penalty not exceeding 10l., or less than 40s., on a chimney-sweeper for employing children under fourteen years of age, not apprentices. By § 8. requiring any person to ascend a flue, to extinguish fire, is declared a misdemeanor. By § 9. the binding or assignment of apprentices to chimney-sweepers shall take place by consent of two justices, and be indorsed on the indenture, which indenture and consent to be in the form annexed to the act; and every indenture

in any other form shall be void. By § 10. the | It is used for a meeting in a church or vestry. age of the apprentice to be inserted in the indenture. By § 11. no chimney-sweeper shall let out to hire to any other person, for the purpose of chimney-sweeping, any child already or hereafter to be bound apprentice under the act. By § 12. boys are to have a trial of the business previous to being apprenticed. By § 13. justices are to examine boys who have been upon trial before binding, and if boys are unwilling, shall refuse their sanc-By § 14. no chimney-sweeper shall have more than two boys on trial, or more than four apprentices at the same time. By § 15. streets are not to be hawked or called by chimney-sweepers, under a penalty not exceeding 40s. By § 16. apprentices are not to be evil-treated by their employers, under a penalty not exceeding 10l., or less than 40s. By § 17. complaints preferred by apprentices or their employers to be inquired into by justices. By § 18. all withs and partitions between any chimney or flue which after the passing of the act shall be built or rebuilt, shall be of brick or stone, and at least equal to half a brick in thickness; and every breast, back, and with or partition of any chimney or flue, hereafter to be built or rebuilt, shall be built of sound materials, and the joints of the work well filled in with good mortar or cement, and rendered or stuccoed within; and also every chimney or flue hereafter built or rebuilt in any wall, or of greater length than four feet out of any wall, not being a circular chimney or flue of twelve inches in diameter, shall be in every section of the same not less than fourteen inches by nine inches; and no chimney or flue shall be constructed with any angle therein which shall be less obtuse than an angle of 120 degrees, and every salient or projecting angle in any chimney or flue shall be rounded off four inches at the least, upon pain of forfeiture, by every master builder or other master workman who shall make or cause to be made such chimney or flue, of 100l., to be reco-vered, with full costs of suit, by any person who shall sue for the same in the courts at Westminster: provided that nothing in the clause shall prevent chimneys or flues being built at angles with each other of 90 degrees, and more, such chimneys or flues having therein proper doors or openings not less than six inches square. By § 19. convictions under the act are to be made before two justices. By § 26. the act shall continue in force until the 1st of January, 1840, and from thence until the end of the then next session of parliament.

CHIPP, CHEAP, CHIPPING. the place to be a market town, as Chipping-

ham, &c. Blount.

CHEAPINGA-CHIPPINGAVEL, or

VEL. Toll for buying and selling.

CHIRCHGEMOT, CHIRGEMOT, KIRK-MOTE. Ciregemot (Sax.) forum ecclesiasticum. Leg. H. 1. c. 8: 4 Inst. 321 .- A synod. mon Pleas who ingresseth fines, acknow-

Blount.

CHIROGRAPH, chirographum, or scriptum chirographatum.] Any public instrument or gift of conveyance, attested by the subscription and crosses of witnesses, was in the time of the Saxons called chirographum ; which being somewhat changed in form and manner by the Normans, was by them styled charta; in following times, to prevent frauds and concealments, they made their deeds of mutual covenant in a script and rescript, or in a part and counter-part, and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied or cut asunder in an indented manner, the sheet or skin or parchment; which being delivered to the two parties concerned, were proved authentic by matching with and answering to one another: and when this prudent custom had for some time prevailed, then the word chirographum was appropriated to such bipartite writings or indentures.

Anciently when they made a chirograph or deed, which required a counter-part, they ingrossed it twice upon one piece of parch-ment contrariwise, leaving a space between, in which they wrote in great letters the word CANFROGRADA; and then cut the parchment in two, sometimes even and sometimes with indenture through the midst of the word: this was afterwards called dividenda, because the parchment was so divided or cut; and it is said the first use of these chirographs

was in Henry the Third's time.

Chirograph was of old used for a fine; the manner of engrossing whereof, and cutting the parchment in two pieces, is still observed in the Chirographer's Office: but as to deeds, that was formerly called a Chirograph, which was subscribed by the proper hand-writing of the vendor or debtor, and delivered to the vendee or creditor; and it differed from syngraphus, which was in this manner, viz. Both parties, as well the creditor as debtor, wrote their names and the sum of money borrowed, on paper, &c., and the word SENCRADIMES in capital letters in the middle thereof, which letters were cut in the middle, and one part given to each party, that upon comparing them (if any dispute should arise) they might put an end to the difference. The chirographs of deeds have sometimes concluded thus :- Et in hujus rei testimonium huic scripto, in modum chirographi confecto, vicissim sigilla nostra appossuimus. The chirographs were called chartæ divisæ, scripta per chirographos divisa, chartæ, per alphabetum divisæ; as the chirographs of all fines are at this time. Kennet's Antiq. 177. Mon. Ang. tom. 2. p. 94.

CHIROGRAPHER OF FINES, chirographus finium, et concordiarum, of the Greek Χειρόγραφον, a compound of Χειρ, manus a hand, and γεάφω scribo, I write; a writing of a man's hand.] That officer in the Com-

Vol. I.—42

ledged in that court into a perpetual record, rechose in action is a thing incorporeal, and after they are examined and passed in the other offices, and that writes and delivers the indentures of them to the party: and this officer makes out two indentures, one for the buyer, another for the seller; and also makes one other indented piece, containing the effect of the fine, which he delivers to the custos brevium, which is called the foot of the fine. The chirographer likewise, or his deputy, proclaims all the fines in the court every term, according to the statute, and endorses the proclamations upon the backside of the foot thereof; and always keeps the writ of covenant, and not of the fine: the chirographer shall take but 4s. fee for a fine, on pain to forfeit his office, &c. Stats. 2 H. 4. c. 8: 23 Eliz. c. 3: 2 Inst. 468.

Fines now abolished. See Fine of Lands.

CHIRURGEON. See Surgeon.

CHIVALRY, servitium militare, from the Fr. chevalier.] A tenure of lands by knight's service; whereby the tenant was bound to perform service in war unto the king, or the mesne lord of whom he held by that tenure. -See tit. Tenures.

Chivalry was of two kinds, either regal, held only of the king; or common, held of a common person; that which might be held only of the king was called servitium serjeantia, and was again divided into grand and petit serjeanty; the grand serjeanty was where one held lands of the king by service, which he ought to do in his own person, as to bear the king's banner or spear, to lead his host, or to find a man at arms to fight, &c. Petit serjeanty was when a man held lands of the king to yield him annually some small thing towards his wars, as a sword, dagger, bow, &c .- See tit. Serjeanty.

Of the Court of Chivalry, its power and jurisdiction, see post, tit. Court of Chivalry.

CHOP-CHURCH, ecclesiarum permutatio.] Is a word mentioned in a statute of King H. 6. by the sense of which, it was in those days a kind of trade, and by the judges declared to be lawful: but Brooke in his Abridgment says, it was only permissable by law: it was without a doubt a nick-name given to those that used to change benefices; as to chop and change is a common expression. 9 H. 6. c. 65. Vide Litera missa omnibus episcopis, &c. contra Choppe-Churches, anno 1391. Spelm. de Con. vol. 2. p. 642.

CHORAL, choralis. Signifies any person that by virtue of any of the orders of the clergy, was in ancient time admitted to sit and serve God in the choire. Dugdale in his History of St. Paul's Church says, that there were formerly six Vicars Choral belonging to

that church.

CHOSE, Fr. A thing.] Used in the common law with divers epithets; as chose local, chose transitory, and chose in action. Chose local is such a thing as is annexed to a place, as a mill, and the like: and chose transitory is that thing which is moveable, and may be taken away, or carried from place to place.

only a right; as an annuity, obligation for debt, &c. And generally all causes of suit for any debt, duty, or wrong, are to be accounted choses in action: and it seems chose in action may be also called chose in suspense. because it hath no real existence or being, nor can properly be said to be in our possession. Bro. tit. Chose in Action. 1 Lil. Ab. 264.

A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action or suit for it, and so for the goods, is a chose in action: so a debt on an obligation, and power and right of action to sue for the same. 1 Brownl. 33. And a condition and power of re-entry into land upon a feoffment, gift, or grant, before the performance of the condition, is of the nature of a chose in action. Co. Lit. 214: 6 Rep. 50: Dyer, 244. If one have an advowson when the church becomes void, the presentation is but as a chose in action, and not grantable; but it is otherwise before the church is void. Dyer, 296. Where a man hath a judgment against another for money, or a statute, these are choses in action. An annuity in fee to a man and his heirs, is grantable over: but it has been held, that an annuity is a chose in action, and not grantable. 5 Rep. 89: Fitz. Grant, 45. A chose in action cannot be transferred over; nor is it advisable: nor can a chose in action be a satisfaction, as one bond cannot be pleaded to be given in satisfaction for another: but in equity choses in action may be assignable (which need not be by deed. 4 T. R. 690.); and the king's grant of a chose in action is good. Cro. Jac. 170. 371: Chanc. Rep. 169.

Charters, where the owner of the land hath them in possession, are grantable: a possibility of an interest, or estate in a term for years, is near to a chose in action, and therefore may not be granted; but a possibility, joined with an interest, may be a grantable chattel. Co. Lit. 265: 4 Rep. 66: Mod. Ca. 1128. And this the law doth provide, to avoid multiplicity of suits, and the subversion of justice, which would follow if these things were grantable from one man to another. Dyer, 30: Ploud. 185. Stock is a chose in

action. 5 Price, 217.

But by release choses in action may be released and discharged for ever; but then it must be to parties and privies in the estate, &c., for no stranger may take advantage of things in action; save only in some special cases. Co. Lit. 214: Yelv. 9. 85.—See tit. Assignment.

By stat. 7 and 8 G. 4. c. 29. § 5. persons stealing any of the following securities usually termed choses in action, (viz. any tally, order, or other security, entitling or evidencing the title of any person, or any body corporate, to any share, &c. in any public stock or fund of Great Britain or Ireland, or any foreign state, or in any fund of any body corporate, &c., or in any savings' bank, or stealing any debenture, deed, bond, bill, note,

warrant, order, or other security for money, or for payment of money, or any warrant or order for the delivery of any goods or valuable thing) are declared guilty of felony of the same nature, and in the same degree, and punishable as if they had stolen any chattel of less value, with the share, interest, or deposit to which the security stolen may relate, or with the money due on such security, or the value of the goods mentioned in the warrant or order.

CHRISMATIS DENARII, Chrisom pence. Money paid to the diocesan, or his suffragan, by the parochial clergy, for the chrisom consecrated by them about Easter, for the holy uses of the year ensuing. This customary payment being made in Lent near Easter, was in some places called Quadragesimals, and in others Paschals and Easter pence. The bishop's exaction of it was condemned by Pope Pius XI. for simony and extortion; and thereupon the custom was released by some of our English bishops.—See Cartular. Mon. de Bernedy, MS. Cotton.

CHRISTIANITY. Of the punishment of offences against, see tits. Blasphemy, Heresy,

and also tit. Religion.

CHURCH. Ecclesia .- A temple or building consecrated to the honour of God and religion, and anciently dedicated to some Saint, whose name it assumed; or it is an assembly of persons united by the profession of the same Christian faith, met together for religious worship. A church to be adjudged such in law must have administration of the sacraments, and sepulture annexed it. If the king founds a church, he may exempt it from the ordinary's jurisdiction; but it is otherwise in case of a subject.

The manner of founding churches in ancient times was, after the founders had made their applications to the bishop of the diocese, and had his licence, the bishop or his commissioners set up a cross, and set forth the church yard where the church was to be built; and then the founders might proceed in the building of the church, and when the church was finished, the bishop was to consecrate it; and then, and not before, the sacraments were to be administered in it. Stillingfleet's Ecclesiast. Cases. But by the common law and custom of this realm, any person who is a good Christian may build a church without licence from the bishop, so as it be not prejudicial to any ancient churches; though the law takes no notice of it as a church, till consecrated by the bishop, which is the reason why church and no church, &c. is to be tried and certified by the bishop. And in some cases, though a church has been consecrated, it must be consecrated again; as in case any murder, adultery, or fornication be committed in it, whereby it is defiled; or if the church be destroyed by fire, &c.

The ancient ceremonies in consecrating the ground on which the church was intended to be built, and of the church itself after it was

provided for building, the bishop came in his robes to the place, &c., and having prayed, he then perfumed the ground with incense, and the people sung a collect in praise of that saint to whom the thurch was dedicated; then the corner stone was brought to the bishop, which he crossed, and laid for the foundation: and a great feast was made on that day, or on the saint's day to which it was dedicated; but the form of consecration was left to the discretion of the bishop, as it is at this day.

The form of consecration is founded on the solemn and affecting address of Solomon on the dedication of the temple built by him in Jerusalem. See 1 Kings, chap. 8: 2 Chron. c. 6: Hobbe's Christian Commonwealth, c. 42:

Part 3. of his Leviathan.

A church in general consists of three principal parts, that is, the belfry or steeple, the body of the church with the aisles, and the chancel: and not only the freehold of the whole church, but of the church-yard, are in the parson or rector; and the parson may have an action of trespass against any one that shall commit any trespass in the church or church-yard; as in the breaking of seats annexed to the church, or the windows, taking away the leads, or any of the materials of the church, cutting the trees in the churchyard, &c. But church-wardens may, by custom, have a fee for burying in the church; the church-yard is a common place of burial for all the parishioners. Vent. 274: Keb. 504. 523.—But see Cro. Jac. 367: Gibs. 453. and post Church-wardens, III. 2.

And it seems that actions for taking away the seats must be brought in the name of the church-wardens, the parishioners being at the expence of them. Raym. 246: 12 Co. 105:

3 Com. Dig. tit. Esglise (F. 3.)

If a man erect a pew in a church or hang up a bell, &c. therein, they thereby become church goods, though not expressly given to the church; and he may not afterwards remove them. Shaw. P. L. 79. The parson only is to give licence to bury in the church; but for defacing a monument in a church, &c. the builder, or heir of the deceased, may have an action. Cro. Jac. 367. See Acc. Spooner v. Brewster, 3 Bing. 136. And a man may be indicted for digging up the graves of persons buried, and taking away their burial dresses, &c. the property whereof remains in the party who was the owner when used: and it is said an offender was found guilty of felony in this case, but had his clergy. Co. Lit. 113.

Though the parson hath the freehold of the church and church-yard, he hath not the feesimple, which is always in abeyance; but in some respects the parson hath a fee-simple qualified. Lit. 644, 645. The chancel of the church'is to be repaired by the parson, unless there be a custom to the contrary; and for these repairs, the parson may cut down trees in the church-yard, but not otherwise, See stat. 35 E. 1. stat. 2. Ne Rector prosternat, built, were thus; when the materials were &c. The church-wardens are to see that the 328 CHURCH.

body of the church and steeple are in repair; assent of the ordinary, patron, and incumbent, but not any aisle, &c. which any person may be united: and by stat. 17 Car. 2. c. 3. claims by prescription to him or his house: concerning which repairs the canons require every person who hath authority to hold ecclesiastical visitation to view their churches within their jurisdictions once in three years, either in person, or cause it to be done; and they are to certify the defects to the ordinary, and the names of those who ought to repair them: and these repairs must be done by the church-wardens, at the charge of the parishioners. Can. 86: 1 Mod. 236. See post tit. Church-wardens, III. 2.

A grant of part of the chancel of a church, by a lay impropriator, to A. his heirs and assigns, is not valid in law; and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down pews there erected. Clifford, v. Wicks, 1 Barn. & A. 498.

By the common law, parishioners of every parish are bound to repair the church: but by the canon law, the parson is obliged to do it; and so it is in foreign countries. 1 Salk. 164. In London the parishioners repair both the church and the chancel. The Spiritual Court may compel the parishioners to repair the church, and excommunicate every one of them till it be repaired; but those that are willing to contribute shall be absolved till the greater part agree to a tax, when the excommunication is to be taken off; but the Spiritual Court cannot assess them towards it. 1 Mod. 194: 1 Vent. 367. For though this Court hath power to oblige the parishioners to repair by ecclesiastical censures; yet they cannot appoint in what sum, or set a rate; for that must be settled by the church-wardens, &c. 2 Mod. 8.

If a church be down, and the parish is increased, the greater part of the parish may raise a tax for the necessary enlarging it, as well as the repairing thereof, &c. 1 Mod. 237. But in some of our books it is said, that if a church falls down, the parishioners are not obliged to rebuild it; though they ought to keep it in due repair. 1 Ventr. 35. On rebuilding of churches, it is now usual to apply for, and obtain briefs, on the petition of the parishioners, to collect the charitable contributions of well disposed Christians, to assist them in the expence. See post tit. Churchwardens, III. 2.

For church ornaments, utensils, &c. the charge is upon the personal estates of the parishioners; and for this reason persons must be charged for these, where they live: but though generally lands ought not to be taxed for ornaments, yet by special custom, both lands and houses may be liable to it. 2 Inst. 489: Cro. Eliz. 843: Hetley, 131. It has been resolved that no man shall be charged for his land to contribute to the church reckonings, if he doth not reside in the same parish. Moor. 554.

By stat. 37 H. 8. c. 21. churches not above and Irish Act, 33 G. 2. c. 11. six pounds a year, in the King's books, by

in cities and corporations, &c. churches may be united by the bishop, patrons, and chief magistrates, unless the income exceeds 100l. per ann. and then the parishioners are to consent, &c. See tit. Union.

For completing of St. Paul's Church, and repairing Westminster Abbey, a duty of 2s. per chaldron on coals was granted; and the church-yard is to be inclosed; and no persons build thereon, except for the use of the church.

1 Ann. stat. 2. c. 12.

Fifty new churches are to be built in or near London and Westminster, for the building whereof a like duty is granted upon coals, and commissioners appointed to purchase lands, ascertain bounds, &c. The rectors of which churches were to be appointed by the crown, and the first church-wardens and vestrymen, &c. to be elected by the commissioners. Stat. 9 Ann. c. 22. and see stat. 10 Ann. c. 11. A duty is also granted on coals imported into London, to be appropriated for maintaining of ministers for the fifty new churches. Stat. 1 G. 1. c. 23.

By 43 G. 3. c. 108. "to promote the build-

ing, repairing, and providing of churches and chapels, and of houses for the residence of ministers, and church-yards and glebes," persons possessed of estates in their own right, may by deed enrolled (in England, under stat. 27 H. 8. c. 16., and in Ireland under 10 Car. 1. stat. 2. c. 1. § 17.) or by will executed three months before their decease, give lands not exceeding five acres, or goods and chattels not exceeding 500l. for the purposes of the act. This act does not extend to infants, femes covert, or incapaciated persons.—Only one such gift shall be made by one person, and where the gift exceeds the legal amount, the chancellor may reduce it, § 12.—Plots of land not exceeding one acre, held in mortmain, may be granted by exchange or benefaction, for being annexed to a church, &c. § 4.

In all parochial churches and chapels to be hereafter erected, accommodation shall be

provided for the poor, § 5.

By 51 G. 3. c. 115. the king is empowered to vest lands in any person for building any church, chapel, parsonage house, &c. and by the same act, any person seised in fee simple of any manor, &c. may grant five acres of the waste to any parochial church or chapel. By 54 G. 3. c. 117. rectors, &c. in Ireland, with consent of bishop, may grant one acre of glebe land for site of a new church, or church-yard. By 56 G. 3. c. 141. ecclesiastical corporate bodies are enabled to alienate lands for enlarging church-yards. See further tit. Clergy.

As to the building and repairing of churches, chapels, &c. in Ireland, see stats. 43 G. 3. c. 106. 108: 48 G. 3. c. 65: 49 G. 3. c. 103: 53 G. 3. c. 66: 54 G. 3. c. 117: 4 G. 4. c. 36:

By stat. 58 G. 3. c. 45. for promoting the

CHURCH.

building of additional churches, in populous or chapel, according to the conditions in the parishes, in England and Wales, the Crown is empowered to authorise the Treasury to issue Exchequer Bills to the amount of One Million, on which the Bank may advance money for the purposes of the act. Commissioners to be appointed by the Crown, are required to examine into the state of parishes and extra-parochial places, and to ascertain in what places additional churches or chapels are most required for the exercise of the established religion of the Church. These commissioners are authorised to grant and lend sums out of the said million, for building such churches or chapels; or assisting in building them, when a proportion of the expence is raised by the subscriptions of, or rates on, the inhabitants of any parish or place.

On the representation of the commissioners, parishes may be divided into separate smaller parishes, or into ecclesiastical districts. All laws, as to the publication of banns, and the performance of marriages, christenings, churchings, and burials, are extended to such new churches and chapels. The commissioners are empowered to accept lands for the site of churches and church-yards; which corporations, tenants for life, &c. are empowered to give.-Bishops are authorised to direct the performance of a third service and sermon on Sundays, &c.—Two churchwardens are to be chosen for each new church and chapel, one by the incumbent, and one by the inhabit-Free seats are to be provided in all the new churches and chapels—pews therein may be let—no graves are to be made in the churches—existing churches may be enlarged by parishioners, who may borrow money of the commissioners for that purpose, securing

the repayment on the parish rates.

By stat. 59 G. 3. c. 134. the commissioners for building new churches appointed by 58 G. 3. c. 45. are incorporated. Further powers are also given them. By 59 G. 3. c. 134: 3 G. 4. c. 72: 5 G. 4. c. 103: 7 G. 4. c. 30. they are empowered to unite parts of contiguous parishes into ecclesiastical districts for the purpose of the acts, and to build chapels for the use of such districts, and several other regulations are made for effectuating the intent of the legislature on this important

By 4 G. 4. c. 79. and 5 G. 4. c. 90. provisions are made for the building churches in the Highlands and islands of Scotland. This act is altered by the 3 G. 4. c. 72. and 5 G. 4. c. 103. and 7 and 8 G. 4. c. 72. and by the 1 and 2 W. 4. c. 38. so much of the 7 and 8 G. 4. as authorizes the commissioners, in certain cases, to declaring the right of nominating to churches, to be in the persons building and endowing them, is repealed; and by § 2. it is enacted, that where the population amounts to 2000, and the churches do not afford accommodation, or above 300 persons reside more than two miles from the church, if any person

act mentioned, the bishop may declare the right of nominating to be in such person, or his trustees. Provided that previous to any bishop making such declaration of the right of nomination, there shall be produced a certificate of an architect or surveyor, that the existing churches or chapels do not afford accommodation for one-third of the inhabitants, or that there are 300 persons in the parish resident upwards of two miles from the existing church or chapel.—By § 7. persons intending to build or endow a church or chapel, shall cause notice to be given to the patron and incumbent; and if the patron, within two months after such notice, shall bind himself to build and endow, to the satisfaction of the bishop, he shall be preferred. By § 9. as soon as churches or chapels are finished or consecrated, and the conditions of the act performed, the right of nomination shall be vested in the persons building and endowing them. By § 27. this act is not to affect any local act with respect to churches already built, unless with the consent of the patron.

No man shall cover his head in the church in time of divine service, except he has some infirmity, and then with a cap; and all persons are to kneel and stand, &c. as directed by the Common Prayer during service. Can. 18. A church-warden may justify taking off a person's hat. 1 Saund. 13.

No fairs or markets shall be kept in church-

yards. Stat. 13 E. 1. stat. 2. c. 6.

Any person may be indicted for indecent or irreverent behaviour in the church; and those that offend against the acts of uniformity are punishable either by indictment upon the statute, or by the ordinary, &c. See 2 Barn. & Cres. 699. and farther tits. Church-wardens, Parsons. And as to offences in not coming to church, see tits. Dissenters, Religion.

If any person shall, by words only, quarrel, chide, or brawl, in any church or church-yard; the ordinary of the place is empowered, on proof by two witnesses, to suspend the offender, if a layman, from the entrance of the church; and if a clerk, from the ministration of his office; so long as the said ordinary shall think meet, according to the fault. Stat. 5 and 6 E. 6. c. 4. § 1.

This offence was cognizable in the ecclesiastical court before this statute, ratione loci; and the statute, though it provides a penalty, doth not alter the jurisdiction. Ld. Raym. 850.

If any person shall smite or lay any violent hands upon another, the offender shall ipso facto be deemed excommunicate, 5 and 6 E. 6. c. 4. § 2. But previous to excommunication, there must be either a conviction at law, or a declaratory sentence in the ecclesiastical court. See 1 Hawk, P. C. c. 63: 1 Burr. 240. Burn, Eccl. Law, tit. Church, x.

If one be assaulted in the church, or in a church-yard, he may not beat the other or draw a weapon there, although the other asshall declare his intentien of building a church | saulted him, and it be therefore in his own

may be punished for that by the foregoing been considerably enlarged; and is also distatute. And it is the same in any of the verted into various channels by many modern king's courts, or within view of the courts of justice; because force in that case is not justifiable, though in a man's own defence. Cro.

Jac. 367: 1 Hawk. c. 63. § 4.

If any person shall maliciously strike any person with any weapon, in any church or church-yard; or shall draw any weapon in any church or church-yard, to the intent to strike another therewith, he shall, on conviction, or verdict, or confession, or by two witnesses, at the assizes or sessions, be adjudged to have one of his ears cut off; and if he have no ears, he shall be burned in the cheek with a hot iron, having the letter F., whereby he may be known and taken for a fraymaker and fighter, and besides, he shall be and stand ipso facto, excommunicated as is aforesaid, 5 and 6 E. 6. c. 4. § 3 .- The 5 and 6 E. 3. c. 4. § 3. here noticed, relative to striking with a weapon, &c. in a church or church-yard, was repealed by the 9 G. 4. c. 31. See also Mortmain.

By stat. 27 G. 3. c. 44. no suit shall be brought in any ecclesiastical court for striking or brawling in any church or church-yard, atter the expiration of eight calendar months, from the time when such offence shall have

been committed.

By stats. 7 and 8 G. 4. c. 30. § 2. persons unlawfully and maliciously setting fire to any church or chapel, or any dissenting chapel duly registered, are guilty of felony, and shall suffer death as felony, &c. By § 8. persons riotously and tumultuously assembling, and by fire demolishing, pulling down, or destroying, or beginning so to do, any such buildings, are also guilty of felony, and punishable in like manner.

CHURCH-WARDENS. Anciently styled Church-Reeves or Ecclesiæ Guardiana.] Officers instituted to protect the edifice of the church; to superintend the ceremonies of public worship; to promote the observance of religious duties; to form and execute parochial regulations; and to become, as occasion may require, the legal representatives of the

body of the parish.

The office was originally confined to such matters only as concerned the church, considered materially as an edifice, building, or place of public worship; and the duty of suppressing profaneness and immorality was intrusted to two persons annually chosen by the parishioners, as assistants to the church-wardons, who from their power of inquiring into offences, detrimental to the interests of religion, and of presenting the offenders to the next provincial council, or episcopal synod, were called quest-men or synods-men, which last appellation has been converted into the name of sides-men. But great part of the duty of these testes synodales, or ancillary officers, is now devolved upon the church-wardens; the sphere of whose duty has, since the dens may be in a select vestry, or a particular

defence: for it is a sanctified place, and he jestablishment of the overseers of the poor, verted into various channels by many modern acts of parliament. See Paroch. Antiq. 649. for a more particular account of the origin and progress of these sides-men.

Under this head it will be proper to consider,

- I. 1. Of the Election of Church-wardens; 2. Of Exemptions from being elected.
- II. Of their Interest in the Things belong. ing to the Church.
- III. 1. Of their Power; and, 2. Duty. IV. Of their Accounts. And see Poor.

I. 1. Of the Election of Church-wardens: 2. Of Exemptions from being elected.—They are generally chosen by the joint consent of the parishioners and minister; but by custom (on which the right of choosing these offices entirely depends, 2Atk. 650: 2 Stra. 1246.) the minister may choose one, and the parishioners another; or the parishioners alone may elect both. 1 Vent. 267. But where the custom of a parish does not take place, the election shall be according to the directions of the canons of the church: Can. 89, 90. which direct that all church-wardens or quest-men in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another: and without such a joint or several choice, none shall take upon them to be church-wardens. Gibs. Cod. 241, 2:1

If the parson or vicar, who has, by custom, a right to choose one church-warden, be under sentence of deprivation, the right of choosing both results to the parishioners. Carth. 118.

The parson cannot intermeddle in the choice of that church-warden which it is the right of the parishioners by custom to elect. 2 Stra. 1045. Under the word Parson a Curate is in-

cluded. 2 Stra. 1246.

In most of the parishes in London, the parishioners choose both church-wardens by custom; but in all parishes erected under stat. 9 Anne, c. 22. the canon shall take place (unless the act, in virtue of which any church was erected, shall have specially provided that the parishioners shall choose both); inasmuch as no custom can be pleaded in such new par-Gibs. 215: Co. Lit. 113: 1 Ro. Abr. ishes. 339 : Cro. Jac. 532 : 1 Comm. 77.

By stat. 58 G. 3. c. 45. two church-wardens of each church built under that act are to be chosen, one by the incumbent, and one by the

parishioners.

In the election of church-wardens by the parishioners, the majority of those who meet at the vestry, upon a written notice given for that purpose, shall bind the rest of the parish. Lanc, 21. See Nolon, 41.

By custom also, the choice of church-war-

number of the parishioners, and not in the body of the parishioners at large. Hard. 378: 1 Mod. 181. See this Dict. tit. Vestry. Any attempt to disturb the election of churchwardens is an ecclesiastical offence, for which the party must answer in the spiritual court. 2 Barn. & A. 43.

In some cases the lord of the manor prescribeth for the appointment of church-wardens: and this shall not be tried in the Ecclesiastical Court, although it be a prescription of what appertains to a spiritual thing. God.

153: 2 Inst. 653.

Where a parish contained within itself a borough not co-extensive with it, and the mayor of the borough, on a return to a mandamus for allowing a poor rate made by the church-wardens and overseers of the whole parish, stated a custom which had existed since 43 Eliz. of appointing separate churchwardens and overseers, and of making separate rates for the borough and those parts of the parish which lay without the borough; it was holden that such custom was invalid, and the return was quashed. R. v. Gordon. 1

Barn. & A. 524.

The validity of the custom of choosing church-wardens is to be decided, like all other customs of the realm, by the courts of common law, and not by the spiritual court. Cro. Car. 552: 6 Mod. 89: 2 Ld. Raym. 1008: 3 Salk. 88: and see 7 East. 573.—So also the legality of the votes given on the election is to be determined by the common law. Burr. 1420.—But the Spiritual Court may become the means of trying the validity of the election by a return of "not elected"-" not duly elected," or any other return that answers the writ, and affords an opportunity of trying the right in an action for a false return. 1 Ld. Raym. 138: Stra. 610: 2 Ld. Raym. 1379. 1405: 2 Salk. 433: 5 Mod. 325: Cowp. 413.

When a parish certificate was granted by two persons, who described themselves on the face of it as " A. the only church-warden, and B. the only overseer of the poor of the parish," held that after a lapse of 63 years in absence of evidence to the contrary, the court would intend that the parish had by custom but one church-warden. R. v. Catesby, 4 D. & R. 434: 2 B. & C. 814.

The parishioners are sole judges of what description of persons they think proper to choose as church-wardens; the Spiritual Court therefore cannot in any case control or examine into the propriety of the election. 1 Salk. See also the authorities immediately preceding.—And the parishioners may, for misbehaviour, remove them. 13 Co. 70: Com. Dig. 3. tit. Esglise (F. 1.)—An indictment also lies against them for corruption and extortion in their office. 1 Sid. 307.

The Court of King's Bench will not grant a mandamus to the church-wardens, to call a vestry to elect their successors. Stra. 686. Sed vid. Stra. 52.—Nor will the court grant a quo warranto to try the validity of an election Incumb. 381: 1 Vent. 127: 4 Vin. 527. to the office. 4 Term Rep. 382.

They are sworn into their offices by the Archdeacon or Ordinary of the diocese, and if he refuse, a mandamus shall issue to compel him. Cro. Car. 551. 5 Com. Dig. tit. Mandamus (A.) 8 Barn. & Cres. 681. and without fee. 1 Salk. 330. But the oath must be general, " to execute their duty truly and faithfully."-Hard. 364. and under stats. 4 Jac. 1. c. 5: 1 Jac. 1. c. 9: & 21 Jac. 1. c. 7. to execute the laws against drunkenness. See post, III. 2.

If a church-warden, properly appointed, refuse to take the oath, he may be excommunicated. Gibs. Cod. 961. 1 Mod. 194. And he must not execute the office till he is sworn.

Gibs. 243. Shaw. P. L. 70.

2. All peers of the realm, by reason of their dignity, are exempted from the office. Gibs. 215. So are all clergymen, by reason of their order. 6 Mod. 140. 2 Stra. 1107. 1 Ld. Raym. 265.—Members of Parliament, by reason of their privilege. Gibs. Cod. 215 .- Practising Barristers - and such only, as it seems .- Attorneys. Com. Dig. tit. Attorney. (B. 16.) Clerks in Court. 1 Ro. Rep. 368. but see Mar. 30.—Physicians, Surgeons, Apothecaries, Aldermen, Dissenting Teachers, Prosecutors of Felons, Militia-men .- See tit. Constable, II. 2.

No person living out of the parish, although he occupies lands within the parish, may be chosen church-warden; because he cannot take notice of absences from church nor disorders in it, for the due presenting of them.

Gibs. 215.

II. Of their Interest in the Things belonging to the Church.-Church-wardens are a corporation by custom, to sue and be sued for the goods of the church; and they may purchase goods, but not lands, except it be in London, by custom. Jones 439. Cro. Car. 532. 552. 4 Vin. 525. n. 1 Ld. Raym. 337: Co. Lit. 3: 5 Barn. & Cres. 433.

In the city of London, by special custom. the church-wardens, with the minister, make a corporation for lands as well as goods; and may as such, hold, purchase, and take lands for the use of the church, &c. And there is also a custom in London, that the minister is there excused from repairing the chancel of the church. 2 Cro. 325: Co. Lit. 3: 1 Rol. Abr. 330. Church-wardens may have appeal of robbery for stealing the goods of the church. 1 Rol. Abr. 393: Cro. Eliz. 179. And they may also purchase goods for the use of the parish. Mar. 22. 67: Cro. Car. 552: 3 Bulst. 264: Yelv. 173.—They may also take money or things (by legacy, gift, &c.) for the benefit of the church. 2 P. Wms. 125. And they may dispose of the goods of the church, with the consent of the parishioners. 1 Rol. Abr. 393: 1 Vent. 89: Cro. Jac. 234: 4 Vin. 256.

But the church-wardens (except in London) have no right to, or interest in, the freehold and inheritance of the church, which alone belongs to the parson or incumbent. Comp.

A custom pleaded for the church-wardens-

of a parish to set up monuments, &c. in a | the diocese for a sequestration; which being church, without the consent of either rector or ordinary, determined to be illegal. Beckwith v. Harding, 1 Barn. & A. 508.

They may bring an appeal of robbery for goods of the church feloniously stolen.—Y.B. vol. 11. p. 27.—and ejectment for land leased to them for years. Runnington's Ejectment, 59: 3 Com. Dig. Esglise (F. 3.)

If they waste the goods of the church, the new church-wurdens may have actions against them, or call them to account; though the parishioners cannot have an action against them for wasting the church goods; for they must make new church-wardens, who must prosecute the former, &c. 1 Danv. Abr. 788: 2 Cro. 845: Bro. Account, 1.

They have a certain special property in the organs, bells, parish books, bible, chalice, surplice, &c. belonging to the church; of which they have the custody on behalf of the parish, whose property they really are; for the taking away, or for any damage done any of these, the church-wardens may bring an action at law, and therefore the parson cannot sue for them in the Spiritual Court. 1 Ro. Rep. 255. Cro. Eliz. 179: 1 Vent. 89: 7 Mod. 116.

But they have not, virtute officii, the custody of the title deeds of the advowson, though they are kept in a chest in the church. 4 T. R. 351.

III. 1. Of their Power; and 2. Duty.— Church-wardens have power and authority throughout the parish, though it extends into different hundreds and counties; being, though temporal officers, employed in ecclesiastical affairs, and must therefore follow the ecclesiastical division of the kingdom. Shaw. P. L. 86.

They have, with the consent of the minister, the placing the parishioners in the seats of the body of the church, appointing gallery keepers, &c. reserving to the ordinary a power to correct the same: and in London, the churchwardens have this authority in themselves.

Particular persons may prescribe to have a seat, as belonging to them by reason of their estates, as being an ancient messuage, &c. and the seats being constantly repaired by them: also one may prescribe to any aisle in the church, to sit, and bury there, always repairing the same. 3 Inst. 202: Cro. Jac. 366. See 5 Term R. 296: 5 Barn. & A. 356. If the ordinary displaces a person claiming a seat in a church by prescription, a prohibition shall be granted, &c. 12 Rep. 106. The parson impropriate has a right to the chief seat in the chancel; but by prescription another parishioner may have it. Noy's Rep.

A chapel-warden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without consent of the perpetual curate. Jones v. Ellis,

2 Younge & J. 265.

Besides their ordinary power, the churchwardens have the care of the benefice during

granted, they are to manage all the profits and expences of the benefice for him that succeeds, plough and sow in his glebes, gather in tithes, thrash out and sell corn, repair houses, &c.; and they must see that the church be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice. 2 Inst. 489: Shaw. P. L. 99: Stat. 13 & 14 Car. 2. c. 12.

The church-wardens have not originally power to make any rate themselves, exclusive of the parishioners, their duty being only to summon the parishioners to a vestry, who are to meet for that purpose; and, when they are assembled, a rate made by the majority present shall bind the whole parish, although the church-wardens voted against it. Comp. Incumb. 389: 1 Vent. 367: 3 Term Rep. 592.

But if the church-wardens give the parishioners due notice, that they intend to meet for the purpose of making a rate to repair the church, and the parishioners refuse to come, or, being assembled, refuse to make any rate, they may make one without their concurrence; for they are liable to be punished in the Ecclesiastical Courts for not repairing the church. Degge, 172: 1 Vent. 367: 1 Mod. 79. 194. 237. See farther on this subject, tit. Vestry.

A taxation by a pound-rate is the most equitable way, which if refused to be paid, should be proceeded for in the Ecclesiastical Court; and Quakers are subject to such church rate, recoverable as their tithes. Wood's Inst.

b. 1. c. 7: Gibs. 219: Degge, 171.

Church-wardens de facto may maintain an action against a former one for money received by him for the use of the parish, though the validity of the election of the plaintiffs be doubtful, and though they are not the immediate successors of the defendant. 2 W. Black.

A parish may have two divisions, with church-wardens keeping separate accounts for each division; therefore when two churchwardens in the parish of A. were elected for the township of B. and two others for the rest of the parish, who each made separate rates for their own division respectively: the churchwardens for the township of B. may maintain assumpsit against their predecessors in office, to recover a balance remaining in their hands, without joining the present or late churchwardens of the parish, either as plaintiffs or defendants, and without proving that their appointment had been wholly legal. Astle v Thomas, 3 D. & R. 492: 2 B. & C. 271: 1 C. &. P. 103.

2. Their duty is extensive and various; the heads of it are therefore here ranged alphabetically.

Apprentices.—See this Dict. tits. Appren-

tices, Chimney-Sweepers.

Bastards.—The church-wardens are bound its vacancy: and as soon as there is an avoid- to provide for such for whose sustenance the ance, they are to apply to the Chancellor of parish has made no provision; and this without an order of justices. Hays v. Bryant, to open it at the instance of any person, ex-Trin. 29 G. 3. in C. P.

Belfry .- Church-wardens ought to keep the keys of, and take care the bells are not rung

without proper cause. Can. 88.

Briefs.—Church-wardens are by stat. 4 An. c. 14. to collect the charity-money upon briefs; which are letters patent issuing out of Chancery, to rebuild churches, restore loss'by fire, &c., which are to be read in churches; and the sums collected, &c. to be indersed on the briefs in words at length, and signed by the minister and church-wardens; after which they shall be delivered, with the money col-lected, to the persons undertaking them, in a certain time, under the penalty of 20l. A register is to be kept of all money collected, &c. Also the undertakers in two months after the receipts of the money, and notice to sufferers, are to account before a Master in Chancery, appointed by the Lord Chancellor.

Church briefs, which are mentioned under

this title, are now abolished.

Burial.—The consent of the church-wardens must be had for burying a person in a different parish from that in which he dies. It is their duty not to suffer suicides, or excommunicated persons, to be buried in the church or church-yard, without licence from the bishop. By stat. 30 Car. 2. c. 3. they are to apply to the magistrates to convict offenders for not burying in woollen. See also post, Register.

Butter and Cheese .- The penalties under stat. 13 and 14 Car. 2. c. 26. for reforming abuses in, are payable to the church-wardens of the parish where the offence is committed.

Chimney-sweepers .- See that tit. in this Dict. Church.—Church-wardens or quest-men are to take care it be well aired, the windows glazed, the floors well paved, &c. If churchwardens erect or add a new gallery, &c. they must have the consent of the parishioners, and a licence of the ordinary, but not for occasional repairs. 2 Inst. 439: 1 Mod. 273. See ante, III. 1. They must also take care to have in the church a large bible, a book of common prayer, a book of homilies, a font of stone, a decent communion table; with bread and wine for the communion, a table-cloth, carpet, and flagon, plate, and bowl of silver, gold, or 'pewter. Can. 20. Y. B.8 H. 5. p. 4: Doct. & Stud. 118: Deg. 151. Church-wardens also are to sign certificates of persons taking the sacrament, to qualify for offices. They are to see that the ten commandments are set up at the East end of the church, and other chosen sentences upon the walls, with a reading desk and a pulpit, and a chest for alms, all at the charge of the parish. It is also the duty of church-wardens to prevent any irreverence or indecency from being committed in the church; and therefore they may pull off a person's hat in the church, or even turn him out if he attempts to disturb the congregation. The church being under the stat. 22 Car. 2. c. 1. recare of the church-wardens, they may refuse 155. See farther Poor.

cept the parson, or any one acting under him. 1 Sand. 13: 1 Lev. 196: 1 Sid. 301: 3 Salk. 37: 12 Mod. 433: Can. 85. They are not to suffer any stranger to preach, unless he appears qualified, by producing a licence-and such preacher is to register his name, and the day when he preached, in a book. Can. 50. 52. The pulpit is exclusively the right of the parson of the parish, and the church-wardens are punishable if they shut the door against him; and his consent is necessary to a stranger's preaching. 3 Salk. 87: 12 Mod. 433.

See farther this Dict. tit. Church.

Church-yards.—By the canons of the church it is ordained that the church-wardens, or quest-men, shall take care that the churchyards be well and sufficiently repaired, found, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charges, unto whom the same, by law, appertaineth; they are also to see that the church be well kept and repaired; and by a constitution of Archbishop Winchelsea, this charge is to be at the expence of the parishioners. 2 Inst. 489. (But one who has land adjoining to the church-yard may by custom be bound to keep the fences in repair.) Church-wardens shall suffer no plays, feasts, banquets, suppers. church-ales, drinkings, temporal courts or leets, lay juries, musters, or any profane usage, to be kept in the church or churchyard .- Nor shall they suffer any idle persons to abide either in the church-yard or the church-porch during the time of divine service or preaching, but shall cause them to come in or to depart. So also, by the common law, church-wardens may justify the removal of tumultuous persons from the churchyard to prevent them from disturbing the congregation whilst the minister is performing the rites of burial. 1 Mod. 168. And by the canon law may prevent an excommuni-cated person from even entering into the

church-yard at any time or on any pretence. By 59 G. 3. c. 12. § 17. all buildings and lands purchased and hired by church-wardens and overseers, by authority and for the purposes of the act, shall be conveyed, devised, and assured to the church-wardens and overseers and their successors, in trust for the parish; and such church-wardens, &c. shall and may accept, take, and hold in virtue of a body corporate on bchalf of the parish, all buildings and lands belonging to the parish, &c.

By the 1 and 2 W. 4. c. 59. the churchwardens and overseers may inclose from any forest or waste lands belonging to the Crown, with the consent of the Treasury, any portion of such forest or waste not exceeding 50 acres, for cultivating and improving the same for the use and benefit of such parish and the poor persons within the same.

Conventicles.—Church-wardens used to levy the penalties by warrant of a justice, under stat. 22 Car. 2. c. 1. repealed by 52 G. 3. c.

Vol. I .- 43

County Rate.—See stat. 12 G. 2. c. 29.

Drunkenness .- Church-wardens are to receive the penalties under stat. 4 G. 1. c. 5: 21 G. 2. c. 7: and 1 Jac. 1. c. 9. Sec this Dict. tit. Constable.

Fast Days.—See stat. 5 Eliz. c. 5.

Fire.—See this Dict. tit. Fire.

Game .- Church-wardens are to receive the penalties under stat. 1 Jac. 1. c. 27.

Greenwich Hospital .- Church-wardens are to sign certificates of out-pensioners under

stat. 3 G. 3. c. 16.

Hawkers and Pedlars.—Church-wardens are to apprehend, and receive the penalties under stat. 9 and 10 W. 3. c. 27, and 9 G. 2. c. 23.

Non-conformists.—Church-wardens to levy the penalty of 12d. on persons not coming to church each Sunday, under stat. 1 Eliz. c. 2.

Parson.-Church-wardens are to observe whether he reads the thirty-nine articles twice a year, and the canons once in the year, preaches every Sunday good doctrine, reads the Common Prayer, celebrates the sacraments, preaches in his gown, visits the sick, catechises children, marries according to law,

Parishioners.-Church-wardens to see if they come to church, and duly attend the worship of God: if baptism be neglected; women not churched; persons marrying in prohibited degrees, or without bans or licence: alms-houses or schools abused; legacies given to pious uses; &c. Can. 117: Cro. Car. 291: Vent. 114.

Poor .- Church-wardens are to act in conjunction with the overseers; every churchwarden being an overseer, but not è contrà.-

See this Dict. tit. Overseer, Poor.

By 55 G. 3. c. 137. no church-warden (overseer. &c.) is to be concerned in any contract for supplying the poor, while he is in such office, on penalty of 100l., except in certain cases of necessity specified in the act, under a certificate of two justices of the peace. See 3 Barn. & A. 145. An overseer who supplied coals indirectly for the use of the poor was held not liable to any penalty, unless he did it for his own profit. 3 Barn. & Cres. 6. A farmer furnished the produce of his land to the poor of the parish at a fair market price; he was held liable to penalties under the 55 G. 3. c. 137. 8 Taunt. 239.

Presentments .- Church-wardens, by their oath, are to present, or certify to the bishop or his officers, all things presentable by the ecclesiastical law, which relate to the church, to the minister, and to the parishioners. The articles which are delivered to church-wardens for their guidance in this respect, are, for the most part, founded on the book of canons, and on rubricks of the common prayer. They are also bound by the 4 Jac. 1. c. 5. to prevent tippling or drunkenness, and by 3 Jac. 1. c. 4. parish; though the validity of the election of recusants. They need not take a fresh oath the plaintiffs to their office be doubtful, and upon each presentment they make,

than once a year; but they may do it a

as they please, except there is a custom in the parish to the contrary; and, upon default or neglect in the church-wardens, the minister may present; but such presentment ought to be upon oath. Can. 117: Cro. Car. 285. 291: 1 Vent. 86. 114; and see 1 Vent. 127: 1 Saund. 13: 1 Sid. 463.

Rates.-See ante, III. 1.

Recusants .- See Presentments, Non-con-

Registers .- Church-wardens shall provide a box wherein to keep the parish register, with three locks and three keys; two of the keys to be kept by them, and one by the minister: and every Sunday they shall see that the minister enter therein all the christenings, weddings, and burials that have happened the week before; and at the bottom of every page, they shall, with the minister, subscribe their names: and they shall, within a month after the 25th day of March, yearly, transmit to the bishop a copy thereof for the year before, subscribed as above. By stat. 23 G. 3. c. 67. upon the entry of any burial, marriage, birth, or christening in the register of any parish, precinct, or place, a stamp duty of 3d. shall be paid; and therefore the churchwardens and overseers, or one of them, are directed to provide a book for this purpose, with proper stamps for each entry, and to pay for the same, and for the stamps contained therein, out of the rates under their management; and to receive back the moneys which shall be so paid from the persons authorised to demand and receive the said duties.

Sunday.-Church-wardens to levy penalties for profaning: under stat. 1 Car. 1.c. 1, and 29 Car. 2. c. 7.

IV. Of their Accounts .- At the end of the year the church-wardens are to yield just accounts to the minister and parishioners, and deliver what remains in their hands to the parishioners or to new church-wardens: in case they refuse, they may be presented at the next visitation, or the new officers may by process call them to account before the ordinary, or sue them by writ of account at common law. Shaw. P. L. 76. 12 Mod. 9: Bro. Account. But in laying out their money, they are punishable for fraud only, not indiscretion. Gibs. 196: 1 Burn's Just. 349: Shaw. P. L. 76. If their receipts fall short of their disbursements, the succeeding church-wardens may pay them the balance, and place it to their account. 1 Rol. Ab. 121: Can. 89. 109. &c. And the Court of Chancery on application will make an order for the purpose. 2 Eq. Ab. 203: Pre. Ch. 43: but see 4 Vin. (8vo.)

Church-wardens de facto may maintain an action against a former church-warden for money received by him for the use of the

actions to be brought in the courts of West- loss of ears, burning, and excommunication. minster, or at the assizes, for money mis-spent by church-wardens, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted.

Church-wardens are comprehended within the purview of the stats. 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12. as to pleading the general issue to actions brought against them, and as to double costs when they have judgment.

But in an action on the case against a church-warden for a false and malicious presentment, though there be judgment for him, yet he shall not have double costs; for the statute does not extend to spiritual affairs. Cro. Car. 285. 467: 1 Sid. 463: 1 Vent. 86: 2 Hawk. P. C. 61: Hardw. 125.

The Spiritual Court can only order the church-wardens' accounts to be audited, but cannot make a rate to re-imburse them, because they are not obliged to lay out money before they receive it. Hardw. 381: 2 Stra.

974: Cro. Car. 285, 286.

But a custom that the church-wardens shall, before the end of their year, give notice to the parishioners to audit their accounts, and that a general rate shall be made, for the purpose of re-imbursing them all money advanced, is good. 2 Andr. 32.

If there be a select committee or vestry elected by custom, and the church-wardens exhibit their accounts to such committee, who allow the same, this shall discharge them from being proceeded against in the Spiritual Court. Lutw. 1027. So of allowance at a vestry in general. Bunb. 247. 289: 1 Vent. 367: 1 Sid. 281: Raym. 418: 2 Barn. K. B. 421: Andr. 11. And if the Spiritual Court take any step whatever after the accounts are delivered in, it is an excess of jurisdiction for which prohibition will be granted, even after sentence. 3 Term Rep. 3

CHURCHESSET, or churchset, ciricseat.] A Saxon word used in Domesday, which is interpreted quasi semen ecclesia, corn paid to the church. Fleta says, it signifies a certain measure of wheat, which in times past every man on St. Martin's day gave to holy church, as well in the times of the Britons as of the English; yet many great persons, after the coming of the Romans, gave their contribution according to the ancient law of Moses, in the name of first fruits; as in the writ of King Canutus sent to the Pope is particularly contained, in which they call it churchsed. Selden's Hist. Tithes, p. 216.

CHURCH-SCOT. Customary oblations paid to the parish-priest; from which duties the religious sometimes purchased an exemption for themselve and their tenants.

CHURCH-YARD. Chiding, quarrelling, or brawling there is punishable ecclesiastically by 5 and 6 E. 6. c. 4. § 1; and by 27 G. 3. c. 14, the suit is to be commenced within eight calendar months: and by 5 and 6 E. 6. c. 4. execution. 4 Inst. 223: 3 Leon. 3. striking with a weapon, or drawing with such intent in any church-yard, is punishable with den of the Cinque Ports. And there are

Taking up dead bodies out of a church-yard, though for the purpose of dissection, is an indictable offence. 2 T. R. 733; Leach, 498: Rex v. Gilles, Russ. & Ry. 366.

CHURLE, ceorle carl. Was in the Saxon times a tenant at will, of free condition, who held some land of the Thanes, on condition of rents and services; which cearles were of two sorts; on that hired the lord's tenementary estate, like our farmers; the other that tilled and manured the demesnes (yielding work and not rent), and were thereupon called his sock. men or ploughmen.

Spelm.

CINQUE PORTS, quinque portus.] Those havens that lie towards France, and therefore have been thought by our kings to be such as ought to be vigilantly guarded and preserved against invasion: in which respect they have an especial government, called Lord Warden of the Cinque Ports, and divers privileges granted them, as a peculiar jurisdiction; their warden having not only the authority of an admiral amongst them, but sending out writs in his own name, &c. 4 Inst. 222.

Cambden says, that Kent is accounted the key of England; and that William, called the Conqueror, was the first that made a constable of Dover Castle, and warden of the Cinque Ports, which he did to bring that country under a stricter submission to his government; but King John was the first who granted the privileges to those ports which they still enjoy: however, it was upon condition that they should provide a certain number of ships at their own charge for forty days, as often as the king should have occasion for them in the wars, he being then under a necessity of having a navy for passing into Normandy, to recover that dukedom which he And this service the Barons of the Cinque Ports acknowledged and performed, upon the king's summons, attending with their ships the time limited at their proper costs, and staying as long after as the king pleased at his own charge. Somner of Roman Ports in Kent. See this Dict. tit. Navy.

The Cinque Ports, as we now account them, are, Dover, Sandwich, Romney, Winchelsea, and Rye; and to these we may add Hythe and Hastings, which are reckoned as part or members of the Cinque Ports; though by the first instituton it is said that Winchelsea and Rye were added as members, and that the others were the Cinque Ports: there are also several other towns adjoining that have the privileges of the ports. These Cinque Ports have certain franchises to hold pleas, &c. and the king's writs do not run there: but on a judgment in any of the king's courts. if the defendant hath no goods, &c. except in the ports, the plaintiff may get the records certified into Chancery, and from thence sent by mittimus to the Lord Warden to make

several courts within the Cinque Ports; one annum out of his manor of B., and after the before the constable, others within the parts grantee disseiseth the granter of the same themselves, before the mayors and jurats; manor, who brings an assise and recovers the another, which is called curia quinque portuum opud Shepway: there is likewise a court of Chancery, in the Cinque Ports, to decide matters of equity; but no original writs issue thence, 1 Danv. Ab. 793. The jurisdiction of the Cinque Ports is general, extending to personal, real, and mixed actions; and if any erroneous judgment is given in the Cinque Ports before any of the mayors and jurats, error lies according to the custom, by bill in nature of error, before the Lord Warden of the Cinque Ports, in his court of Shepway. And in these cases the mayor and jurats may be fined, and the mayor removed, &cc. 4 Inst. 334: Cromp. Jurisd. 138.-And error lies from the court of Shepway to the Court of K. B. Jenk. 71; 1 Sid. 356.

It has been observed that the Cinque Ports are not jura regulia, like counties palatine, but are parcel of the county of Kent; so that if a writ be brought against one for land within the Cinque Ports, and he appears and pleads to it, and judgment is given against him in the Common Pleas, this judgment shall bind him; for the land is not exempted out of the county, and the tenant may waive the benefit of his privilege. Wood's

Inst. 519.

The Cinque Ports cannot award process of outlawry. Cro. Eliz. 910. 'And a quo minus lies to the Cinque Ports. Ibid. 911. If a man is imprisoned at Dover by the Lord Warden, an habeas corpus may be issued; for the privilege that the king's writ lies not there is intended between party and party, and there can be no such privilege against the king; and an habeas corpus is a prerogative writ, by which the king demands an account of the liberty of the subject. Cro. Jac. 543: 1 Nels. Ab. 447.

Certiorari lies to the Cinque Ports to remove indictments; and the jurisdiction that brev. dom. regis non currit is only in civil causes between party and party. 2 Hawk. P.

C. c. 27. § 24.

By stat. 51 G. 3. c. 36. the king is empowered to appoint justices of the peace within and throughout the liberties of the Cinque Ports for facilitating the execution of justice; but such justices are not to interfere with the power of the sessions within the several Cinque Ports, nor within the corporate towns of Pevensey, Scaford, Lydd, Folkestone, Feversham, Fordwich, Tenterden, or Deal; nor to claim any authority with those towns, nor any right or privilege belonging to any member of those corporations.

CIRCADA. A tribute anciently paid to the bishop or archdeacon for visiting the churches. Du Fresne.

CIRCUITY OF ACTION, circuitus actionis.] A longer course of proceeding to recover a thing sued for than is needful: as panelled appear not, or appearing are chal-

land, and 201. damages, which being paid, the grantee brings his action for 10l. of his rent due during the time of the disseisin, which he must have had if no disseisin had been: this is called circuity of action, because as the grantor was to receive 20l. damages, and pay 10l. rent, he might have received but 10l. only for damages, and the grantee might have kept the other 10l. in his hands by way of retainer for his rent, and so saved his action, which appears to be needless. de Ley. If the obligce in a bond covenant not to sue the obligors, this may be pleaded as a release in order to avoid circuity of action; but if he covenant not to sue one of two obligors, this shall not operate as a release to the other. See tit. Action; and see 4 Term R. 470.

CIRCUITS. Certain divisions of the kingdom appointed for the judges to go twice a year, for administering of justice in the several counties. These circuits are made in the respective vacations, after Hilary and Trinity terms. As to their antiquity, see Madd. Hist. Exch. c. 3. § 12: Wynnes, Eun. v. 2. 577.

See tits. Assize, Nisi Prius.

The several counties of England are divided into six circuits, viz. 1. MIDLAND; containing the counties of Northampton, Rutland, Lincoln, Nottingham, Derby, Leicester, Warwick-2. Norfolk; Bucks, Bedford, Huntingdon, Cambridge, Norfolk, Suffolk—3. Home; Hertford, Essex, Kent, Sussex, Surrey—4. Oxford; Berks, Oxford, Hereford, Salop, Gloucester, Monmouth, Stafford, Worcester—5. Western; Southampton, Wilts, Dorset, Devon, Cornwall, Somerset—6. Northern; York, Durham, Northumberland, Cumberland, Westmoreland, Lancashire. Wales is now divided into two circuits, one embracing the counties of North Wales and Chester, and the other the counties of South Wales. And since the 1 W. 4. c. 70. one of the English judges holds the assizes for the several counties of South Wales, and one for the counties of North Wales, and the two judges together hold the assizes at Chester. See farther, tit. Assize. See 3 G. 4. c. 10. as to the power of opening and reading the circuit commissions on a day subsequent to the day named therein. See 3 and 4 W. 4. c. 71. § 3. under Justices of Assize.

CIRCUMSPECT AGATIS. Is the title of a statute made anno 13 E. 1 st. 4. relating to prohibitions, prescribing certain cases to the judges, wherein the king's prohibition lies not. 2 Inst. 187. See tit. Prohibition.

CIRCUMSTANTIAL EVIDENCE. See

tit. Evidence.

CIRCUMSTANTIBUS. By-standers; a word of art, signifying the supplying or making up the number of jurors, if any imif a person grant a rent-charge of 101. per lenged by either party, by adding to them so many of such as are present, or standing by quest; for in the time of the Saxons there (tales de circumstantibus,) who are qualified as will serve the turn. See tit. Jury.

CIRCUMVENTION, is any act of fraud, whereby a person is reduced to a deed by de-

creet. Scotch Dict.

CITATION, citatio.] A summons to appear, applied particularly to process in the Spiritual Court. The Ecclesiastical Courts proceed according to the course of the civil and canon laws, by citation, libel, &c. A person is not generally to be cited to appear out of the diocese, or peculiar jurisdiction where he lives; unless it be by the archbishop, in default of the ordinary; where the ordinary is party to the suit, in cases of appeal, &c., and by law a defendant may be sued where he lives, though it is for subtracting tithes in another diocese, &c. 1 Nels. 449. By the stat. 23 H. 8. c. 9. every archbishop may cite any person dwelling in any bishop's diocese within his province for heresy, &c., if the bishop or other ordinary consents; or if the bishop or ordinary, or judge, do not do his duty in punishing the offence. Where persons are cited out of their diocese, and live out of the jurisdiction of the bishop, a prohibition, or consultation, may be granted; but where persons live in the diocese, if when they are cited they do not appear, they are to be excommunicated, &c. The above statute was made to maintain the jurisdiction of inferior dioceses; and if any person is cited out of the diocese, &c., where the civil or canon law doth not allow it, the party grieved shall have double damages. If one defame another within the peculiar of the archbishop, he may be punished there; although he dwell in any remote place out of the archbishop's peculiar. Godb. 190. See tit. Courts Ecclesiastical.

CITY, civitas.] According to Cowel is a town corporate, which hath a bishop and cathedral church, which is called civitas, oppidum and urbs; civitas, in regard it is governed by justice and order of magistracy; oppidum, for that it contains a great number of inhabitants; and urbs, because it is in due form begirt about with walls. But Crompton, in his Jurisdictions, where he reckons up the cities, leaveth out Ely, although it hath a bishop and cathedral church; and puts in Westminster, though it hath not at present a bishop: and Sir Edward Coke makes Cambridge a city; yet there is no mention that it was ever an episcopal see. Indeed it appears by the stat. 35 H. 8. c. 10. that there was a bishop of Westminster; see tit. Bishops; since which in stat. 17 Eliz. c. 5. it is termed a city or borough: and notwithstanding what Coke observes of Cambridge, in the old stat. 11 H. 7. c. 4. Cambridge is called only a town.

Kingdoms have been said to contain as many cities as they have sees of archbishops and bishops; but according to Blount, city is a word which hath obtained since the Con- which the old Romans used, compiled from

were no cities, but all great towns were called burghs, and even London was then styled London Bourg; as the capital of Scotland is now called Ediuburgh. And long after the Conquest the word city is used promiscuously with the word burgh, as in the charter of Leicester it is called both civitas and burgus; which shows that those writers were mistaken that tell us every city was or is a bishop's see. And though the word city signifies with us such a town corporate as hath usually a bishop and cathedral church, yet it is not always so.

A city, says Blackstone, is a town incorporated, which is or hath been the see of a bishop; and though the bishoprick be dissolved, as at Westminster, yet still it remaineth a

city. 1 Comm. 114.

It appears, however, that Westminster retained the name of city, not because it had been a bishop's see, but because it was expressly created such, in the letters-patent by King Hen. VIII. erecting it into a bishoprick. -See Burnet's Reform. Appx. There was a similar clause in favour of the other five new created cities, Chester, Peterborough, Oxford, Gloucester, and Bristol: the charter for Chester is in Gib. Cod. 1449; and that for Oxford in 14 Rym. Fæd. 854. Lord Coke seems anxious to rank Cambridge among the cities. Mr. Wooddeson, late Vinerian Professor (see his Lectures, i. 302.) has produced a decisive authority that cities and bishops' sees had not originally any necessary connexion with each other. It is that of Ingulphus, who relates that at the great council assembled in 1072, to settle the claim of precedence between the two archbishops, it was decreed that bishops' sees should be transferred from towns to cities.

The accidental coincidence of the same number of bishops and cities would naturally produce the supposition that they were connected together as a necessary cause and effect; it is certainly a strong confirmation of the above authority that the same distinction is not paid to bishops' sees in Ireland.

Mr. Hargrave, in his notes to 1 Inst. 110, proves that although Westminster is a city, and has sent citizens to parliament from the time of Ed. VI. it never was incorporated; and this is a striking instance in contradiction of the learned opinions there referred to, viz. that the king could not grant within time of memory to any place the right of sending members to parliament without first creating that place a corporation. 1 Comm. edit. 1793, in n. See also tits. Parliament, Bishops, Borough, &c.

CIVIL LAW. Is defined to be that law which every particular nation, commonwealth, or city, has established peculiarly for itself: jus civils est, quod quisque populus sibi constituit. Just. Inst. Now more properly distinguished by the name of municipal law: the term Civil Law being chiefly applied to that

man law was founded first, upon the regal constitutions of their ancient kings; next upon the twelve tables of the Decemviri; then upon the laws or statutes enacted by the Senate or people; the edicts of the Prator and the Responsa Prudentum, or opinions of learned lawyers; and lastly upon the imperial decrees or constitutions of successive emperors.-These had by degrees grown to an enormous bulk; but the inconvenience arising therefrom was in part remedied, by the col-lections of three private lawyers, Gregorius, Hermogenes, and Papsnius; and afterwards by the Emperor Theodosius the younger, by whose orders a code was compiled, A. D. 438, being a methodical collection of all the imperial constitutions then in force; which Theodosian Code was the only book of civil law received as authentic in the western part of Europe, till many centuries after.—For Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the present body of Civil Laws was compiled and finished by Trebonian, about the year 533.
This consists of—1. The *Institutes*; which

contain the elements or first principles of the Roman law, in four books .- 2. The Digests or Pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematic method .- 3. A New Code, or collection of imperial constitutions, in twelve books; the lapse of a century having rendered the former code of Theodosius imperfect .- 4. The Novels, or new constitutions posterior in time to the other books, and amounting to a supplement to the code containing new decrees of successive emperors, as new questions happened to arise.-These form the body of the Roman law, or Corpus Juris Civilis, as published about the time of Justinian; which, however, soon fell into neglect and oblivion till about the year 1130, when a copy of the Digests was found at Amalfi, in Italy; which accident, concurring with the policy of the Roman ecclesiastic, suddenly gave a new vogue and authority to the Civil Law, and introduced it into several nations. 1 Comm. 80, 81.

The Digests or Pandects, was collected from the works and commentaries of the ancient lawyers, some whereof lived before the coming of our Saviour. The whole Digest is divided into seven parts: the first part contains the elements of the law, as what is justice, right, &c. The second part treats of judges and judgments. The third part of personal action, &c. The fourth part of contracts, pawns, and pledges. The fifth part of wills, testaments, &c. The sixth part of the possession of goods. The seventh part of obligations, crimes, punishments, &c. The Institutes contain a system of the whole body of law, and are an epitome of the Digest divided into four books; but sometimes they

the law of nature and of nations. The Ro-, because they are for instruction, and show an easy way to the obtaining a knowledge of the Civil Law: but they are not so distinct and comprehensive as they might be, nor so useful at this time as they were at first. The Novels or Authentics, were published at several times, without any method; they are termed Novels as they are new laws, and Authentics, being authentically translated from the Greek into the Latin tongue; and the whole volume is divided into nine collations, constitutions, or sections; and they again into 168 novels, which also are distributed into certain chapters. The first collation relates to heirs, executors, &c.; the second the state of the church; the third is against bawds; the fourth concerns marriages, &c.; the fifth forbids the alienation of the possessions of the church; the sixth shows the legitamacy of children, &c.; the seventh determines who shall be witnesses; the eighth ordains wills to be good, though imperfect, &c.; and the ninth contains matter of succession in goods, &c. Dict. See Gibbon's Decline and Fall, vol. 8. chap. 44.

To these tomes of the Civil Law we may add the Book of Feuds, which contains the customs and services that the subject or vassal oweth to his prince or lord, for such lands or fees as he holdeth of him. The Constitutions of the Emperor were either by a rescript, which was the letter of the Emperor in answer to particular persons who inquired the law of him; or by edict, which the Emperor established of his own accord, that it might be generally observed by every subject; or by decree, which the Emperor pronounced between plaintiff and defendant, upon hearing a particular cause. The power of issuing forth rescripts, edicts, and decrees, was given to the prince by the lex regia, wherein the people of Rome wholly submitted themselves to the government of one person, viz. Julius Cæsar, after the defeat of Pompey, &c. And by this submission the prince could not only make laws, but was esteemed above all coercive power of them. Dict.

How far the Civil Law is adopted and of

force in this kingdom, see tit. Canon Law.

Before the Reformation decrees were as frequent in the Canon Law as in the Civil Law.—Many were graduates in utroque jure or utriusque juris. J. U. D. or juris utriusque doctor, is still common in foreign universities. But Hen. VIII. in the twenty-seventh year of his reign, when he had renounced the authority of the Pope, issued a mandate to the University of Cambridge, to prohibit lectures and the granting degrees in Canon Law in that University. Stat. Acad. p. 137 .- it is probable that at the same time Oxford received a similar prohibition, and that degrees in canon law have ever since been discontinued in England. 1 Comm. 392. in n.

CIVIL LIST. See tit. King.

TO CLACK WOOL. Is to cut off the correct the Digest; they are called Institutes, sheep's mark, which makes it weigh lighter; as to force wool, signifies to clip off the upper | 252. 254: Poph. 67. One in reversion after and hairy part thereof; and to bard it, is to cut the head and neck from the rest of the

fleece. Stat. 8. H. 6. c. 22. CLADES. Clida, cleta, cleia, from the Brit. clie, and the Irish clia.] . A wattle or hurdle; and a hurdle for penning or folding of sheep is still in some counties of England

called a cley. Paroch. Antiq. p. 575. CLARENDON, Constitutions of. Certain Constitutions made in the reign of Henry II. A. D. 1164, in a great council held at Clarendon, whereby the King checked the power of the Pope, and his clergy, and greatly narrowed the total exemption they claimed from the

secular jurisdiction. 4 Com. 422.

CLARETUM. A liquor made of wine and honey, clarified or made clear by decoction, &c., which the Germans, French, and English, called hippocras: and it was from this the red wines of France were called claret,-Girald. Camb. apud Wharton. Ang. Sax. Par. 2, p. 480.

CLAIM, clameum. A challenge of interest in any thing that is in the possession of another, or at least out of a man's own possession; as claim by charter, by descent, &c.

In Plow. Comm. 359. (a) Dyer, C. J. is said to have defined claim to be, a challenge of the ownership or property that one hath not in possession, but which is detained from him by wrong.

CLAIM is either verbal, where one doth by words claim and challenge the thing that is so out of his possession; or it is by an action brought, &c.; and sometimes it relates to lands, and sometimes to goods and chattels. Lit. Sect. 420. Where any thing is wrongfully detained from a person, this claim is to be made; and the party making it may thereby avoid descents of lands, disseisins, &c. and preserve his title, which otherwise would be in danger of being lost. Co. Lit. 250. man who hath present right or title to enter, must make a claim; and in case of reversions, &c. one may make a claim where he hath right, but cannot enter on the lands: when a person dares not make an entry on the land, for fear of being beaten or other injury, he may approach as near as he can to the land, and claim the same; and that shall be sufficient to vest the seisin in him. 1 Inst. 250. See tit. Entry.

If nothing doth hinder a man, having a right to land, from entering or making his claim; there he must do so, before he shall be said to be in possession of it, or can grant it over to another; but where the party who hath right is in possession already, and where an entry or claim cannot be made, it is otherwise. I Rep. 157. A claim will divest an estate out of another, when the party must enter into some part of the land; but if it be only to bring him into possession, he may do it in view. By claim of lands in most cases is intended a claim with an entry into part of the lands, or by a near approach to it. Co. Lit.

an estate for years, or after a statute-merchant, staple, or elegit, may enter and make a claim to prevent a descent or avoid a collateral warrantry. And claim of a remainder by force of a condition must be upon the land, or it will not be sufficient. Co. Lit. 202.

If a man seised of lands in right of his wife make a fcoffment in fee on condition, and the husband dieth, and then the condition is broken, and the heir enters; in this case the wife need not claim to get possession of her estate, for the law doth vest it in her with-

out any claim. Co. Lit. 202: 8 Rep. 43.

The claim of the particular tenant shall be good for him in reversion or remainder; and of him in reversion, &c. for particular tenant: so claim of a copyholder will be good for the lord, &c. But if tenant for years, in a court of record, claim the fee of his land, it is a forfeiture of his estate. Plowd. 359: Co. Lit. 251. A claim may be made by the party himself, and sometimes by his servants or deputy: and a guardian in soccage, &c. may claim, or enter, in the name of the infant that hath right, without any commandment. Co. Lit. 245.

Claim or entry should be made as soon as may be; and by the Common Law it is to be within a year and a day after the disseisin, &c.; and if the party who hath unjustly gained the estate do afterwards occupy the land, in some cases an assize, trespass, or forcible entry, may be had against him. Lit. Sect. 426. 430.

If a fine is levied of lands, strangers to it are to enter and make a claim within five years, or be barred: infants after their age, feme coverts after the death of their husbands, &c. have the like time by stat. 1 R. 3. c. 7. See tit. Fines.

CONTINUAL CLAIM, is where a man hath right and title to enter into any lands or tenements, whereof another is seised in fee, or in fee tail; if he who hath title to enter makes continual claim to the lands or tenements before the dying seised of him who holdeth the tenements, then, though such tenant die thereof seised, and the lands or tenements descend to his heir, yet may he who hath made such continual claim, or his heir, enter into the lands or tenements so descended, by reason of the continual claim made, notwithstanding the descent. So (Si come), in case a man be disseised, and the disseisee makes continual claim to the tenements in the life of the disseisor, although the disseisor dieth disseised in fee, and the land descend to his heir, yet may the disseisee enter upon the possession of the heir, notwithstanding the descent. Litt. § 414.

But such claim must always be made within the year and the day before the death of the person holding the land; for if such tenant do not die seised within a year and a day after such claim made, and yet he that hath right dares not enter, he must make another claim, within the year and the day after | CLAUSUM FREGIT. See tits. Capias, the first claim, and so toties quoties, that he Common Pleas. may be sure his claim shall always have been made within a year and a day before the death of the tenant; and hence it seems it is called Continual Claim. See farther tit. En-

try; as also Descent.

By stat. 32 H. 8. c. 43. five years must clapse without entry or continual claim, in order that a descent on the disseisor's death should take away the entry of the disseisee, or his heir; but after the five years the disseisee must make continual claim, as before the statute. And by stat. 4 Anne, c. 16. § 16. no claim (or entry) shall be of effect to avoid a fine, unless an action shall be commenced thereon within a year, and prosecuted with effect. See tits. Fine, Entry, Disseisen, &c.— And for farther particulars, see 1 Inst. 150. and n. Its efficacy in preserving a right of entry is now taken away. See Entry, Limitation of Actions, II. 1.

CLAIM OF LIBERTY. A suit or petition to the king in the Court of Exchequer, to have liberties and franchises confirmed there by

the king's attorney general. Co. Ent. 93.
CLAMEA ADMITTENDA IN ITINERE PER AT-An ancient writ by which the TORNATUM. king commanded the justices in eyre to admit a person's claim by attorney who was employed in the king's service, and could not come in his own person. Reg. Orig. 19.

CLASSIARUS. A seaman, or soldier serving at sea. Chart. Carol: 5 Imperator. Thomæ Comit. Surr. dat. in urbe Londiniensi,

8 Junii 1522.

CLAUD, Brit.] A ditch: claudere, to enclose, or turn open fields into enclosures. Pa-

roch. Antiq. 236.

CLAVES INSULÆ. A term used in the Isle of Man, where all ambiguous and weighty cases are referred to twelve persons, whom they call claves insulæ, i. e. the keys of the island.

CLAVIA. In the inquisition of Serjeanties in the 12th and 13th years of King John, within the counties of Essex and Hertford, Boydin Aylet tenet quatuor lib terræ in Bradwell, per manum Willielmi de dono per serjeantiam clavie, viz. by the serjeanty of the club or mace. Brady's Append. Introduct. to Eng. Hist. 22.

CLAVIGERATUS. A treasurer of a church. Mon. Angl. tom. 1. p. 184.

CLAUSE IRRITANT, is any provision which makes a penalty be incurred, and the obligation to be null for the future; or upon any other account, makes the right to vacate or resolve. Scotch Dict.

CLAUSE RESOLUTIVE, is a provision whereby the contract to which it is affixed is, for non-performance, declared to have been null from the beginning. Scotch Dict.

CLAUSE ROLLS, rotuli clausi.] Contain all such matters of record as were committed to close writs; these rolls are preserved in the Tower.

CLAUSUM PASCHIÆ. Stat. Westm. 1. In crastino clausi Paschæ, or In crastino octabis Paschæ, which is all one, that is, the morrow of the utas (or eight days) of Easter. 2 Inst. 157. Clausum Pascha, i. e. Dominici in albis; sic dictum, quod Pascha claudat. Blount.—The end of Easter—the Sunday after Easter-Day.

CLAUSURA HEYÆ. The enclosure of a hedge. Rot. Plac. in itinere apud Cestriam,

ann. 14 H. 7,

CLAWA. A close, or small measure of

land. Mon. Ang. tom. 2. p. 250.

CLERGY.—Clerus.] Signifies the assembly or body of clerks or ecclesiastics, being taken for the whole number of those who are de clero Domini, of our Lord's lot or share, as the tribe of Levi was in Judea; and are separate from the noise and bustle of the world, that they may have leisure to spend their time in the duties of the Christian religion.

The clergy in general were heretofore divided into regular and secular; those being regular which lived under certain rules, being of some religious order, and were called men of religion, or, the religious; such as all abbots, priors, monks, &c. The secular were those that lived not under any certain rules of the religious orders, as bishops, deans, parsons, &c .- Now, the word clergy comprehends all persons in holy orders, and in ecclesiastical offices, viz. archbishops, bishops, deans and chapters, archdeacons, rural deans, parsons (who are either rectors or vicars,) and curates,-to which may be added parish clerks, who formerly frequently were, and yet sometimes are, in orders.—As to the law more peculiarly respecting each of these, see the several tits. particularly tit. Parson.

This venerable body of men have several privileges allowed them by our municipal laws, and had formerly much greater, which were abridged at the time of the reformation, on account of the ill use which the Popish clergy had endeavoured to make of them; for the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. The personal exemptions, however, for the most part continue; a clergyman cannot be compelled to serve on a jury, nor to appear at a Court Leet, or view of frank-pledge, which almost every other person is obliged to do. 2 Inst. 4. (See tit. Court Leet.) But if a layman is summoned on a jury, and before the trial takes orders, he shall, notwithstanding, appear and be sworn. 4 Leon. 190. A clergyman cannot be chosen to any temporal office, as bailiff, reeve, constable, or the like, in regard of his own continual attendance on the sacred function. Finch, L. 88. During his attendance on divine service he is privileged from arrests in civil suits; for a reasonable time, eundo, redeundo, & morando, to perform service. Stats. 50 E. 3. c. 5: 1 R. 2. c. 16: 12

Co. 100: 9 G. 4. c. 31. § 23. In cases of fel- of King Edgar, they were bound to obey the without being branded; and might likewise have it more than once. See post, Clergy, Benefit of.-Clergymen also have certain disabilities; they are not capable of sitting as members of the House of Commons. Stat. 41 G. 3. c. 63. See tit. Parliament.

By stat. 21 H. S. c. 13. the clergy were not (in general) allowed to take any lands or tenements to farm, on pain of 10l. per month, and total avoidance of the lease; unless where they had not sufficient glebe, and the land is taken for the necessary expences of their household, § 8 .- Nor on like penalty, to keep any tanhouse, or brewhouse. - Nor to engage in any trade, or sell merchandize, on forfeiture of treble value.

See 43 G. 3. c. 84: 54 G. 3. c. 175: 57 G. 3. c. 99. as to England, and 5 G. 4. c. 91. as to Ireland, regulating the residence, &c. of the clergy, and this Dict. tit. Residence.

As to increasing of small livings in England, by what is usually termed Queen Anne's bounty, see stats. 2 and 3 Anne, c. 11: 1 G. 1. c. 10: 43 G. 3. c. 107: 45 G. 3. c. 84: 55 G. 3. c. 147. In Ireland, by Archbishop Boulter's charity; see Irish Act, 29 G. 2. c. 18 as amended by 46 G. 3. c. 60.

As to augmenting and modifying the stipends of the clergy of Scotland, see 48 G. 3. c. 138: 50 G. 3. c. 84: and as to augmentations in England, see 1 and 2 W. 4. c. 45.

As to stipendiary curates in England, see stat. 53 G. 3. 149: 54 G. 4. c. 175.

See farther, tits. Church, Curate, First-fruits, Ordination, Parson, Residence.

By the statute called Articuli Cleri, 9 E. 2. st. 1. c. 3, if any person lay violent hands on a clerk, the amends for the peace broken shall be before the king (that is, by indictment,) and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed; which, if the offender will redeem by money, it may be sued for before the bishop. See 4 Comm. 217.

So much of the statute Articuli Cleri, 9 E. 2. st. 1. c. 3., as related to assaults on clerks in orders, was repealed by the 9 G. 4. c. 31., under which assaults upon clergymen stand on the same footing as assaults on other

Although the Clergy claimed an exemption from all secular jurisdiction, yet Mat. Paris tells us, that soon after William the First had conquered Harold, he subjected the bishoprics and abbeys who held per baroniam, that they should be no longer free from military service; and for that purpose he in an arbitrary manner registered how many soldiers every bishopric and abbey should provide, and send to him and his successors in time of war; and having placed these registers of ecclesiastical servitude in his treasury, those who were aggrieved departed out of the realm: but the clergy were not till then exempted from all secular service; because, by the laws

ony he had (while it existed) benefit of clergy, secular magistrate in three cases, viz. upon any expedition to the wars, and to contribute to the building and repairing of bridges, and of castles for the defence of the kingdom. It is probable, that by expedition to the wars it was not at that time intended they should personally serve, but contribute towards the charge: one they must do, as appears by the petition to the king, anno 1267, viz. Ut omnes clerici tenentes per baroniam vel feudum laicum, personaliter armati procederent contra regis adversarios, vel tantum servitium in expeditione regis invenirent, quantum pertineret ad tantum terram vel tenementum. But their answer was, that they ought not to fight with the military but with the spiritual sword, that is, with prayers and tears; that they were to maintain peace and not war; and that their baronies were founded on charity; for which reason they ought not to perform any military Blount. service.

That the clergy had greater privileges and exemptions at common law than the laity is certain; for they are confirmed to them by Magna Charta, and other ancient statutes; but these privileges are in a great measure lost, the clergy being included under general words in later statutes; so that clergymen are liable to all public charges imposed by act of parliament, where they are not particularly excepted as above stated. Their bodies are not to be taken upon statute-merchant or staple, &c.; for the writ to take the body of the conusor is si laicus sit; and if the sheriff or any other officer arrest a clergyman upon any such process, it is said an action of false imprisonment lies against him that does it, or the clergyman arrested may have a superse-deas out of Chancery. 2 Inst. 4.

In action of trespass, account &c. against a person in holy orders, wherein process of capias lies, if the sheriff return that the defendant is clericus beneficiatus nullum habens laicum feodum ubi summoneri potest; in this case the plaintiff cannot have a capias to arrest his body; but the writ ought to issue to the bishop, to compel him to appear, &c. But on execution had against such clergyman, a sequestration shall be had of the profits of his benefice. 2 Inst. 4: Degge, 157.

By stat. 9 G. 4. c. 31. § 23. the arresting a clergyman on civil process while performing divine service (or in his going or returning) is

made a misdemeanor.

The foregoing are all the privileges remaining on civil accounts: though by the common law, they were to be free for the payment of tolls, in all fairs and markets, as well for all the goods gotten upon their church-livings, as for all goods and merchandises by them bought to be spent upon their rectories; and they had several other exemptions, &c.

Upon proof of repeated acts of incontinency, habitual profligacy, and immorality of a clergyman, coupled with constant neglect of duty, the Ecclesiastical Court is bound at once to proceed to deprivation. Burgoyne v., or, after conviction, by way of arresting judg Free, affirmed by the delegates, 2 Hagg. Rep. 556, 662.

CLERGY, BENEFIT OF. This was formerly a subject of great importance and curiosity. It is treated of at length in Blackstone's chapter on that subject. 4 Comm. 305. By the act 7 and 8 G. 4. c. 28. § 6. (for England) and 9 G. 4. c. 54. § 12. (for Ireland) this privilege is abolished. The distinction therefore between the various sorts of felonies now is, their being capital or not capital; the former being punishable by death, and the latter by transportation, imprisonment, &c. A proviso is added to the repealing clause, "that nothing in the act contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of the act."

By a previous act of 7 and 8 G. 4. c. 27. the several statutes regulating this privilege

were repealed.

By § 7. of the act 7 and 8 G. 4. c. 28. (and § 13. of the act 9 G. 4. c. 54.) it is enacted that no person convicted of felony shall suffer death, unless for some felony excluded from the benefit of clergy, before the first day of the session in which the act was passed, or made punishable with death by some act passed after that day.

By subsequent sections of the acts every person convicted of felony not punishable by death shall be punished in manner prescribed by the acts relating to the felony; and every person convicted of any felony for which no punishment is specially provided shall be deemed punishable by transportation, imprisonment, &c. See farther tits. Felony, Lar-

ceny, Transportation, &c.

This Benefit of Clergy had its original from the pious regard paid by Christian princes to the church in its infant state; and the ill use the Popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church were principally of two kinds: 1. Exemption of places consecrated to religious duties from criminal arrests, which was the foundation of sanctuaries; 2. Exemption of the persons of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the privilegium clericale.

In England, however, a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy; and therefore, though the ancient privilegium clericale was, in some capital cases, yet it was not univereally allowed. And in those particular cases the use at first was for the bishop or ordinary missioners of the Navy. See stat. 22 and 23 to demand his clerks to be remitted out of Car. 2. c. 11. But see now as to the transfer the king's courts as soon as they were indicted: till it was finally settled, in the reign of miralty, 2 W. 4. c. 40. Henry IV. that the prisoner should first be arraigned, and might either then claim his Chancery, is an officer that files all affidavits benefit of clergy, by way of declinatory plea; made use of in court.

ment. The latter was most usually practised, being more to the satisfaction of the court to have the crime previously ascertained by confession, or the verdict of a jury; and also more advantages to the prisoner himself, who might possibly be acquitted, and so need not the benefit of his clergy at all.

CLERICO INFRA SACROS ORDINES CONSTITUTO, NON ELIGENDO IN OFFICIUM. A writ directed to those who have thurst a bailiwick, or other office upon one in holy orders, charging them

to release him. Reg. Orig. 143.

CLERICO CAPTO PER STATUTUM MERCATORUM, &c. A writ for the delivery of a clerk out of prison, who is taken and imprisoned upon the breach of a statute merchant. Reg. Orig.

147. See ante, tit. Clergy.

CLERICO CONVICTO COMMISSO GAOLÆ IN DE-FECTU ORDINARII DELIBERANDO. An ancient writ, that lay for the delivery of a clerk to his ordinary, that was formerly convicted of felony, by reason his ordinary did not challenge him according to the privileges of clerks. Reg. Orig. 69. See ante, tit. Clergy.

CLERK, clericus.] The law term for a clergyman, and by which all of them who have not taken a degree are designated in deed, &c. In the most general signification is one that belongs to the holy ministry of the church; under which, where the Canon Law hath full power, are not only comprehended sacerdotes and diaconi, but also subdiaconi, lectores, acolyti, exorcista, and ostiarii: but the word has been anciently used for a secular priest; in opposition to a religious or regular; Paroch. Antiq. 171; and is said to be properly a minister or priest, one who is more particularly called in sortem Domini. Blount.

CLERK. In another sense denotes a person who practices his pen in any court, or otherwise; of which elerks there are various kinds, in several offices, &c. The clergy, in the early ages, as they engrossed almost every other branch of learning, so were they peculiarly remarkable for their proficiency in the study of the law. Nullus clericus nisi causidicus is the character given of them soon after the Conquest by William of Malmsbury. The judges therefore were usually created out of the sacred order; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated clerks to this day. 1 Comm. 17.

CLERK OF THE ACTS. An officer in the Navy Office, whose business it is to record all orders, contracts, bills, warrants, &c. transacted by the Lord High Admiral, or Lords Commissioners of the Admiralty, and Com-

CLERK OF AFFIDAVITS. In the court of

CLERK. 343

all things judicially done by the justices of assizes in their circuits. Crompt. Jurisd. 227. He is the Clerk of the Crown for the respective counties included in his circuit. This officer (with others) is associated to the judge in commissions of assize, to take assizes, &c., and is by letters patent constituted a justice of gaol delivery; he also is the keeper of all the records relating to the criminal pro-ceedings of the circuit. Clerk of the Assise shall not be counsel with any person on the circuit. Stat. 33 H. 8. c. 24. § 5. To certify the names of felons convict. See tit. Clergy, Benefit of, II. How punished for concealing, &c. any indictment, recognizance, fine, or forfeitures. Stat. 22 and 23 C. 2. c. 22. § 9: 3 G. 1. c. 15. § 12.—See tit. Estreat, Sheriff. To take but 2s. for drawing an indictment, and nothing if defective. 10 and 11 W. 3.c. 23. §§ 7, 8. Fineable for falsely recording appearances of persons returned on a jury. 3 G. 2. c. 25. § 3. See tit. Jury.

CLERK OF THE BAILS. An officer belonging to the Court of King's Bench. He files the bail pieces taken in that court, and attends for

that purpose.

CLERK OF THE CHEQUE. An officer in the King's Court, so called because he hath the check and controlment of the yeomen of the guard, and all other ordinary yeomen belonging either to the King, Queen, or Prince; giving leave, or allowing their absence in attendance, or diminishing their wages for the same: he also by himself or deputy takes the view of those that are to watch in the court, and hath the setting of the watch. See stat. 33 H. 8. c. 12. Also there is an officer of the same name in the King's dock-yards at Plymouth, Deptford, Woolwich, Chatham, &c.

CLERK CONTROLLER OF THE KING'S HOUSE. Whereof there are two: An officer in the king's court, that hath authority to allow or disallow charges and demands of Pursuivants, Messengers of the Green Cloth, &c. He hath likewise the oversight of all defects and miscarriages of any of the inferior officers: and hath a right to sit in the counting-house with the superior officers, viz. the Lord Steward, Treasurer, Controller, and Cofferer of the Household, for correcting any disorders. See stat. 33 H. 8. c. 12.

CLERK OF THE CROWN, clericus coronæ.] An officer in the King's Bench, whose function is to frame, read, and record all indictments against offenders there arraigned or indicted of any public crime. And when divers persons are jointly indicted, the clerk of the crown shall take but one fee, viz. 2s. for them all. Stat. 2 H. 4. c. 10. He is otherwise termed Clerk of the Crown Office, and exhibits informations by order of the court, for divers offences. See tit. Information.

CLERK OF THE CROWN IN CHANCERY. An officer in that court who continually attended the Lord Chancellor in person or by deputy: thereon; and the delivery out of all the rolls he prepared for the Great Seal special matters to every officer of the court; the receiving of

CLERK OF THE ASSISE. Is he that writes of state by commission, or the like, either immediately from his Majesty's orders, or by order of his council, as well ordinary as extraordinary, viz. commissions of lieutenancy, of justices of assize, over and terminer, gaol delivery, and of the peace, with their writs of association, &c. Also all general pardons at the King's coronation; or in parliament, where he sat in the Lords' house in parliament time; and into his office the writs of parliament, with the names of knights and burgesses elected thereupon, were to be returned and filed. He had likewise the making out of all special pardons: and writs of execution upon bonds of statute-staple forfeited; which was annexed to this office in the reign of Queen Mary, in consideration of his chargeable attendance. By 2 and 3 W. 4. c. 111. this office is abolished after the 20th of August, 1833; but no office is to be determined by that act which was held by any person appointed before 1st June, 1832, till the death of the officer.

CLERK OF THE DECLARATIONS. An officer of the Court of King's Bench, that files all declarations in causes there depending, after they are ingrossed. See Tidd's Prac. 322.

CLERK OF THE DELIVERIES. An officer in the Tower of London, who exercises his office in taking of indentures for all stores, ammuni-

tion, &c. issued from thence.

CLERK OF THE ERRORS, clericus errorum.] In the Court of Common Pleas, transcribes and certifies in the King's Bench the tenor of the records of the cause or action upon which the writ of error, made by the cursitor, is brought there to be heard and determined. The Clerk of the Errors, in the King's Bench, likewise transcribes and certifies the records of causes, in that court, into the Exchequer, if the cause of action were by bill: if by original, the Lord Chief Justice certifies the record into the House of Peers in Parliament, by taking the transcript from the Clerk of the Errors, and delivering it to the Lord Chancellor, there to be determined, according to the stats. 27 Eliz. c. 8. and 31 Eliz. c. 1. The Clerk of the Errors in the Exchequer also transcribes the records, certified thither out of the King's Bench, and prepares them for judgment in the court of Exchequer Chamber, there. Stats. 16 Car. 2. c. 2: 20 Car. 2. c. 4. See tit. Error; and see as to the appointment of the Filazer and Clerk of the Errors in the Exchequer, 2 and 3 W. 4. c. 110. §§ 1. 4. 9. As to the compensation to the Clerk of the Errors under the late writ of error act, see 6 G. 4. c. 96. § 4.

CLERK OF THE ESSOINS. An officer belonging to the Common Pleas, who keeps the essoin rolls; and the essoin roll is a record of that court; he has the providing of parchment, and cutting it out into rolls, marking the numbers 344 CLERK.

them again when they are written, and the of them, which are examples of all measures binding and making up the whole bundles of every term; which he doth as servant of the Chief Justice. The Chief Justice of C. B. is at the charge of the parchment of all the rolls, for which he is allowed; as is also the Chief Justice of B. R., besides the penny for the seal of every writ of privilege and outlawry, the seventh penny taken for the seal of every writ in court under the green wax, or petit seal; the said Lord Chief Justices having annexed to their offices or places the custody of the said seals belonging to each court.

CLERK OF THE ESTREATS, clericus extractorum. A clerk or officer belonging to the Exchequer, who every term receives the estreats out of the Lord Treasurer's Remembrancer's Office, and writes them out to be levied for the king: and he makes schedules of such sums estreated as are to be discharged.

See tit. Estreat.

CLERK OF THE HANAPER, OF HAMPER. officer in Chancery, whose office was to receive all the money due to the king, for the seals of charters, patents, commissions, and writs; as also fees due to the officers for enrolling and examining the same. He was obliged to attend on the Lord Chancellor daily in the term time, and all times of scaling, having with him leather bags, wherein were put all charters, &c. After they were sealed, those bags, being sealed up with the Lord Chancellor's private seal, were delivered to the Controller of the Hanaper, who, upon receipt of them, entered the effect of them in a book, &c. This hanaper represented what the Romans termed fiscum, which contained the Emperor's treasure; and the Exchequer was anciently so called, because in eo reconderentur hanapi et scutræ cæteraque vasa quæ in censum et tributum persolvi solebant; or it may be for that the yearly tribute which princes received was in hampers or large vessels full of money. By 2 and 3 W. 4. c. 111. this office was abolished after the 20th of August, 1833; but it is provided that no office is to be determined by the act which is held by any person appointed before 1st June, 1832, till the death of the officer.

CLERK OF THE INFOLMENTS. An officer of the Common Pleas, that inrols and exemplifice all fines and recoveries, and returns writs

of entry, summons, and seisin, &c.

CLERK OF THE JURIES, clericus juratorum.] An officer belonging to the court of Common Pleas, who makes out the writs of habeas corpora and distringas, for the appearance of juries, either in that court, or at the assizes, after the jury or panel is returned upon the venire facias: he also enters into the rolls the awarding of these writs; and makes all the continuances, from the going out of the habeas corpora until the verdict is given.

CLERK OF THE MARKET, clericus mercati hospitii regis.] Is an officer of the king's the king's measures, and keep the standards Commons.

throughout the land; as of ells, yards, quarts. gallons, &c., and of weights, bushels, &c. And to see that all weights and measures in every place be answerable to the same standard: as to which office see Fleta, lib. 2. cap. 8. 9, 10. &c. Touching this officer's duty, there are also divers stats. as 13 R. 2. c. 4. and 16 R. 2. c. 3. by which every clerk of the market is to have weights and measures with him when he makes essay of weights, &c. marked according to the standard; and to seal weights and measures under penalties.

The duties and powers of clerks of the market of the king's or prince's household, were regulated by stats. 16 Car. 1. c. 19: 22 Car. 2. c. 8: 23 Car. 2. c. 19; but these acts are all repealed by the stat. 5 G. 4. c. 74. § 23. for ascertaining and establishing uniformity of Weights and Measures. See that tit.

CLERK MARSHAL OF THE KING'S HOUSE, an officer that attends the Marshal in his court,

and records all his proceedings.

CLERK OF THE NICHILS, OF NIHILS, clericus nihilorum.] An officer of the court of Exchequer, who makes a roll of all such sums as are nihiled by the sheriffs upon their estreats of green wax, and delivers the same into the Remembrancer's Office, to have execution done upon it for the king. See stat. 5 R. 2. c. 13. Nihils are issues by way of fine or amercement. Now abolished. See Nihils, Public Revenue.

CLERK OF THE ORDNANCE, an officer in the Tower who registers all orders touching the

king's ordnance.

CLERK OF THE OUTLAWRIES, clericus utlagariorum.] An officer belonging to the court of Common Pleas, being the servant or deputy to the King's Attorney-General, for making out writs of capias utlagatum, after outlawry; the King's Attorney's name being to every one of those writs.

By the 2 W. 4. c. 39. process of outlawry may be had in the Exchequer, and for this purpose the Lord Chief Baron may appoint some fit person holding some other office in the court, to execute the duties of filazer, registrar, and clerk of outlawries.

CLERK OF THE PAPER OFFICE, an officer in the Court of King's Bench, that makes up the paper-books of special pleadings and de-

murrers in that court.

CLERK OF THE PAPERS, an officer in the Common Pleas, who hath the custody of the papers of the warden of the Fleet, enters commitments and discharges of prisoners, delivers

out day-rules, &c.

CLERK OF A PARISH. See tit. Parish Clerk. CLERK OF THE PARLIAMENT ROLLS, clericus rotulorum parliamenti.] An officer who records all things done in the high court of parliament, and ingrosseth them in parchment rolls, for their better preservation to posterity; of these officers there are two, one in the house, to whom it belongs to take charge of Lords' House, and another in the House of CLERK. 345

By the 5 G. 4. c. 82. after the expiration of the justices of peace in quarter sessions have the existing letters patent, the Clerk of the Parliaments shall be appointed by his Majesty, and execute his office in person, and be removable by his Majesty on an address of the House of Lords.

CLERK OF THE PATENTS, or of the letters patent under the Great Seal of England. office erected 18 Jac. 1. and abolished by 2 and 3 W. 4. c. 111. after 20th August, 1833.

CLERK OF THE PEACE, clericus pacis.] An officer belonging to the sessions of the peace: his duty is to read indictments, inrol the proceedings and draw the process; he keeps the counterpart of the indenture of armour; records the proclamation of rates for servant's wages; has the custody of the register-book of licences given to badgers of corn; of persons licensed to kill game, &c. And he registers the estates of papists and others not taking the oaths. Also he certifies into the King's Bench and to the courts of Over and Terminer on the circuit, transcripts of indictments, outlawries, attainders, and convictions, had before the justices of peace, within the time limited. See tit. Clergy, Benefit of .-And as to his duty respecting estreats, see tit. Estreats.

The Custos Rotulorum of the county hath the appointment of the clerk of the peace, who may execute his office by deputy, to be approved of by the Custos Rotulorum to hold the office during good behaviour. See stats. 37 H. 8. c. 1: 1 W. & M. c. 21.

It was solemnly decided that the right of appointment to the office of clerk of the peace is by law in the Custos Rotulorum of the county and not in the crown. Harding, Pltf., Pollock, &c. Dfts. 1 Dow. 454: 6 Bing. 25. Qu. whether the profits of this office are assignable? 3 Taunt. 173.

The following is the form of the oath prescribed by stat. 1 W. & M. c. 21. to be taken by the clerk of the peace in open sessions be-

fore he enters on his office.

I.C. P. do swear, that I have not [paid] nor will pay any sum or sums of money, or other reward whatsoever, nor given any bond or other assurance to pay any money, fee, or profit, directly, or indirectly, to any person or persons whomsoever, for [my] nomination So help me God. and appointment.

He is also to take the oaths of allegiance, supremacy, and adjuration, and perform such requisites as other persons who qualify for offices.

By stat. 22 G. 2. c. 46. § 14. no clerk of the peace, or his deputy, shall act as solicitor, attorney, or agent, at the sessions where he acts as clerk or deputy, on penalty of 50l. with treble costs.

Burn, in his Instice, tit. Clerk of the Peace, hints how necessary it is that all his fees should be regulated.

If a clerk of the peace misdemeans himself,

power to discharge him; and the Custos Rotulorum is to choose another, resident in the county, or on his default the sessions may appoint one: the place is not to be sold, on pain of forfeiting double the value of the sum given by each party, and disability to enjoy their respective offices, &c. Stat. 1 W. & M. sess.

The order of removal of the clerk of the peace, pursuant to this statute, need not set out the evidence. Stra. 996. But it must show that a charge was exhibited against him sufficient to covenant his removal. Ld. Raym. 1265: Salk. 680.

The appointment and tenure of clerks of the peace in Ireland are regulated by stat. I G. 4. c. 7. and by 8 G. 4. c. 67. § 12. that these offices shall be kept open from 12 to 3 daily. The appointment to the office of clerk of the peace both in England and Ireland belongs of right to the Custos Rotulorum of each county. Harding v. Pollock, D. P. 6 Bingh. 25. 85.

By stat. 57 G. 3. c. 91. justices of peace, at their general sessions, are authorised to settle tables of fees to be taken by clerks of the peace in the several counties of England and Wales, and a penalty of 5l. is imposed on such clerks taking higher fees: copies of the tables of fees are to be kept hung up in the sessions room.

The sessions have not power to order payment to the clerk of the peace of a per centage on money raised for the repair of bridges, in lieu of his fees, although such per centage was claimed as an ancient fee. 1 B. & A.

312: 2 B. & A. 522.

See stat. 11 G. 4. c. 1. authorising the transfer of certain balances in the hands of clerks of the peace in England and Wales, on account of licences for lunatic asylums, under 14 G. 3. c. 49. (Repealed by 9 G. 4. c. 41.)

CLERK OF THE PELLS, clericus pellis.] clerk belonging to the Exchequer, whose office is to enter every teller's bill into a parchment roll or skin, called pellis receptorum, and also to make another roll of payments, which is termed pellis exituum; wherein he sets down by what warrant the money was paid: mentioned in the stat. 22 and 23 Car-2. c. 22.—Now abolished.

CLERK OF THE PETTY BAG, clericus parvæ bagæ.] An officer of the Court of Chancery. There are three of these officers, of whom the Master of the Rolls is the chief. Their office is to record the return of all inquisitions out of every shire; to make out patents of customers, gaugers, controllers, &c.; all conge d'elires for bishops, the summons of the nobility, and burgesses to parliament, commissions directed to knights and others of every shire, for assessing subsidies and taxes: all offices found post mortem are brought to the clerks of the petty bag to be filed: and by them are entered all pleadings of the Chancery concerning the validity of patents or other things which pass the Great Seal; they also make forth liberates upon extents of sta346

tutes staple, and recovery of recognizances forfeited, and all elegits upon them; and all suits for or against any privileged person are prosecuted in their office, &c.

CLERK OF THE PIPE, clericus pipæ.] officer in the Exchequer, who having the accounts of debts due to the king, delivered and drawn out of the Remembrancer's offices, charges them down in the great roll, and is called clerk of the pipe from the shape of that roll, which is put together like a pipe: he also writes out warrants to the shcriffs to levy the said debts upon the goods and chattels of the debtors; and if they have no goods, then he draws them down to the Lord Treasurer's Remembrancer, to write estreats against their lands. The ancient revenue of the crown stands in charge to him, and he sees the same answered by the farmers and sheriffs; he makes a charge to all sheriffs of their summons to the pipe, and green wax, and takes care it be answered on their accounts. And he hath the drawing and ingressing of all leases of the king's lands: having a secondary and several clerks under him. In the reign of King Hen. VI. this office was called Ingrossator magni rotuli. See stat. 33 H. 8. c. 22.—Abolished.

CLERKS OF THE PLEAS, clericus placitorum.] An officer in the Court of Exchequer, in whose office all the officers of the court, upon special privilege belonging unto them, ought to sue or be sued in any action, &c. By 2 and 3 W. 4. c. 110. § 8. this office is not to be again filled up after the death of W. S. Rose, its present possessor, and the Deputy Clerk of the Pleas is made one of the masters and prothonotaries of the court under its new constitution. See 1 W. 4. c. 70.

CLERKS OF THE PRIVY SEAL, clericus privati sigilli.] These are four of the officers which attend the Lord Privy Seal: or if there be no Lord Privy Seal, the principal Secretary of State; writing and making out all things that are sent by warrant from the Signet to the Privy Seal, and which are to be passed to the Great Seal: also they make out privy seals, upon a special occasion of his Majesty's affairs, as for loan of money, and the like. He that is now called Lord Privy Seal, seems to have been in ancient times called Clerk of the Privy Seal; but notwithstanding to have been reckoned in the number of the great officers of the realm. Stats. 12 R. 2. c. 11. 27 H. 8. c. 11. See Clerk of the Signets.

CLERK OF THE REMEMBRANCE. An officer in the Exchequer, who is to sit against the Clerk of the Pipe, to see the discharges made in the pipe, &c. Stat. 37 E. 3. c. 4. The Clerk of the Pipe and Remembrancer shall be sworn to make a schedule of persons discharged in their offices. Stat. 5 R. 2. st. 1. c.

15.—Abolished.

CLERK OF THE ROLLS. An officer of the Chancery, that makes search for, and copies deeds, offices, &c.

CLERK OF THE RULES. In the Court of King's Bench, is he who draws up and enters all the rules and orders made in court; and gives rules of course on divers writs: this officer is mentioned in stat. 22 and 23 Car. 2.

CLERK OF THE SEWERS. An officer belong. ing to the commissioners of sewers, who writes and records their proceedings, which they transact by virtue of their commissions, and the authority given them by stat. 13 Eliz. c. 9. See tit. Sewers.

CLERK OF THE SIGNET, clericus signeti.] An officer continually attendant on his Majesty's principal secretary, who hath the custody of the privy signet, as well for scaling his Majesty's private letters, as such grants as pass the king's hand by bill signed; and of these clerks or officers there are four that attend in their course, and have their diet at the secretary's table. The fees of the Clerk of the Signet, and Privy Seal, are limited particularly by statute, with a penalty annexed for taking any thing more. See 27 H. 8. c. 11.

See stat. 57 G. 3. c. 63. for regulating the offices of Clerks of the Signet and Privy Seal; the duties of which (after the termination of the then existing interests) are to be performed in person under directions of the Treasury; and such officers are declared incapable of sitting in parliament. By 2 W. 4. c. 49. as any of the offices of Clerks of the Signet and Clerks of the Privy Seal shall become vacant, the Lords Commissioners of the Treasury may abolish any such office, and direct the duties thereof to be executed by the remaining clerks in the said offices. The money arising from the salaries of such abolished offices is to be carried to the consolidated fund.

CLERK OF THE KING'S SILVER, clericus argenti regis.] An officer belonging to the Court of Common Pleas, to whom every fine is brought after it hath passed the office of the custus brevium, and by whom the effect of the writ of covenant is entered into a paperbook; according to which all the fines of that term are recorded in the rolls of the court. After the King's silver is entered, it is accounted a fine in law, and not before. See tit. Fine.—Abolished. See Fine of Lands.

CLERK OF THE SUPERSEDEASES. An officer belonging to the Court of the Common Pleas, who makes out writs of supersedeas, upon a defendant's appearing to the exigent on an outlawry, whereby the sheriff is forbidden to return the exigent. See tit. Outlawry.

CLERK OF THE TREASURY, clericus thesaurarii.] An officer of the Common Pleas, who hath the charge of keeping the records of the court, and makes out all the records of Nisi Prius; also he makes all exemplifications of records being in the Treasury; and he hath the fees due for all searches. He is the servant of the Chief Justice, and removeable at pleasure; whereas all other officers of the

court are for life: there is a Secondary, or Grants of lands, &c. from the crown, are con-Under Clerk of the Treasury, for assistance, who hath some fees and allowances: and likewise an under keeper, that always keeps one key of the Treasury door, and the chief clerk of the secondary, another; so that the one cannot come in without the other. bound to personal attendance, this officer cannot be compelled to serve the office of overseer. 6 Bing. 195.

CLERK OF THE KING'S GREAT WARDROBE. An officer of the king's household, that keeps an account or inventory of all things belonging to the royal wardrobe. Stat. 1 E. 4. c. 1.

CLERK OF THE WARRANTS, clericus warran-

torum.] An officer belonging to the Common Pleas' Court, who enters all warrants of attorney for plaintiffs and defendants in suits; and inrolls deeds of indentures of bargain and sale, which are acknowledged in the court or before any judges out of the court. And it is his office to estreat into the Exchequer all issues, fines, and amerciaments, which grow due to the king in that court, for which he hath a standing fee or allowance. He is justified in not entering a warrant of attorney till arrears of his fees are paid. 1 Bing. R. 277.

CLERKS AND SERVANTS. (In cases not punishable capitally.) Stealing any chattel, money, or valuable security, belonging to, or in the possession of their master, may be transported for 14 years, and not less than seven years, or imprisoned not exceeding three years (and, if male, whipped), 7 and 8 G. 4. c. 29. § 46. And by § 47, 48. clerks and servants, or any person employed for or in such capacity, taking into their possession any chattel, money, or valuable security, on account of their master; and embezzling the same, or any part, are liable to the same punishment.
—So in Ireland by 9 G. 4. c. 55. § 39. 41.

CLOCKS AND WATCHES. Penalties on workmen, &c. embezzling materials of clocks and watches, stat. 27 G. 2. c. 7. See tit. Manufacturers. By stat. 37 G. 3. c. 108. a duty on clocks and watches was imposed, payable by the proprietors; but this was repealed by 38 G. 3. c. 40. See Watches.

By 38 G. 3. c. 24. the duty on gold and silver plate, under 24 G. 3. st. 2. c. 53. and 37 G. 3. c. 90. § 16. was repealed so far as related to plate used for watch-cases.

CLOERE. A prison or dungeon; it is conjectured to be of British original: the dungeon or inner prison of Wallingford Castle, temp. H. 2. was called cloere brien, i. e. carcer brieni, &c. Hence seems to come the Lat. cloaca, which was anciently the closest ward or nastiest part of the prison: the old cloacerius is interpreted carceris custos: and the present cloacerius, or keeper of a jakes, is an office in some religious houses abroad imposed on an offending brother, or by him chosen as an exercise of humility and mortification.

CLOSE ROLLS AND CLOSE WRITS.

tained in charters or letters patent, that is, open letters, literas patentes, so called because they are not sealed up, but exposed to open view, with the Great Seal pendant at the bottom; and are usually addressed by the king to all his subjects at large. And therein they differ from other letters of the king, sealed also with his Great Seal, but directed to particular persons, and for particular purposes: which therefore, not being fit for public inspection, are closed up and scaled on the outside, and are thereupon called writs close, literæ clausæ; and are recorded in the close rolls, in the same manner as the others are in the patent-rolls. 2 Comm. 346.

CLOSH. Was an unlawful game forbidden by stat. 17 E. 4. c. 3. and 33 H. 8. c. 9. It is said to have been the same with our nine-pins, and is called closhcayles by stat. 33 H. 8. c. 9. At this time it is allowed, and called hailes,

or skittels. See tit. Gaming. CLOTH. No cloth made beyond sea shall be brought into the king's dominions, on pain of forfeiting the same, and the importers to be farther punished. Stat. 12 E. 3. c. 3.-

See tits. Manufacturers, Wool.

CLOTHIERS. Are to make broad-cloths of certain lengths and breadths, within the lists; and shall cause their marks to be woven in the cloths, and set a seal of lead thereunto, showing the true length thereof. Stat. 27 H. 8. c. 12. Exposing to sale faulty cloths are liable to forfeit the same; and clothiers shall not make use of flocks or other deceitful stuff in making of broad-cloth under the penalty of 5l. Stats. 5 and 6 E. 6. c. 6 .-Justices of peace are to appoint searchers of cloth yearly, who have power to enter the houses of clothiers; and persons opposing them shall forfeit 10l. Stats. 30 Eliz. c. 20; 4 Jac. 1. c. 2: 21 Jac. 1. c. 18. All cloth shall be measured at the fulling-mill by the master of the mill; who shall make oath before a justice for true measuring; and the millman is to fix a seal of lead to cloths, containing the length and breadth, which shall be a rule of payment for the buyer, &c. Stats. 10 Anne, c. 16. By stat. 1 G. 1. c. 15. broad-cloths must be put into water for proof, and be measured by two indifferent persons chosen by the buyer and seller, &c. And clothiers selling cloths before sealed, or not containing the quantity mentioned in the seals, incur a forfeiture of the sixth part of the value. Persons taking off or counterfeiting seals, forfeit 201. By stat. 12 G. 1. c. 34. clothiers are to pay their work-people their full wages agreed, in money, under the penalty of 10l. &c.; inspectors of mills and tenter-grounds to examine and seal cloths, are to be appointed by justices of peace in sessions; and mill-men sending clothiers any cloths before inspected, forfeit 40s. The inspector to be paid by the clothiers 2d. per cloth. Stat. 13 G. 1. c. 23.— If any cloth remaining on the tenters be stolen in the night, and the same is found

upon any person, on a justice's warrant to duet of any stage coachman, such driving or search, such offender shall forfeit treble value, leviable by distress, &c. or be committed to gaol for three months; but for a second offence he shall suffer six months' imprisonment; and for the third offence be transported as a felon, &c. Stat. 15 G. 2. c. 27.—See tit. Drapery; and more particularly tits. Manufacturers, Servants, Wool.

All the statutes mentioned under this title were repealed by the 49 G. 3. c. 109., with the exception of the 15 G. 2. c. 27. which is

still in force.

CLOVE. The two-and-thirtieth part of a weigh of cheese, i. e. eight pounds, old. Stat.

9 H. 6. c. 8.

A word made use of for a CLOUGH. valley in Domesday book. But among merchants, it is an allowance for the turn of the scale, on buying goods wholesale by weight. Lex Mercat.

CLUTA, Fr. clous.] Shoes, clouted shoes; and most commonly horse shoes: it also signifies the streaks of iron or tie with which cart-wheels are bound. Consuetud. Dom. de Farend. MS. fol. 16. Hence clutarium or cluarium, a forge where the clous or iron shoes are made. Mon. Angl. tom. 2. p. 598.

CLYPEUS. A shield.—Metaphorically one of a noble family. Clypei prostrati, a noble family extinct. Mat. Paris, 463.

COACH, currus.] A convenience well

known. For the regulating of hackney coaches and chairs in London, there are several statutes, viz. 9 Anne, c. 23. made perpetual by 3 G. 1. c. 7. and enlarged as to the number of coaches, by 11 G. 3. c. 24: 42 G. 3. c. 78. so as to make the whole number to be licensed 1100, and enlarged also as to chairs, by 10 Anne, c. 19. and 12 G. 1. c. 12. making the whole number of those 400.

By 48 G. 3. c. 87. the fares were increased. By 54 G. 3. c. 147. 200 hackney chariots were allowed to be licensed as part of the 1100, and by 55 G. 3. c. 159. 200 additional hackney chariots were allowed, and several

regulations made as to the fares.

The other statutes now in force are, 12 Anne, st. 1. c. 14: 1 G. 1. c. 57: 30 G. 2. c. 22: (See Carts.) 4 G. 3. c. 36: 7 G. 3. c. 44: 10 G. 3. c. 44: 11 G. 3. cc. 24. 28: 12 G. 3. x. 49: 24 G. 3. st. 2. c. 27: 26 G. 3. c. 72: 32 G. 3. c. 47.

The statutes here noticed with relation to hackney coaches were repealed by the 1 and 2 W. 4. c. 22. See Hackney Coach.

STAGE COACHES. Several acts have been from time to time made for regulating passengers in those useful (but when overladen, dangerous) vehicles; the last in force is 50 G. 3. c. 48. They are subject to certain mileage duties under the commissioners of stamps.

As to the liability of masters, &c. of coaches

as common carriers, see tit. Carrier.

Where persons are maimed or injured by the furious driving or other wilful miscon-

misconduct is by stat. 1 G. 4. c. 4. declared a misdemeanor, punishable by fine and imprisonment.

COACH-HOUSE. By stat. 7 and 8 G. 4. c. 30. § 2. persons unlawfully and maliciously setting fire to any coach-house, &c. are guilty of felony, and shall suffer death; and by & 8. persons riotously and tumultuously assembling together, and with force demolishing, pulling down, or destroying, or beginning so to do, any coach-house, &c. are also guilty of felony, and punishable in like manner with

COACHMAKERS. Makers of coaches, chariots, chaises, &c. must take out annual licenses from the Excise-office, and pay a duty for every carriage built by them for sale.

COADJUTOR, Lat.] A fellow-helper or assistant; particularly applied to one appointed to assist a bishop; being grown old and infirm, so as not to be able to perform his duty.

By stat. 52 G. 3. c. 62. coadjutors to archbishops and bishops in Ireland are empowered to exercise all the ecclesiastical powers of their principals, except presenting to be-

COAL-MINES. Maliciously setting fire to coal-mines, or to any delph of coal, is felony. 10 G. 2. c. 32. § 6. See tits. Black Act, Felony.

COALS. By stats. 7 E. 6. c. 7: 16 and 17 Car. 2. c. 2: [made perpetual by 7 and 8 W. 3. c. 36. § 2.] and 17 G. 2. c. 35. the sack of coals is to contain four bushels of clean coals: and sea coals brought into the river Thames, and sold, shall be after the rate of thirty-six bushels to the chaldron; and one hundred and twelve pounds to the hundred, The Lord Mayor and Court of Aldermen in London, and justices of the peace of the several counties, or three of them, are empowered to set the price of all the coals to be sold by retail; and if any persons shall re-fuse to sell for such prices, they may appoint officers to enter wharfs or places where coals are kept, and cause the coals to be sold at the prices appointed. The stat. 12 Anne, st. 2. c. 17. regulates the contents of the coal bushel, which is to hold one Winchester bushel, and one quart of water. By stats. 9 H. 5. st. 1. c. 10: 30 Car. 2. c. 8: 6 and 7 W. 3. c. 10: 11 G. 2. c. 15: 15 G. 3. c. 27: and 31 G. 3. c. 36. commissioners are ordained for the measuring and marking of keels, and boats, &c. for carrying coals; and vessels carrying coals before measured and marked shall be forfeited, &c.

By stat. 9 Anne, c. 28. contracts between coal owners and masters of ships, &c. for restraining the buying of coals are void; and the parties to forfeit 100l. And selling coals for other sorts than they are, shall forfeit 50l. Not above fifty laden colliers are to continue in the port of Newcastle, &c. And work-people in the mines there shall not be

349 COALS.

penalty of 51.

By 37 G. 3. c. 122. the provisions of stat. 12 G. 1. c. 34. and 22 G. 2. c. 27. as to payment of wages in money, are extended to lahourers in the collicries in Great Britain and Ireland.

By stat. 3 G. 2. c. 26. containing several regulations as to lightermen and coal buyers, and explained by stat. 11 G. 2. c. 15. coal sacks shall be scaled and marked at Guildhall, &c. on pain of 20s. Also sellers of coals are to keep a lawful bushel, and put three bushels to each sack, which bushel and other measures shall be edged with iron, and scaled; and using others or altering them, incurs a foriciture of 50t. &c. The penalties above 51. recoverable by action of debt, &c. and under that sum before justices of peace.

The offence of selling coals of a different description from those confracted for, upon the stat. 3 G. 2. c. 26. § 4. is complete in the county where the coals are delivered, and not where they are contracted for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But though not justly measuring such coals is a local omission of a local act, required by the 13th section of the act to be performed at the place where the coals are kept for sale, at which place the bushel of queen Anne is required to be kept and used. for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer: and therefore the offence is local, and must be laid in the county where the coals were put into the sacks without having been so justly measured. Butterfield qui tam v. Windle and another. 4 Eust, 355.

A dealer in coals by the chaldron, who sold to another by the chaldron a certain quantity as and for 10 chaldron of coals pool measure, without justly measuring the same with the lawful bushel of Queen Anne, is liable to the penalty of 50l. imposed by the 13th section of the stat. 3 G. 2. c. 26. upon such defaulters who sell coals by the chaldron, or less quantity, without measuring them.

qui tam v. Thompson, 3 East, 525.

See the stat. 6 G. 3. c. 22. now in force, as to the lading coals ships, at Newcastle and Sunderland in turn, according to lists to be

By 51 G. 3. c. 84. the act 22 G. 3. c. 41. (prohibiting persons concerned in the customs from voting for members of parliament) is declared not to affect the fifteen coal-meters [and ten corn-meters] of London.

Drawbacks of duties of customs are allowed

on coals used in mines, &c. by various acts. Stat. 28 G. 3. c. 53. was past to indemnify the London coal buyers against certain penalties, which they had literally incurred under stats. 9 Anne, c. 28. and 3 G. 2. c. 26., and also for the purpose of putting an end to the Society at the Coal-Exchange, formed to regu-

employed who are hired by others, under the | late (i. e. to monopolize) the trade; subjecting all persons, above five in number, entering into covenant or partnerships, to punishment by indictment or information in B. R.

By I and 2 W. 4. c. 16. the duties of custom on coals, culm, or cinders, brought coastwise, or by land or inland carriage, or navi-

gation, are repealed.

By the 1 and 2 W. 4. c. 76. part of the 9 Anne, c. 28. and also the acts 47 G. 3. sess. 2. c. 68. and 56 G. 3. c. 21: 57 G. 3. c. 1: 57 G. 3. c. 40: and 9 G. 4. c. 65. are repealed: and by § 3. the piece of ground, called the Coal Exchange in London, is continued vested in the mayor and commonalty of London for the purposes of the act 47 G. 3. c. 68. And there shall be on the same an open market, called the Coal Market, and the Lord Mayor and aldermen may appoint and remove clerks as they shall see reasonable. The corporation are empowered to remove or enlarge the market, and for that purpose to purchase lands and tenements. Seven days' previous notice is to be given in the London Guzetie of the opening of the market. And for defraying the expences of the market, the purchase of lands, &c., it shall be lawful for the corporation to take from every master of a vessel laden with coals, cinders, or culm, arriving in the port of London to the westward of Gravesend, one penny per ton on such coals, &c., to be levied as the other duties thereafter made payable. The duty is to be applied in payment of expences of obtaining the act, and when they are paid, and also the costs of purchasing land, &c. &c., and the duty shall be more than sufficient for supporting the market and paying the compensation and salaries to the clerks, and others employed in executing the act, then the overplus of the monies received from the duty shall be laid out in stock, in the names of the chamberlain, town clerk, and comptroller, and shall accumulate till the dividends shall be sufficient for the payment of the salaries, and other allowances to the clerks and officers employed in execution of the act; and when the dividends shall be sufficient for that purpose the duty shall cease; but it may be raised again if necessary for the purposes of the act. By § 25. the corporation are empowered to borrow money upon the credit of the duty. court of aldermen are authorized to make hylaws, with reasonable penalties, for the regulation of the market. But such by-laws must be approved by one or more of the judges, and shall be printed and published. The chamberlain is to keep an account of the duty, and the monies borrowed on credit of it; and an account of the produce shall once in every year be laid before both houses of par-liament. By § 43. all coals, einders, and culm, sold out of any vessel in London or Westminster, or within twenty-five miles of the General Post-office, shall be sold by weight, and not by measure. By § 45. if any seller shall knowingly sell one sort of coals

for another within the assigned limits, he be so conveyed without the carman being shall pay 101. per ton, but shall not be subject to such penalty, in respect of any number of tons exceeding twenty-five tons for the same offence. By § 47. the seller shall with every quantity of coals exceeding 560 pounds, de-livered from any lighter, &c. within the limits aforesaid, deliver a ticket in the form mentioned in the act, under penalty of 20l. By § 48. coals sold from any lighter, &c., or wharf, &c., within the aforesaid limits, except coals carried and delivered in bulk as thereinafter received, shall be delivered in sacks containing 112 pounds, or 224 pounds net. Provided that coals sold from any ship, &c., or wharf, &c., within the limits aforesaid, above 560 pounds may be delivered in bulk in carts or carriages, or in any lighter, &c., if the purchasers think fit. Provided also, that where such coals shall be delivered in any cart or other carriage in bulk, the weight of such cart, &c., as well as of the coals, shall be previously ascertained by a weighing machine fixed for that purpose on the wharf or place from which the coals shall be brought; and the sellers' ticket shall state the weight of the cart, &c., as well as of the coals, under a penalty of 50l. Every carman or driver of any cart, &c., in which any coals above 560 pounds shall be carried from any ship, &c., or from any wharf, warehouse, &c., in London and Westminster, or within twenty-five miles from the Post-office aforesaid, shall, if required by the purchaser, or person on his behalf, weigh the wagon or other carriage with the coals therein, at any public weighing machine for carts, &c., which may be on the road to the place of delivery, under a penalty of 10l. If in any case, where any coals shall be delivered in bulk to the purchaser, from any ship, &c., or from any wharf, or place within the limits aforesaid, a less quantity shall be expressed in the ticket to be delivered therewith, the seller shall for every such offence forfeit 101.; and if the deficiency shall exceed 224 pounds the seller shall forfeit 50l. § 52. And be it farther enacted, that if any carman or driver of any cart, &c. laden with coals for sale, or to be delivered to the purchaser by any seller or dealer, or carrier of coals from any ship, &c., or from any wharf, &c. within the limits aforesaid, shall not have placed in, on, or under his cart, &c., a perfect weighing machine marked at Guildhall, London, by the proper officer there, for, which the sum of 2s. 6d. shall be paid, and no more, which machine shall be the form, size, and dimensions of the machine approved by the lords commissioners of his Majesty's treasury, and deposited at the office of the hall keeper of the city of London, then such carman or driver of such cart, &c., shall forfeit and pay any sum not exceeding 101.; and the seller, or dealer, or carrier of such coals shall forfeit any sum not exceeding 201., provided always, that coals which shall be conveyed in bulk, or in any cart, &c. belonging to the purchaser of such coals, may

obliged to carry a weighing machine therewith, or any person being subject or liable to any penalty in respect thereof. § 54. Provided that the carman of any cart, &c. in which coals shall have been carried in sacks for delivery to the purchaser, from any ship, &c., or from any wharf, &c. within the limits aforesaid, shall weigh, if he shall be required so to do, any one or more of the sacks contained in such cart, &c. which may be chosen by the purchaser with the coals therein, and also afterward weigh in like manner such sack without any coals therein, under a penalty of not more than 201., nor less than 51. Provided that if any purchaser requiring any sack of coals to be weighed as aforesaid, shall find the coals therein to be deficient in weight, and shall signify to the carman his desire to have all the coals contained in such cart, &c. or any part of such coals weighed or reweighed in the presence of some constable, police officer, or other indifferent person, then the carman shall remain at or before the house of the purchaser with such coals, and the cart, &c. until such coals are weighed, under a penalty of 20l. All coals sold in any quantity less than 560 pounds, or in the quantity of 560 pounds within the limits, shall be weighed previous to being delivered to the purchaser, and also in the presence of such purchaser, or his agent or servant, under a penalty on the seller of 5l. A proper machine or proper scales and weights for weighing coals, shall be kept at every watch-house, or police station, or at any other place or places which shall from time to time be appointed by any two or more of his Majesty's justices within the limits aforesaid; and the same shall be provided and kept in repair from time to time by the overseers of the poor of the township, parish, &c. in which such watchhouse, &c. shall be situate, out of the poor rates, and shall be used at any time for weighing any coals respecting which there may be any dispute; and in case the overseers of any such township, &c. shall not provide such a machine on or before the first day of January after the passing of this act, or if such overseer shall not cause such machine to be repaired, or a new machine to be provided within seven days after notice of the want thereof in writing shall have been given to him, such overseer shall forfeit 10l.

A great number of acts, confined in the extent of the district within which they are to operate (and therefore classed not in the general body of statutes, but in the list of local and personal acts), have been from time to time passed to regulate the dealings, and prevent the frauds of dealers in coals.

By stat. 37 H. 8. c. 6. persons wilfully and maliciously burning any wain or cart laden with coal, or any other goods of any person, shall not only forfeit treble damages to the party grieved, but also 10l. sterling to the king in the way of a fine. And by the same persons burning any heap of wood prepared,

cut, and felled for making coals.

By stat. 7 and 8 G. 4. c. 30. § 5. persons unlawfully and maliciously setting fire to any mine of coals or canal coal shall be guilty of felony, and suffer death, &c. See tit. Mines.

COAL BEARERS. See Colliers. COAL HEWERS. See Colliers.

COAT-ARMOUR: Coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the Croisade in the Holy Land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. 2 Comm. 306.

It is the business of the Court Military, or the Court of Chivalry, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c., and also rights of place or precedence, where the king's patent or acts of parliament (which cannot be over-ruled by this court), have not already determined it. 3 Comm. 105.

COCHERINGS, or Cosherings, an exaction or tribute in Ireland, now reduced to

chief rents. See Bonaght.

COCKET, cockettum.] A seal belonging to the king's custom-house; or, rather, a scroll of parliament sealed, and delivered by the officers of the custom-house to merchants, as a warrant that their merchandises are customed: which parchment is otherwise called literæ de cocketto or literæ testimoniales de cocketto. Stat. 11 H. 6. c. 15: Reg. Orig. 179. 192.—See also Mad. Excheq. vol. 1. c. 18. The word cockettum, or cocket, is also taken for the custom-house or office where goods to be transported were first entered, and paid their customs, and had a cocket or certificate of discharge; and cocketta luna is wool duly entered and cocketted, or authorised to be transported. Mem. in Scac. 23 Ed. 1.

Cocket is likewise used for a sort of mea-Fleta lib. 2. cap. 9. Panis veno integer quadrantalis frumenti ponderabit unum cocket et dimidium: and it is made use of for a distinction of bread, in the statute of bread and ale, 51 H. 3. st. 1. ord. pro pistor: where mention is made of wastel bread, cocket bread, bread of treet, and bread of common wheat; the wastel bread being what we now call the finest bread, or French bread; the cocket bread the second sort of white bread; bread of treet, and of common wheat, brown or household bread, &c. See

COCKSETUS. A boatman, cockswain, or Cowel.

Bread.

COCULA. A cogue, or little drinking-cup, in form of a small boat, used especially at sea, and still retained in a cogue [cag or

statute the like punishment is imposed on keguel of brandy. These drinking cups are also used in taverns to drink new sherry, and other white wines which look foul in a

> CODICIL, codicillus, from codex, a book, a writing.] A schedule or supplement to a will, where any thing is omitted which the testator would add, or where he would explain, alter, or retract what he hath done. See tits. Will, Devise.
>
> COFFEE, TEA, CHOCOLATE, and COCOA

The duties on these articles form a branch of the public renenue, under the head of Customs and Excise; and, like all other subjects of those jurisdictions, are liable to a variety of penal regulations by acts of parliament, necessary to prevent the numerous frauds and evasions daily endeavoured to be practised, to the impoverishment of government, and the injury of the fair trader. See tits. Excise, Customs, and also tit. Navigation

COFFERER OF THE KING'S HOUSE. HOLD, is a principal officer of the king's house, next under the controller, who, in the counting-house, and elsewhere, hath a special charge and oversight of other officers of the household, to all which he pays their wages: this officer passes his accounts in the Exchequer. Sec stat. 39 Eliz. c. 7.

COGGLE. A small fishing-boat, upon the coasts of Yorkshire; and cogs (cogones) are a kind of little ships, or vessels, used in the rivers Ouse and Humber. Stat. 23 H. 8. c. 18. See Mat. Paris, anno 1066. And hence the cogmen, boatmen, or seamen, who, after shipwreck or losses by sea, travelled and wandered about to defraud the people by begging and stealing. Du Fresne.

COGNATI. Relations by the mother, as the agnati are relations by the father.

COGNATIONE. A writ of cousenage. See Cousenage.

COGNISANCE, or CONUSANCE, Fr. connusaunse, Lat. cognitio.] Is used diversely in our law: sometimes for an acknowledgment of a fine. See tit. Fine. In replevin, cognisance, or conusance, is the answer given by a defendant, who hath acted as bailiff, &c. to another, in making a distress. See tits. Distress, Replevin.

Cognisance also signifies the badge of a servant, as the crest of any nobleman or gentle-

The most usual sense in which this term is now used is relative to the claim of cognisance of pleas. This is a privilege granted by the king to a city or town, to hold plea of all contracts, &c. within the liberty of the franchise; and when any man is impleaded for such matters in the courts of Westminster, the mayor, &c. of such franchise may ask cognisance of the plea, and demand that it shall be determined before them: but if the courts at Westminster are possessed of the plea before cognisance be demanded, it is then too late.

Terms de Ley. Sec stats. 9 H. 4. c. 5: 8 H. 6. c. 26: 3 Comm. 298: 4 Comm. 277. See

tit. Pleading.

Cognisance of pleas extends not to assizes; and when granted, the original shall not be removed: it lies not in a quare impedit, for they cannot write to the bishop, nor of a plea out of the county court, which cannot award a resummons, &c. Jenk. Cent. 31, 34. This cognisance shall be demanded the first day: and if the demandant in a plea of land counterpleads the franchise, and the tenant joins | unless the cognovit is first produced to the with the claim of the franchise, and it is found against the franchise, the demandant shall recover the land; but if it be found against the demandant, the writ shall abate-15id. 18.

There are three sorts of inferior jurisdictions, one whereof is tenere plucita, and this is the lowest sort; for it is only a concurrent jurisdiction, and the party may sue there or in the king's courts, if he will. The second is conusance of pleus, and by this a right is vested in the lord of the franchise to hold the plea, and he is the only person who can take advantage of it. The third sort is an exempt jurisdiction, as where the king grants to a great city, that the inhabitants thereof shall be sued within their city, and not elsewhere; this grant may be pleaded to the jurisdiction of the Court of K. B. if there be a court within that city which can hold plea of the cause, and nobody can take advantage of this privilege but a defendant; for if he will bring certiorari, that will remove the cause, but he may waive it if he will, so that the privilege is only for his benefit. 3 Salk. 79, 80. pl. 4: Hil. 1 An. B. R. Crosse v. Smith.

King Hen. VIII. by leiters patent of the 14th of his reign, and confirmed by parliament, granted to the University of Oxford coun-sance of pleas, in which a scholar or servant of a college should be a party, its quod justiciurii de utroque banco se non intromittant. An attorney of C. B. sucd a scholar in C. B. for buttery. By the court, this general grant does not extend to take away the special privilege of any court without special words.

Lit. Rep. 304: Oxford (University's) case. See 11 East. 543: 12 East, 12: 15 East, 634. See farther tit. University.

COGNISOR AND COGNISEE. Cognisor is he that passeth or acknowledgeth a fine of lands or tenements to another; and cognisee is he to whom the fine of the said lands, &c. is acknowledged. Stat. 32 H. 8. c. 5.

Cognition is the process whereby molesta-

tion is determined. Scotch Dict.
COGNITIONES. Ensigns and arms, or a military coat painted with arms. Mat. Par-

is, 1250.

COGNITIONIBUS MITTENDIS. A writ to one of the king's justices of the Common Pleas, or other that hath power to take a fine, who having taken the fine defers to certify it, commanding him to certify it. Reg. Orig. prerogative, as the arbiter of domestic com-68.

COGNOVIT ACTIONEM, is where a defendant acknowledges or confesses the plaintian's case og linst him to be just and true; and, before or after issue, sources judgment to be entered against him without trial. And here the countession goods 11' extends no airther than to what is contained in the declaration; out if the describant will confess more he may. 1 Rol. 929: 11.b. 178.

By rule of K. B. Hil. 2 and 3 G. 4. no judgment can be entered on any cognovit Clerk of the Dockets, and, after taxation of costs, filed with him; and by 3 G. d. c. 39. § 3. every cognovit given in any personal action, if in the K. B., or a true copy if in any other court, shall be filed with an affidavit of exccution with the said Clerk of the Dockets. within twenty-one days after execution, or shall be decined fraudulent, against assignees under a bankruptcy, against the person giving it; and the defeasance, if any, must also be filed as aforesaid, and must be written on the same paper as the cognovit, or the cognovit shall be null and void. These provisions are extended to assignces of insolvent debtors by the 5 G. 4. c. 61. § 16. and 7 G. 4. c. 15. § 33. And see 5 Barn. & Cres. 650: Tidd's Prac. 562. (9th cd.) And as to cognovits given by

COHUAGIUM, a tribute paid by those who met promisenously in the market or fair; chua signifying a promiscuous multitude of men in a fair or market .- Quieti ab omni thelonio, passagio, pontagio, coluagio, pallagio,

bankrupts, see 6 G. 4.c. 16. § 108. and tit. Bank-

&c. Du Cange.

rupit.

COIF, coija.] A title given to serjeants at law; who are called serjeants of the coif, from the lawn coif they wear on their heads under their caps when they are created. The use of it was anciently to cover tous aram clericalem, otherwise called corona clericalis; because the crown of the head was close shaved, and a border of hair le't round the lower part, which is made to look like a crown. Blount. See tit. Clerk.

COIN, cuna pecunia.] Seems to come from the Fr. coiga, i. e. angulus, a corner, whence it has been held, that the ancientest sort of coin was square with corners, and not round as it now is: it is any sort of money coined. Cromp. Jurisd. 220.

Moncy is an universal medium or common standard, by comparison with which the value of all merchandize may be ascertained; or it is a sign which represents the value of all

commodities. 1 Comm. 276, 277.

Metals are well calculated for this sign, because they are durable, and are capable of many subdivisions; and a precious metal is still better calculated for this purpose, because

it is most portable. Ibid.

The coining of money is in all states the act of the sovereign power; and, as money is the medium of commerce, it is the king's merce, to give it authority, or make it current. COIN. 353

The king may, by his proclamation, legitimate foreign coin, and make it current here, declaring at what value it shall be taken grant from the king, or by prescription, which

m payment. 1 Hale, 194.

Therefore it seems that no one can be enforced to take in payment any money but of lawful metal, that is, gold and silver, except for sums under sixpence. 1 Hale, Hist. 195: 2 Inst. 577.

Coin is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom: and this is one of the royal prerogatives belonging to every sovereign prince, that he alone in his own dominions may order and dispose the quantity, value, and fashion of his coin. But the coin of one king is not current in the kingdom of another, unless it be at great loss; though our king by his prerogative may make any foreign coin lawful money of England at his pleasure, by proclamation. Terms de Ley. If a man binds himself by bond to pay one hundred pounds of lawful money of Great Britain, and the person bound, the obligor, pays the obligee the money in French, Spanish, or other coin, made current either by act of parliament, or the king's proclamation, the obligation will be well performed. Co. Lit. 207. But it is said a payment in farthings is not a good payment. 2 Inst. 517. See post.

When a person has accepted of money in payment from another, and put the same into his purse, it is at his peril after his allowance; and he shall not then take exception to it as bad, notwithstanding he presently reviews it.

Terms de Ley.

The coining of money is in all states the act of the sovereign power; that its value may be known on inspection. And with regard to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination. With regard to the materials, Sir Edward Coke lays it down (2 Inst. 577.) that the money of England must either be of gold or silver, and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by Charles II .: and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise. But this copper coin is not upon the same footing with the other in any respect, particularly with regard to the offence of counterfeiting it, as has been already noticed. And as to the silver coin, it was enacted by stat. 14 G. 3. c. 42. that no tender of payment in silver money, exceeding twentyfive pounds at one time, shall be a sufficient tender in law for more than its value by weight, at the rate of 5s. 2d. an ounce. This was a clause in temporary act, which expired in 1783, was revived by 38 6.3. c. 59., and made perpetual by 39 6.3. c. 75., but repealed by 56 6.3. c. 68. § 12. See post.

As to the *impression*, the stamping thereof is the unquestionable prerogative of the crown: for, though divers bishops and monasteries had formerly the privilege of coining money,

yet, as Sir Matthew Hale observes (1 Hist. P. C. 191.), this was usually done by special grant from the king, or by prescription, which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides the t, they had only the profit of the coinage, and the power of instituting either the impression or denomination; but had usually the stamp sent them from the

Exchequer.

The denomination, or the value for which the coin is to pass current, is likewise in the breast of the king; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called Esterling, or sterling metal; a name for which there are various reasons given, but none of them entirely satisfactory. Spelm. Gloss. 203: Du Fresne, 3. 165. most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the Esterlings or Easter-lings, as those Saxons were anciently called, who inhabited that district of Germany now occupied by the Hans-towns and their appendages: the earliest traders in modern Europe. Of this steeling or esterling metal all the coin of the kingdom must be made, by stat. 25 E. 3. c. 13.—So that the king's prerogative seemeth not to extend to the debasing or enhaveing the value of the coin, below or above the sterling value: 2 Inst. 577; though Sir Maithew Hale, (1 Hal. P. C. 194.) appears to be of another opinion. The king may also by his proclamation legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments. 1 H. P. C. 197. But this, it seems, ought to be by comparison with the standard of our own coin, otherwise the consent of parliament will be necessary. The king may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current. Hale, P. C. 197.

This standard hath been frequently varied in former times; but hath for many years past been thus invariably settled. The pound troy of gold, consisting of twenty-two carats (or 24th parts) fine, and two of alloy, is divided into forty-four guineas and a half of the present value of 21s. each. And the pound troy of silver (consisting of eleven ounces and two penny-weights fine, and eighteen penny-weights alloy) was, from the end of the reign of Queen Elizabeth until 56 George III. divided into sixty-two shillings. See Folkes on English Coins, and stat. 14 G. 3. c.

42.

Guineas have been raised and fallen, as money has been scarce or plenty, several times by statute; and anno 3 G. 1. guineas were valued by proclamation at 21s., at which they now pass.

In the 7th year of King William III. an

act 7 and 8 W. 3. c. 1. was made for calling. in all the old coin of the kingdom, and to melt it down and re-coin it; the deficiencies whereof were to be made good at the public charge; and in every hundred pound coined 40l. was to be shillings, and 10l. sixpences, under certain penalties.

By stat. 56 G. 3. c. 68. to provide for a new silver coinage, and to regulate the currency of the gold and silver coin of the realm, so much of stat. 18 Car. 2. c. 5. as related to coining silver brought to the Mint without any charge was repealed; so much of stat. 7 and 8 W. 3. c. 1, as related to the weight and fineness of silver coin under the Mint-indenture; and so much of 14 G. 3. c. 42. as required the pound troy of silver to be coined into 62 shillings, was also repealed; and a temporary act, 38 G. 3. c. 59. by which the coinage of any silver at the Mint was prohibited, was also repealed, § 1-3.

By § 4. &c. of the said act, 56 G. 3. c. 68. it is enacted, that the pound troy of standard silver, 11 oz. 2 dwts. fine, and 18 dwts. alloy, should be coined into 66 shillings .- Provisions were by this act made for calling in the old silver coin; and by § 9, 10. it was enacted, that after a certain time silver coin and bullion might be brought to the Mint to be coined at the rate of 66s. per pound troy of standard silver, of which 62s. should be delivered to the party bringing the bullion, and 4s. be retained for charge of assaying, coinage, &c.

By § 11, 12. of this act, 56 G. 3. c. 68. it is farther enacted, that the gold coin of the realm shall be, and be considered, the only legal tender for payments (except for sums; not exceeding 40s. for which silver coin is made a legal tender) within the United Kingdom of Great Britain and Ireland;-that the gold coin should continue to hold its former weight and fineness; -and that gold coin of any new denomination to be coined should be of weight proportioned to the weight of the gold coin then current.-Under this last provision gold sovereigns were coined to pass for 20s. each, containing 20-21th parts of the weight of a guinea.

Lastly, by § 13. &c. of the said act, 56 G. 3. c. 68. it was enacted that the current gold coin shall not be received or paid for more or less than its value, according to its denomination; on penalty of imprisonment, for the first offence, for six months; second offence, one year; and subsequent offence, two years, &c. But $\S\S 13-16$. of this act are now repealed by $2\ W.\ 4.\ c.\ 34$.

All former acts relating to the coin are extended to the silver coin coined under this act.

Of Offences relating to the Coin.—Before the passing of the new stat. 2 W. 4. c. 34. the laws touching offences against the coin stood greatly in need of revision, having been made at remote periods of time, and often under circumstances which had ceased to operate. The provisions of many were defective, and the language of all required amendment.

The principal feature in the new act is the change introduced with regard to the nature of the higher offences against the coin. These, which were formerly high treason, are now made felony; and for the punishment of death that of transportation is substituted throughout the act. Capital punishment is thus abolished in no less than seven instances. The distinction made in the old statutes between treasons or felonies, and misdemeanors. is still preserved in the new act, with the exception of the second offence of uttering counterfeit coin, which was formerly a misdemeanor, but is now made a felony.

The offences under the new statute are. with some few exceptions, the same which were found in the former acts. In defining the crime of counterfeiting, an alteration has been introduced to meet the case of the false coin being discovered in a state not fit for cir. The definition of the various offences of colouring coin or metals has also been amended. With regard to the offence of putting off counterfeit coin, the words "offer to put off," &c. are added. The bare possession of counterfeit coin, knowing it to be such, with intent to utter, which was held to be no offence at common law, is made a misdemeanor by the new act. Some alteration has been made with regard to the offences against the copper coin. Uttering or having possession of false copper money, and making or having possession of tools for making of copper coin, are now, for the first time, made offences by statute. In no case, under the new act, is there any penalty attached to a third offence; the highest punishment, viz. transportation for life, being affixed to a second conviction.

An important alteration has been made with regard to the procedure in cases of coining, by § 15. of the new statute, which permits several persons who have been acting in concert in different counties to be jointly tried in the same county.

The new statute is confined to offences against the king's current gold, silver, and copper coin. The offence of counterfeiting foreign money current here by proclamation (a case not likely to arise) is not provided for. The statutes relating to the counterfeiting, &c. of foreign counterfeit coin, not current in this country, are left untouched.

The operation of the new statute is confined to Great Britain and Ireland, the former statutes not being repealed, so far as the same may be in force, in any part of his majesty's dominions out of the United Kingdom.

The subject may be divided into five parts,

treating-

1. Of Offences against the Gold and Silver Coin.

II. Of Offences against the Copper Coin.

III. Of Offences against Foreign Coin.
IV. Of Offences with regard to making Coining Tools, &c.

V. Of Various Matters relating to the Coin,

I. Of Counterfeiting the Gold and Silver Coin.—By the old law, Stat. of Treasons, 25 Ed. 3. st. 5. c. 2. if a man counterfeit the king's great or privy seal, or his money, he is guilty of high treason. By the new law, 2 W. 4. c. 34. § 3. it is enacted, "That if any person shall falsely make or counterfeit any coin, resembling, or apparently intended to resemble, or pass for any of the king's current gold or silver coin, every such offender shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every such offence shall be deemed to be complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

By the 4th section of the new statute it is enacted, That if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over, any coin whatsoever, resembling, or apparently intended to resemble, or pass for any of the king's current gold or silver coin, or if any person shall gild or silver, or shall, with any such wash or materials capable of producing the colour of gold or silver, wash, colour, or case over any piece of silver or copper, or of coarse gold or coarse silver, or if any metal or mixture of metals, respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin, resembling, or apparently intended to resemble, or pass for any of the king's current gold or silver coin; or if any person shall gild, or shall, with any wash or material capable of producing the colour of gold, wash, colour, or case over, any of the king's current silver coin, or file, or in any manner utter such coin, with intent to make the same resemble or pass for any of the king's current gold coin; or if any person shall gild, or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over, any of the king's current copper coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold or silver coin; every such offender shall, in England and Ireland, be guilty of felony; in Scotland, of a high crime and offence; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned any term not exceeding four years.

There are six offences provided against by this section of the new statute:—

1. Gilding, silvering, or colouring, with gold or silver, any coin resembling the lawful gold or silver coin.

2. Gilding, silvering, or colouring, with gold or silver, any piece of silver or copper, or of coarse gold, or of coarse silver, or of any metal or mixture of metals, of a fit size and figure to be coined, and with intent that the same shall be coined into counterfeit coin.

3. Gilding, or colouring with gold, any good silver coin, with intent to make it pass

for good gold coin.

4. Filing or altering such coin, with the ike intent.

5. Gilding, or silvering, or covering with gold or silver, any copper coin, with intent to make it pass for good gold or silver coin.

6. Filing or altering such copper coin with

the like intent.

Impairing the gold and silver coin is also an offence. By the 5th sect. of the new act, if any person impair, demolish, or lighten any

if any person impair, demolish, or lighten any of the king's current gold or silver coin, with intent to make coin lightened pass for the king's current coin, he shall be guilty of felony, and liable to transportation for fourteen years, or imprisonment for three years. The words of this clause are more comprehensive than those of the old act. 5 Eliz. c. 11. and the words "for wicked lucre, or gain's sake," are omitted. See Roscoe on Coin, p. 18.

The 6th sect. applies to buying and selling false coin for a lower value than its denomination, and renders this offence, and also that of importing false coin, intended to pass for the king's current coin, a felony, punishable with transportation for life, or imprisonment not exceeding four years. See Roscoe, p. 20.

By the 7th sect. any person knowingly ut-

By the 7th sect. any person knowingly uttering false coin, intended to pass for the king's current coin, shall be guilty of a misdemeanor, and imprisoned for a year; and in case of such person having in his possession, at the time of the offence, other counterfeit coin, or in case he shall, within ten days, knowingly utter more counterfeit coin, he shall be imprisoned for two years; and in case of a second offence, after a former conviction, he shall be guilty of felony, and liable to be transported for life, or imprisoned for four years. See Roscoe, p. 30.

Before the new act, the mere having in possession counterfeit coin seems not to have been an offence; Russ. & Ry. 288; though the procuring counterfeit coin with intent to circulate it was an offence at common law. By the 8th sect. of the new act, the having in possession three or more pieces of false coin with intent to utter it, is rendered a misdemeanor, punishable with imprisonment for three years; and the second offence felony, punishable with transportation for life, or imprisonment not exceeding four years.

II. Offences against the Copper Coin.—The twelfth section of the new act consolidates the offences as to the copper coin, and enacts that

any person counterfeiting the king's current | improvement is introduced, and parties acting copper coin, or making, or mending, or buying, or selling, or knowingly having in his custody, any tools, &c. intended for such counterfeiting, or buying, selling receiving, paying, or putting on any lalse coin, resembling the copper coin, for lower value than its denomination imports, shall be guilty of felony, and liable to be transported for seven years, or imprisoned for two years. And any person knowingly tendering, or uttering or possessing, with intent to utter, any counterfeit coin intended to resemble the king's current coin, shall be guilty of a misdemeanor, and liable to be imprisoned for any term not exceeding one year. See Roscoe, 51.

III. Offences relating to the Foreign Coin. By 37 G. 3. c. 126. § 2. if any person shall counterfeit any coin not of the realm, nor permitted to be current here, but resembling the gold or silver coin of any foreign prince, &c., he shall be guilty of felony, and liable to be transported for seven years. By § 3. the inporting such coin is a felony, punishable in the same manner. By § 4. uttering or tendering such coin is punishable with six months' imprisonment, and two years for the second offence; the third offence is a felony without clergy. By § 6. any person having in his possession, without excuse, more than five pieces of such coin, shall forfeit the same, and also not more than 5l. nor less than 40s. for every piece of such coin in his custody; one moiety to the informer, and the other to the poor of the parish. By 43 G. 3. c. 139. counterfeiting foreign copper money is a misdemeanor, punishable with imprisonment for one year; and for the second offence transportation for seven years. See Roscoe, 61.

IV. Offences with regard to making Coining Tools, &c .- By § 10. of the new act, 2 IV. 4. c. 34. any person knowingly making or mending, or having in his possession, any puncheon, matrix, &c. &c. impressed with the stamp of both or either of the sides of any of the king's gold or silver coin, or making, or mending, or buying, or selling, or having in his custody, any edger, edging tool, &c. &c. for marking coin round the edges with marks resembling those on the king's coin, or knowingly making, or mending, or buying, or selling, or having in his custody, any press for coinage, or cutting engine for cutting round blanks out of gold, silver, or other metal, knowing such engine to be intended for counterfeiting, &c., shall be guilty of felony, and liable to be transported for life, or imprisoned not exceeding four years. See Roscoe, p. 67.

V. Various Matters relating to the Coin. As to the discovery and seizure of counterfeit coin and tools, see 43 G. 3. c. 139. § 7, and § order to have an equal distributory share of 14. of the new act. By § 15. an important his personal estate, at his death, according to

in concert in different counties, in committing any offence against the act, may be tried in either of the counties. The 16th sect. takes away the power of traversing, taless for good canse shown. By § 17. the coin may be proved to be counterfeit by any credible witness, and not necessarily by an officer of the Mint. By § 19. any person imprisoned may be put to hard labour or solitary confinement. See Mr. Rosco's perspictuals work, pussim. COLIBERTS, caliberti.] Were tenants in

socage; and particularly such villeins as were canumitted or made freemen. Donesday. But they had not an absolute freedom; for though they were better than servants, yet they had superior lords to whom they paid certain duties, and in that respect they might be called servants, though they were of middle condition, between freemen and servants. Libertale careus colibertus dicitur esse. Du

COLLATERAL, collateralis.] From the Lat. luterale, sideways, or that which hangeth by the side, not direct: as collateral assurance is that which is made over and above the deed itself: collateral security is where a deed is made of other land, besides those granted by the deed of mortgage; and if a man covenants with another, and enters into bond for per-formance of his covenant, the bond is a col-luteral assurance, because it is external, and without the nature and essence of the covenant. If a man hath liberty to pitch booths or standings, for a fair or market, in another person's ground, it is collateral to the ground. The private woods of a common person, within a forest, may not be cut down without the king's licence, it being a prerogative collateral to the soil. And to be subject to the feeding of the king's deer, is colluteral to the soil of a forest. Cromp. Jurisd. 185: Manwood, p. 66.

COLLATERAL CONSANGUINITY, OF KINDRED. Colluteral relations agree with the lineal in this, that they descend from the same stock or ancestor; but differ in this, that they do not descend from each other. Collaieral kinsmen, therefore, are such as lineally spring from one and the same ancestor, who is the stirps or root, the stipes, trunk, or common stock, from whence these relations are branched out.

2 Comm. 204. See tit. Descent. COLLATERAL DESCENT, and COLLATERAL WAR-RANTY. See Descent and Warranty.

COLLATERAL ISSUE, is where a criminal convict pleads any matter, allowed by law, in bar of execution, as pregnancy, the king's pardon, an act of grace, or diversity of person, viz. that he or she is not the same that was attainted, &c., whereon issue is taken, which issue is to be tried by a jury, instanter.

COLLATIO BONARUM is, in law, where a portion of money advanced by the father to a son or daughter, is brought into holchpot, in the intent of the stat. 22 and 23 Car. 2. c. 100. I titled to the property of the deceased. 2 Comm. Abr. Cas. Eq. p. 254. See tits. Hotchpot, Executor.

COLLATION TO A BENEFICE, collatio beneficii.] Signifies the bestowing of a benefice by the bishop, or other ordinary, when he hath right of patronage. See tit. Advowson.

COLLATIONE FACTA UNI POST MORTEM ALTE-RIUS. A writ directed to the justices of the Common Pleas, commanding them to issue their writ to the bishop, for the admission of a clerk in the place of another presented by the king, who died during the suit between the king and the bishop's clerk: for judgment once passed for the king's clerk, and he dying before admittance, the king may bestow his presentation on another. Reg. Orig. 31.

COLLATIONE HEREMITAGH. A writ whereby the king conferred the keeping of an hermitage upon a clerk. Reg. Orig. 303. 308.

COLLATION OF SEALS. This was when, upon the same label, one seal was set on the back or reverse of the other.

COLLEGE, collegium.] A particular corporation, company, or society of men, having certain privileges founded by the king's license: and for colleges in reputation, see 4 Rep. 106, 108,

The establishment of colleges or universities is a remarkable æra in literary history. The schools in cathedrals and monasteries confined themselves chiefly to the teaching of grammar. There were only one or two masters employed in that office. But in colleges, professors were appointed to teach all the different parts of science. The first obscure mention of academic degrees in the university of Paris (from which the other universities in Europe have borrowed most of their customs and institutions) occurs A. D. 1215. Vide Robert's Hist. Emp. C. V. v. 1. 323.

See the powers of visitors of colleges well explained in Dr. Walker's case. Hardw. 212.

See farther tit. Corporations, Leases, Universities.

COLLEGIATE CHURCH, is that which consists of a dean and secular canons; or more largely, it is a church built and endowed for a society, or body corporate, of a dean or other president, and secular priests, as canons or prebendaries in the said church. There were many of these societies distinguished from the religious or regulars, before the reformation: and some are established at this time; as Westminster, Windsor, Winchester, Southwell, Manchester, &c. See tit. Chapter, Dean.

COLLIGENDUM BONA DEFUNCTI (Letters ad.) In defect of representatives and creditors to administer to an intestate, &c. the ordinary may commit administration to such discreet person as he approves of, or grant him these letters, to collect the goods of the deceased, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and to do by force of which he entered on the lands in other acts for the benefit of such as are en- question, he cannot plead this by itself, as

505. See tit. Executor.

COLLOQUIUM, a colloquendo.] A talking together, or affirming of a thing, laid in declarations for words in actions of slander, &c.

Mod. Cas. 203: Carthew, 90. Slander. COLLUSION, collusio.] Is a deceitful agreement or contract between two or more persons, for the one to bring an action against the other, to some evil purpose, as to defraud a third person of his right, &c. This collusion is either apparent, when it shows itself on the face of the act; or, which is more common, it is secret, when done in the dark, or covered over with a show of honesty. And it is a thing the law abhors: wherefore, when the same, though otherwise in themselves good. Co. Lit. 109. 396: Plowd. 54. Co tusion may sometimes be tried in the same action wherein the covin is, and sometimes in another action, as for lands aliened in mortmain by quale jus; and where it is apparent there needs no proof it: but when it is secret it must be proved by witnesses, and found by jury like other matters of fact. 9 Rep. 33. The stat. of Westm. 2. 13 Ed. 1. c. 33. gives the writ quale jus, and inquiry in these cases: and there are several other statutes relating to deeds made by collusion and fraud. The cases particularly mentioned by the stat. of Westm. 2. are of quare impedit, assise, &c. which one corporation brings against another, with intent to recover the land or advowson, for which the writ is brought, held in mortmain, &c. See tit. Fraud.

COLONIES. See tit. Plantations.

COLONUS. An husbandman or villager, who was bound to pay yearly a certain tribute; or at certain times in the year to plough some part of the lord's land; and from hence comes the word clown.

COLOUR, color.] Signifies a probable plea, but which is in fact false; and hath this end, to draw the trial of the cause from the jury to the judges: and therefore colour ought to be matter in law, or doubtful to the jury. See Bac. Ab. tit. Pleas & Pleading (7th. ed.): Stephens on Pleading.

It is a rule in pleading (with some exceptions, see 4 Barn. & Cres. 547.) that no man be allowed to plead, specially, such a plea as amounts only to the general issue; but in such case he shall be driven to plead the general issue; neral issue in terms, whereby the whole question is referred to a jury. But if a defendant, in an assise or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time give colour to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be that he claims by feoffment with livery from A.,

Vol. I.-46

this plea amounts to no more than the gene-But he may allege this specially, provided he goes farther and says, that the plaintiff claiming by colour of a prior deed of feoffment, without livery, entered, upon whom he entered; and may then refer himself to the judgment of the court, which of the two titles is the best in point of law. Doctor & Stud. 2. c. 53.

Every colour ought to have these qualities following: 1. It is to be doubtful to the lay gens, as in case of a deed of feoffment pleaded, and it is a doubt whether the land passeth by the feoffment, without livery, or not. 2. Colour ought to have continuance, though it wants effect. 3. It should be such colour, that, if it were effectual, would maintain the nature of the action; as in assise, to give colour of freehold, &c. 10 Rep. 88. 90. a. 91. Colour must be such a thing, which is a good colour of title, and yet is not any title. Cro. Jac. 122. If a man justifies his entry for such a cause as binds the plaintiff or his heirs for ever, he shall not give any colour: but if he pleads a descent in bar, he must give colour, because this binds the possession, and not the right; so that when the matter of the plea bars the plaintiff of his right, no colour must be given. When the defendant entitles himself by the plaintiff; where a person pleads to the writ, or to the action of the writ; he who justifies for tithes, or where the defendant justifies as servant: in all these cases no colour ought to be given. 10 Rep. 91: Lutw. 1343. Where the defendant doth not make a special title to himself, or any other, he ought to give colour to the plaintiff. Cro. Eliz. 76. In trespass for taking and carrying away twenty loads of wood, &c. the defendant says, that A. B. was possessed of them, ut de bonis propriis, and that the plaintiff claiming them by colour of a deed after made, took them, and the defendant re-took them; and adjudged, that the colour given to the plaintiff makes a good title to him, and confesseth the interest in him. 1 Lil. Abr. 275. See tit. Pleading.

COLOUR OF OFFICE, color officii.] Is when an act is evilly done by the countenance of an office; and always taken in the worst sense, being grounded upon corruption, to which the office is as a shadow and colour. Plowd. Comment. 64. See as to the distinction between acts done colore officii and virtute officii, 9 East, 364: 2 Barn. & Cres. 729. See Bribery; Extortion.

COLPICES, colpicium, colpiciis.] Young poles, which, being cut down, make levers or lifters; and in Warwickshire they are called

colpices to this day. Blount.

COLPO, a small wax candle, à copo de cere. Hoveden says, that when the King of Scots came to the English court, as long as he staid there, he had every day, De liberatione triginta sol, & duodecim vassellos dominicos, & quadraginta grossos longos colpones de dominica candela regis, &c. anno 1194.

COMBARONES, the fellow barons, or commonalty of the Cinque Ports. Placit. temp. Ed. 1. and Ed. 2. But the titles of barons of the Cinque Ports is now given to their representatives in parliament; and the word combaron is used for a fellow member, the baron and his combaron. See tit. Parliament.

COMBATERRÆ, from Sax. cumbo, Brit. kum, Eng. comb.] A valley or low piece of ground or place between two hills; which is still so called in Devonshire and Cornwall; hence many villages in other parts of England have their names of comb, as Wickcomb, &c. from their situation. Kennett's Gloss.

COMBINATIONS, to do unlawful acts, are punishable before the unlawful act is executed; this is to prevent the consequence of combinations, and conspiracies, &c. 9 Rep. 57. See tits. Confederacy, Conspiracy.

By the stat. 6 G. 4. c. 129. (which repeals the statutes as to combinations by workmen, and substitutes other provisions), the offences of forcing, or endeavoring to force, workmen by violence, threats, intimidation, &c. to leave their service, or to quit their work, or return it unfinished, or to prevent their hiring themselves, and for using violence, &c. towards others, for compelling them to belong to clubs, or to pay fines for not obeying orders as to wages, or for forcing any master to alter mode of work, or limiting number of apprentices, &.c. are punishable with three months' imprisonment, with or without hard labour. § 3. Not to affect meetings for settling of rates of wages or hours of work of the persons meeting. § 4. Nor meetings of masters as to rates of wages, &c. of their workmen. § 5. Summary conviction before two justices • (within four months). § 7. No justice being a master shall act under this act. § 13. Punishment of witnesses summoned and refusing to appear, or be examined, three months' imprisonment. § 8. Offenders compellable to give evidence for the crown, and shall be indemnified. § 6. Forms of convictions, and commitments. § 6. and Sch. Convictions shall be transmitted to quarter sessions and filed. § 11. Appeal to general or quarter sessions, § 12.

COMBUSTIO PECUNIÆ. The ancient way of trying mixt and corrupt money, by melting it down upon payments into the Exchequer. In the time of King Henry II. a constitution was made, called the trial by combustion; the practice of which differed little or nothing from the present method of assaying silver. But whether this examination of money by combustion, was to reduce an equation of money only of sterling, viz. a due proportion of allay with copper; or to reduce it to a fine pure silver without allay, doth not appear. On making the constitution for trial, it was considered, that though the money did answer numero et pondere, it might be deficient in value; because mixed with copper or brass, &c. Vide Lowndes's Essay upon Coin, p. 5. See tit. Coin.

COMITATUS. A county. Ingulphus tells ordinary commandment is replevisable—us, that England was first divided into counties by King Alfred; and counties into hundreds, and these again into tithings; and Fortesque writes that regnum Angliæ per comitatus ut regnum Franciæ per ballivatus distinguitor. It is also taken for a territory or jurisdiction of a particular place, as in Mat. Paris, anno 1234, and divers old char-

ters. See tits. County, Sheriff.

According to Lord Littleton, in his History of Hen. II. lib. 2. fol. 217. each county was anciently an earldom, so that, previous to the reign of King Stephen, there were not any titular earls, nor more earls than counties, though there might be fewer. As to the division of counties into hundreds and ti-things, see Ld. Lit. l. 2. fol. 259: also see

Bract. 1.3. c. 10.

COMITATU COMMISSO, is a writ or commission whereby a sheriff is authorised to take upon him the charge of the county. Reg. Orig. 295.

COMITATU ET CASTRO COMMISSO. A Writ by which the charge of a county, together with the keeping of a castle is committed to

the sheriff. Reg. Orig. 295.

COMITIVA. A companion or fellow traveller; it is mentioned in Brompton, Reg. H. 2. And sometimes it signifies a troop or company of robbers: as in Walsingham, anno

COMMANDERY, præceptoria.] Was any manor or chief messuage, with lands and tenements thereto appertaining, which belonged to the priory of St. John of Jerusalem in England; and he who had the government of such a manor or house was styled the commander; who could not dispose of it but to the use of the priory, only taking thence his own sustenance, according to his degree .--New Eagle in Lincolnshire was and still is called the Commandery of Eagle, and did anciently belong to the said priory of St. John: so Selbach in Pembrokeshire, and Shingay in Cambridgeshire, were commanderies in the time of the knights templars, says Camden: and these in many places in England are termed temples, because they formerly belonged to the said templars. See stat. 26 H. 8. c. 2. The manors and lands belonging to the priory of St. John of Jerusalem were given to King Henry VIII. by stat. 32 H. 8. c. 20. about the time of the dissolution of abbeys and monasteries: so that the name only of commanderies remains, the power being long since extinct.

COMMANDMENT, præceptum.] versely taken: as the commandment of the king, when upon his own motion he had cast any man into prison. Commandment of the justices, absolute or ordinary; absolute, where, upon their own authority, they commit a person for contempt, &c. to prison, as a punishment; ordinary is, when they commit one rather for safe custody, than for any punishment: and a man committed upon such an

prison by the special command of the king, were not formerly bailable by the Court of King's Bench; but at this day the law is otherwise. 2 Hawk. P. C. c. 15. § 36. See

In another sense of this word, magistrates may command others to assist them in the execution of their offices, for the doing of justice; and so may a justice of peace to suppress riots, apprehend felons; an officer to keep the king's peace, &c. Bro. 3. A master may command his servant to drive another man's cattle out of his ground to enter into lands, seize goods, distrain for rent, or do other things; if the thing be not a trespass to others. Fits. Abr. The commandment of a thing is good, where he that commands hath power to do it: and a verbal command in most cases is sufficient; unless it be where it is given by a corporation, or when a sheriff's warrant is to a bailiff to arrest, &c. Bro. 288: Dyer, 202.

Commandment is also used for the offence of him that willeth another man to transgress the law, or do any thing contrary to it; and in the most common signification, it is taken where one willeth another to do an unlawful act; as murder, theft, or the like; which the civilians called mandatum. Bract. lib. 3. c.

19. See tit. Accessory.

In forcible entries, &c. an infant or feme covert may be guilty in respect of actual violence done by them in person; though not in regard to what shall be done by others at their command, because all such commands of theirs are void. Co. Lit. 357; 1 Hawk. P. C. c. 64. § 35. See title Infant. In trespass, &c. the master shall be charged for the act of the servant, done by his command. Bac. Ab. Master & Servant. (K.) But servants shall not be excused for committing any crime, when they act by command of their masters, who have no authority over them to give such command. Doct. & Stud. c. 42: H. P. C. 66: Kel. 13. And if a master commands his servant to distrain, and he abuseth the distress, the servant shall answer it to the party injured. Kitch. 372. If a party justifies in trespass or replevin, alleging a command by one having title, the command may be traversed. 11 East, 65. See tit. Servant. COMMARCHIO. The confines of the

land; from whence probably comes the word marches .- Imprimis de nostris landimeris.

commarchionibus. Du Cange.

COMMENDAM, ecclesia commendata, vel custodia ecclesiæ alicui commissa.] Is the holding of a benefice or church-living, which being void, is commended to the charge and care of some sufficient clerk, to be supplied until it may be conveniently provided of a pastor: and he to whom the church is commended, hath the profits thereof only for a certain time, and the nature of the church is not changed thereby, but is as a thing deposited in his hands in trust, who hath nothing or never granted to any but bishops; and in but the custody of it, which may be revoked. I that case the bishop is made commendatory When a parson is made bishop, there is a cession or voidance of his benefice, by the promotion; but if the king by special dispensation gives him power to retain his benefice notwithstanding his promotion, he shall continue parson, and is said to hold it in commen-Hob. 144: Latch. 236. As the king is the means of avoidances on promotions to dignities, and the presentations thereon belong to him, he often, on the creation of bishops, grants them licences to hold their benefices in commendam; but this is usually where the bishopricks are small, for the better support of the dignity of the bishop promoted: and it must be always before consecration; for afterwards it comes too late, because the benefice is absolutely void. A commendam, founded on the stat. 25 H. 8. c. 21. is a dispensation from the supreme power, to hold or take an ecclesiastical living contra jus positivum: and there are several sorts of commendams; as a commendam semestriss, which is for the benefit of the church without any regard to the commendatory, being only a provisional act of the ordinary, for supplying the vacation of six months, in which time the patron is to present his clerk, and is but a sequestration of the cure and fruits until such time as the clerk is presented: a commmendam retinere, which is for a bishop to retain benefices, on his preferment: and these commendams are granted on the king's mandate to the archbishop, expressing his consent, which continues the incumbency, so that there is no occasion for institution. A commendam recipere is to take a benefice de novo in the bishop's own gift, or in the gift of some other patron, whose consent must be obtained. Dyer, 228: 3 Lev. 381: Hob. 143: Danv. 79.

A commendam may be temporary for six or twelve months; two or three years, &c.; or it may be perpetual, i. e. for life; when it is equal to a presentation, without institution or induction. But all dispensations beyond six months were only permissive at first, and granted to persons of merit: the commendam retinere is for one or two years, &c., and sometimes for three or six years, and doth not alter the estate which the incumbent had before: a commendam retinere, as long as the commendatory should live and continue bishop, hath been held good. Vaugh. 18.

The commendam recipere must be for life, as other parsons and vicars enjoy their benefices; and as a patron cannot present to a full church, so neither can a commendam recipere be made to a church that is then full. Show. 414. A benefice cannot be commended by parts, any more than it may be presented unto by parts; as that one shall have the glebe, another the tithes, &c. Nor can a commendatory have a juris utrum, or take to him and his successors, sue or be sued, in a writ of annuity, &c. But a commendatory in perpetuum may be admitted to do it. 11 H. 4.

of the benefice while he continues bishop of such diocese: as the object is to make an addition to a small bishoprick: and it would be unreasonable to grant it to a bishop for life, who might afterwards be translated to one of the richest sees. See the case of Commendams, Hob. 140; and Collier's Eccl. Hist.

COMMENDATARY, commendatarius.] He that holdeth a church living or preferment in commendam.

COMMENDATORS, are secular persons, upon whom ecclesiastic benefices are bestowed. called so, because the benefices were commended and intrusted to their oversight; they are not proprietors, but only trustees or tutors. Scotch Dict.

COMMENDATORY LETTERS, are such as are written by one bishop to another in behalf of any of the clergy, or others of his diocese, travelling thither, that they may be received among the faithful: or that the clerk may be promoted; or necessaries administered to others, &c.: several forms of these letters may be seen in our historians, as in Bede, lib.

COMMENDATUS, one that lives under the protection of a great man. Spelm.—Com. mendati homines were persons who by voluntary homage put themselves under the protection of any superior lord: for ancient homage was either predial, due for some tenure; or personal, which was by compulsion, as a sign of necessary subjection; or voluntary, with a desire of protection: and those who by voluntary homage put themselves under the protection of any men of power, were sometimes called homines ejus commendati; and sometimes only commendati, as often occurs in Domesday. Commendati dimidii were those who depended on two several lords, and paid one half of their homage to each: and sub-commendati, were like under-tenants, under the command of persons that were dependants themselves on a superior lord: also there were dimidii sub-commendati, who bore a double relation to such depending lords. Domesday. This phrase seems to be still in use, in the usual compliment, Commend me to such a friend, &c., which is to let him know, I am his humble servant. Spelm. of Feuds, cap. 20.
COMMERCE, commercium.] Traffic, trade,

or merchandize in buying and selling of

There is a distinction between commerce and trade; the former relates to our dealings with foreign nations, or our colonies, &c. abroad; the other to our mutual traffic and dealings among ourselves at home.

No municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandize: neither can they have a proper authority for this purpose: for as these are transactions carried on between subjects of independant states, the These commendams are now in fact seldom | municipal laws of one will not be regarded by

the other. For this reason the affairs of com- by stats. 16 Car. 1. c. 11. and 13 Car. 2. c. 2. merce are regulated by a law of their own, called the Law-merchant or Lex-mercatoria, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries. See farther tit. Merchant. See also tit. Bill of Exchange.

COMMISSARY, commissarius.] A title in the ecclesiastical law, belonging to one that exerciseth spiritual jurisdiction, in places of a diocese which are so far from the episcopal city, that the chancellor cannot call the people to the bishop's principal consistory court, without their too great inconvenience. This commissary was ordained to supply the bishop's jurisdiction and office in the outplaces of the diocese; or in such places as are peculiar to the bishop, and exempted from the jurisdiction of the archdeacon: for where, either by prescription or composition, archdeacons have jurisdiction within their archdeaconries, as in most places they have, this commissary is superfluous and oftentimes vexatious, and ought not to be; yet in such cases, a commissary is sometimes appointed by the bishop, he taking prestation money of the archdeacon yearly pro exteriori jurisdictione, as it is ordinarily called. But this is held to be a wrong to archdeacons and the poorer sort of people. Cowel's Interp: 4 Inst.

There are also commissaries in time of war. Persons sent abroad to take care of the supply and distribution of provisions for the army.

COMMISSION, commissio.] The warrant of letters-patent, which all persons exercising jurisdiction either ordinary or extraordinary, have to authorise them to hear or determine any cause or action: as the commission of the judges, &c. Commission is with us as much as delegatio with the civilians: and this word is sometimes extended farther than to matters of judgment; as the commission of purveyance. &c. Commissions of inquiry shall be made to the justices of one bench or the other, &c., and to do lawful things, are grantable in many cases: also most of the great officers, judicial and ministerial, of the realm, are made by commission. And by such commissions, treasons, felonies, and other offences, may be heard and determined; by this means likewise, oaths, cognizances of fines, and answers, are taken, witnesses examined, offices found, &c. Bro. Ab. 12: Rep. 39. See stat. 42 E. 3. c. 4. And most of these commissions are appointed by the king under the Great Seal of England; but a com-mission granted under the Gutt Seal may mission granted under the Guest Seal may be determined by a Privy sal: and by granting another new commission to do the same thing, the former commission determines; and on the death or demise of the king, the commissions of judges and officers generally cease. Bro. Commis.: 2 Dyer. 289, ing and determining one or more causes; There was formerly a High-commission Court and it is the first and largest of the five com-

Of commissions divers may be seen in the table of the Register of Writs. See also stats. 4 Hen. 4. c. 9: 7 Hen. 4. c. 11: 6 Anne, c. 7. By which last act, § 27. it is provided that no greater number of commissioners shall be made for the execution of any office than had

Commission of Anticipation, was a commission under the Great Seal to collect a tax

or subsidy before the day. 15 H. 8. Commission of Array. See tit. Militia.

Commission of Assize, Nisi Prius, Oyer and Terminer, and Gaol Delivery.] By virtue of which the judges sit on the circuit, may, by stat. 3 G. 4. c. 10. in case of necessity be opened and read on a day subsequent to that named therein. See tit. Assize.

COMMISSION of ASSOCIATION. A commission to associate two or more learned persons with the justices in the several circuits and counties of Wales, &c. See tit. Assize, Circuit.

COMMISSION OF CHARITABLE USES, goes out of the Chancery to the bishop and others, where lands given to charitable uses are misemployed, or there is any fraud or disputes concerning them, to inquire of and redress the abuse, &c. Stat. 43 Eliz. c. 4. See tits. Charitable Uses, Mortmain.

COMMISSION DEL CREDERE, is an absolute engagement to the principal from an insurance broker in effecting an insurance, and makes him liable in the first instance, and at all events, though the principal may resort to the underwriter as a collateral security. T. R. 112. (See further for the general nature of a commission del credere, 1 T. R. 285: 6 T. R. 359: and Mackenzie v. Scott, in Dom. Proc. 19 Dec. 1796.) and this Dict. tit. Insurance: and see Buc. Ab. Merchant, tit. Principal and Agent: and see Ibid. tit. Set-

Commissions of Delegates, was a commission under the Great Seal to certain persons, usually lords, bishops, and judges of the law, to sit upon an appeal to the king in the Court of Chancery, where any sentence was given in any ecclesiastical cause by the archbishop. Stat. 25 H. 8. c. 19. But this act is now repealed by 2 & 3 W. 4. c. 92: and the powers of the High Court of Delegates are, from the 1st Feb. 1833, transferred to his Majesty's Privy Council.

COMMISSION TO INQUIRE OF FAULTS AGAINST THE LAW, was an ancient commission set forth on extraordinary occasions and corrup-

COMMISSION OF LUNACY. A commission out of Chancery to inquire whether a person represented to be a lunatic be so or not; that if lunatic, the king may have the care of his estate, &c. See tit. Lunatic.

COMMISSION OF OYER AND TERMINER. English term, is a commission especially granted to some eminent persons of the hearfounded on 1 Eliz. c. 1.; but it was abolished 'missions, by which the English judges of assize do sit in their several circuits. Scotch out of Chancery may discharge commission-Dict. See Commission of Assize, and tit. ers. Besides commissioners relating to judi-

Oyer and Terminer.

Commission of Rebellion, otherwise called a writ of rebellion, issues when a man after proclamation made by the sheriff, upon a process out of the Chancery, on a pain of his allegiance, to present himself to the court by a day assigned, makes default in his appearance: and this commission is directed to certain persons, to the end they, three, two, or one of them apprehend the party, or cause him to be apprehended as a rebel and contemner of the king's laws, wheresoever found within the kingdom, and bring or cause him to be brought to the court on a day therein assigned: this writ or commission goes forth after an attachment returned, non est inventus, &c. Terms de Ley. See tits. Attachment, Chancery.

Terms de Ley. Sec tits. Attachment, Chancery.
Commission of Sewers is directed to certain persons to see drains and ditches well kept and maintained in the marshy and fenny parts of England, for the better conveyance of the water into the sea, and preserving the grass upon the land. Stat. 23 H. 8. c. 5: 13

Eliz. c. 9. See tit. Sewers.

Commission of Treaty with Foreign Princes, is where leagues and treaties are made and transacted between states and kingdoms by their ambassadors and ministers, for the mutual advantage of the kingdoms in alliance.

Commission to take up Men for War, was a commission to press or force men into the king's service. This power of impressing has been heretofore doubted, but the legality of it is now fully established. Vide Fost. Rep. 154: 1 Comm. 419. Broadfoot's case, Comb. 245: Tubb's case, Cowp. 517.

See tits. Mariner, Navy.

COMMISSIONER, commissionarius.] He that hath a commission, letters patent, or other lawful warrant to examine any matters, or execute any public office, &c. And some commissioners are to hear and determine offences without any return made of their proceedings; and others to inquire and examine, and certify what is found. Stat. 4 H. 4. c. 9. Commissioners, by the common law, must pursue the authority of the commission, and perform the effect thereof: and they are to observe the ancient rules of the courts whence they come; and if they do any thing for which they have not authority, it will be void. 2 Co. Rep. 25: Co. Lit. 157. The office of commissioners is to do what they are commanded; and it is necessarily implied, that they may do that also without which what is commanded cannot be done: their authority, when appointed by any statute law, must be used as the statutes prescribe. 12 Rep. 32. If a commission is given to commissioners to execute a thing against law, they are not bound to accept or obey it: commissioners not receiving a commission may be discharged, upon oath before the barons of the Exchequer, &c., and the king by supersedeas out of Chancery may discharge commissioners. Besides commissioners relating to judicial proceedings, there are commissioners of the Treasury, of the Customs, Wine-licenses, Alienations, &c., of which there are an infinite number.

Commissioners for Valuation of Teinds, are those appointed by the parliament to value

teinds. Scotch Dict.

COMMITTEE, are those to whom the consideration or ordering of any matter is referred, by some court, or by consent of parties to whom it belongs: as in parliament, a bill either consented to and passed or denied, or neither, but being referred to the consideration of certain persons appointed by the house farther to examine it, they are thereupon called a committee. And when a parliament is called, and the speaker and members have taken the oaths, and the standing orders of the House are read, committees are appointed to sit on certain days, viz. the committee of privileges, of religion, of grievances, of courts of justice, and of trade; which are the standing committees. But though they are appointed by every new parliament, they do not all of them act, only the committee of privileges; and this being not of the whole House, is first called in the Speaker's chamber, from whence it is adjourned into the House, every one of the House having a vote therein, though not named, which makes the same usually very numerous: and any member may be present at any select committee; but is not to vote unless he be named. The chairman of the grand committee, who is generally some leading member, sits in the clerk's place at the table, and writes the votes for and against the matter referred to them; and if the numbers be equal, he has a casting voice, otherwise he hath no vote in the committee; and after the chairman hath put the question for reporting to the House, if that be carried, he leaves the chair, and the Speaker being called to his chair (who quits it in the beginning, and the mace is laid under the table), he is to go down to the bar, and so bring up his report to the table. After a bill is read a second time in the House of Commons, the question is put whether it shall be committed to a committee of the whole House, or a private committee; and the committees meet in the Speaker's chamber, and report their opinion of the bill with the amendments, &c. And if there be any exceptions against the amendments reported, the bill may be re-committed; eight persons make a committee, which may be adjourned by five, &c. Lex Constitutionis, 147. 150. See Dwarrist the Statutes: and see post, tit. Parliament.

There is a committee of the king, mentioned in West's Symb. tit. Chancery. § 144. And this hath been used, though improperly, for the widow of the king's tenant being dead, who is called the committee of the king, that is one committed by the ancient law of the

The committee of a lunatic, idiot, &c. is the person to whom the care and custody of such lunatic is committed by the Court of Chancery. See tit. Lunatic.

COMMITMENT. The sending of a person to prison, by warrant or order, who hath

been guilty of any crime.

Anciently more felons were committed to gaol without a mittimus in writing, than were with it; such were commitments by watchmen, constables, &c. See 1 H. H. 610 .--But now since the habeas corpus act, a commitment in writing seems more necessary than formerly; otherwise a prisoner may be admitted to bail under that act, whatsoever his offence may have been. Burn's Justice, tit. Commitment. And though according to Gray v. Cookson, 16 East, 20. magistrates may justify under a written conviction drawn up subsequent to their commitment, yet it has been decided that they cannot commit verbally, and justify under a written commitment subsequently drawn up. Hutchinson v. Lowndes, Chester Assizes, and Mich. T. 1832. K. B.

> I. What kind of Offenders may be committed; and by whom; and in what manner.

II. To what Prison they may be committed; and at whose Charge.

III. How they may be removed and discharged.

I. What kind of Offenders may be committed; and by whom; and in what manner.-There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. 2 Hawk. P. C. c. 61. § 1. It is said, that wheresoever a justice of peace is empowered by any statute to bring a person over or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol, to remain there till he shall comply. Id. ib. § 2.

It seems agreed by all the old books, that

wheresoever a constable or private person may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person hath as much authority in cases of this kind as the sheriff or any other officer; and may justify such imprisonment by his own authority, but not by the command of another.—2 Hawk. P. C. c.

But inasmuch as it is certain, that a person lawfully making such an arrest may justify bringing the party to the constable, in order to be carried by him before a justice of peace; and inasmuch as the stat. 7 G. 4. c. 64. which be discharged, unless committed by the

land to the king's care and protection. Kitch. I directs in what manner persons brought before justices of the peace for felony, shall be examined by him in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of 31 Car. 2. c. 2. commonly called the Habeas Corpus act, seems to suppose that all persons who are committed to prison, are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice, and opinions are agrecable hereto; it is certainly most advisable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of the peace, that he may be committed or bailed by him. 2 Hawk. P. C. c. 16. § 3.

It is certain that the privy council, or any one or two of them, or secretary of state, may lawfully commit persons for treason, and for other offences against the state, as in all ages they have done. 2 Hawk. P. C. 117.

As to commitments by the privy council, two cases in Leonard (1 Leon. 71: 2 Leon. 175.) pre-suppose some power for this purpose, without saying what; and the case in 1 Anders. 297. plainly recognises such a power in high treason. But as to the jurisdiction of privy councillors in other offences, it does not appear to have been either claimed or exercised. But see post, as to commitments by the secretary of state for libel; the cases of Derby and Earbury; which Lord Camden said are established, and the court has no right to overturn them. 11 S. T. 323.

As to commitments by the secretary of state, in the case of Entick v. Carrington, C. B. Mich. 6 G. 3, upon a special verdict, respecting the validity of a secretary of state's warrant to seize persons and papers in the case of libels, a very critical inquiry was made into the source of this power in that officer, in cases of libels, and other state crimes. 2 Wils. 275: 11 S. T. 317. 9.—It appears that the king being the principal conservator of the realm, the secretary of state has so much of the royal authority transferred to him as justifies commitment for these crimes, but not the seizure of papers.

The following instances of commitments by the privy council and secretary of state, will farther explain the nature of this power. -1. Howell was committed in the 28th Eliz. and Hollyard in the 30th Eliz. by secretary Walsingham, privy counsellor; and it was determined that where the commitment is not by the whole council, the cause must be expressed in the warrant. 1 Leon. 71: 2 Leon. 175: Sed vide stat. 31 Car. 2. c. 2: Lord Raymond, 65 .- 2. Anno 34 Eliz. the judges remonstrated against the exercise of this power; and declared that all prisoners may

or by one or two of them for high treason. 1 And, 297.—3. Melvin was committed an. 4 C. 1. by secretary Conway, on suspicion of high treason: but the court thought the cause of the suspicion should have been expressed. Palm. 558.—4. Crofton was committed by the council, an. 14 C. 2. for high treason generally. Vaugh. 142: 1 Sid. 78: 1 Keb. 305.—5. Fitzpatrick by the privy council, an. 7 W. 3. for high treason, in aiding an escape; and bailed for neglect of prosecution. 1 Salk. 103.

-6. Yaxley was committed, an. 5 W. & M. by the secretary of state, Lord Nottingham, for refusing to declare if he was a Jesuit. Carth. 291: Skinn. 369.—7. Kendal and Roe were committed, an. 7 W. 3. by secretary Trumbal for high treason, in assisting the escape of Montgomery; and by Holt, C. J. beld good but the prigners were boiled. held good, but the prisoners were bailed. 4 S. T. 559: 5 Mod. 78: Skin. 596: Holt, 144: Lord Raym. 61. 5: Comb. 343: 12 Mod. 82: 1 Salk. 347.—8. Derby was committed, 10 An. for publishing a libel (quære for felony, 11 S. T. 311.), called the Observator; and the court held the warrant good and legal. Fortesc. 140: 11 S. T. 309.-9. Sir W. Wyndham was committed, an. 4 G. 1. by secretary Stanhope for high treason: and by Parker, C. J. held good. Stra. 3: 3 Vin. 516.—10. Lord Scarsdade and Duplin and Harvey were committed, an. 2 G. 1. by Lord Townsend, secretary of state, for treasonable practices, and admitted to bail. 3 Vin. 534.—11. Earbury was arrested and committed by warrant from the secretary of state, for being the author of a seditious libel, and his papers seized, and he continued on his recognizance, an. 7 G. 2: 8 Mod. 177: 11 S. T. 309.—12. Hensey was committed, an. 31 G. 2. by the Earl of Holderness, secretary of state, for high treason, in adhering to the king's enemies. 1 Burr. 642.—13. Shebbear was committed, 31 G. 2. on two warrants from the secretary of state, for a libel. 1 Burr. 640.—14. Wilkes was committed an. 3 G. 3. by warrants from the Earl of Halifax, secretary of state, for a libel, but discharged by his privilege of parliament. 2 Wills. 150: 11 S. T. 302.-15. Sayer was apprehended, 18 G. 3. by warrant from the Earl of Rochford, secretary of state, for high treason, and bailed by Lord Mansfield. Black. Rep. 1165.—See farther tit. Bail, II. and also tit. Arrest.

As to the manner of commitment, it is enacted by stat. 7 G. 4. c. 64. persons taken before one or more justice or justices of the peace on a charge of felony or suspicion thereof, may be committed or bailed according to the circumstances of the cases, as they may raise a stronger or less presumption of guilt; on the examination of the witnesses the prisoner shall be taken into custody, or admitted to bail, and the witnesses bound over to prosecute and give evidence. By § 3. the duty of the magistrate in case of misdemeanor is defined; and by § 4. directions are given to § 17. This resolution was in the case of Sir

queen's command, or by her whole council, | coroners as to proceedings before them in

cases of homicide. See farther tit. Bail.

A justice of the peace may detain a prisoner a reasonable time, in order to examine him; and it is said, that three days is a reasonable time for this purpose. 2 Hawk. P. C. c. 16. § 12: Dalt. c. 125: 2 Inst. 52. 591.

A justice may commit a woman who is a material witness on a charge of felony, and who refuses to appear or to find security; and it makes no difference that she is a feme covert. Bennet v. Watson, 1 Maul. & S. 1. A single justice has no authority to commit a woman delivered of a bastard child for refusing to answer inquiries as to who was the father of the child. Ex parte Martin, 6 Barn.

Every commitment must be in writing (see ante, last page), and under the hand and seal, and show the authority of him that made it, and the time and place, and must be directed to the keeper of the prison. It may be either in the king's name, and only attested by the justice, or in the justice's name. It may command the gaoler to keep the party in safe and close custody; for this being what he is obliged to do by law, it can be no fault to command him so to do. 2 Hawk. P. C. c. 16. § 13, 14, 15.

It ought to set forth the crime with convenient certainty, whether the commitment be by the privy council, or any other authority; otherwise the officer is not punishable by reason of such mittimus for suffering the party to escape; and the court before whom he is removed by habeas corpus ought to discharge or bail him; and this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the court cannot judge whether it were a reasonable ground for imprisonment or not. 2 Hawk. P. C. c. 16. § 17. See tits. Arrest, Bail. But in commitments by Commissioners of Bankrupts, the court will look into the examinations themselves to see whether the Commissioners had jurisdiction. 2 B. & Adol. 410.

A commitment for high treason or felony in general, without expressing the particular species, has been held good. 2 Hawk. P. C. c. 16. § 16. But now, since the habeas corpus act, it seems that such a general commitment is not good; and therefore where A. and B. were committed for aiding and abetting Sir James Montgomery to make his escape, who was committed by a warrant of a secretary of state for high treason; on a habeas corpus they were admitted to bail, because it did not appear of what species of treason Sir James was guilty. Skin. 596: 1 Salk. 347. S. C.

It is safe to set forth that the party is charged upon oath; but this is not necessary; for it hath been resolved, that a commitment for treason, or for suspicion of it, without setting forth any particular accusation or ground of the suspicion, is good. 2 Hawk. P. C. c. 16.

by the secretary of state for high treason, of prisoners committed by justices of the generally. Stra. 2: 3 Vin. 515. at large. It was confirmed by Pratt, C. J. in Wilkes's case, committed by a similar warrant for a libel. 2 Wills. 158: 11 S. T. 304. And Mr. J. Foster says, in cases wherein the justice of the peace hath jurisdiction, the legality of his warrant will never depend on the truth of the information whereon it is grounded. Curtis's case, 136.

Every such mittimus ought to have a lawful conclusion, viz. that the party be safely kept till he be delivered by law, or by order of law, or by due course of law; or that he be kept till farther order (which shall be intended of the order of law), or to the like effect; and if the party be committed only for want of bail, it seems to be a good conclusion of the commitment, that he be kept till he find bail: but a commitment till the person who makes it shall take farther order, seems not to be good; and it seems that the party committed by such or any other irregular mittimus may be bailed. 2 Hawk. P. C. c. 16. § 18.

Also a commitment grounded on an act of parliament ought to be conformable to the method prescribed by such statute; as where the church-wardens of Northampton were committed on the 43 Eliz. c. 2. and the warrant concluded in the common form, viz. until they be duly discharged according to law; but the statute appointing that the party should there remain until he should account, for want. of such conclusion they were discharged. Carth. 152, 153. And where a man is committed as a criminal, the conclusion must be, until he be delivered by due course of law; ii he be committed for contumacy, it should be until he comply.

II. To what Prison they may be committed; and at whose Charge.-All commitments must be to some prison within the realm of England. For,

By the stat. 31 Car. 2. c. 2. the Habeas corpus act, it is enacted, "That no subject of this realm, being an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into any parts, garrisons, islands, or places beyond the seas, which then were, or at any time after should be, within or without the dominions of his Majesty."

By stat. 14 Ed. 3. c. 10. sheriffs shall have the custody of the gaols as before that time they were wont to have, and they shall put in such under-keepers for whom they will answer. And this is confirmed by stat. 19 H. 7. c. 10. Also by stat. 5 H. 4. c. 10. it is enacted, "That none be imprisoned by any justice of the peace, but only in the common gaol, saving to lords, and others who have gaols, their franchise in this case." It seems that the king's grant since the statute 5 H. 4.

W. Wyndham, 2 G. 1. who was committed c. 10. to private persons to have the custody peace is void. And it is said, that none can claim a prison as a franchise, unless he have also a gaol delivery. 2 Hawk. P. C. c. 16. § 7. See stat. 11 and 12 W. 3. c. 19. § 3., made perpetual by stat. 6 G. 1. c. 19. to enable justices of the peace to build and repair gaols in their respective counties, where a clause like that in stat. 5 H. 4. c. 10. is inserted.

Also it hath been held, that regularly no

one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol; or there be evident danger of a rescous from rebels, &c.; yet constant practice seems to authorise a commitment to a messenger; and it is said that it shall be intended to have been made in order for the carrying of the party to gaol. 2 Hawk. P. C. c. 16. § 8, 9.

And it is said, that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next gaol delivery. H. P. C. 114: 2 Hawk. P. C. c. 16. § 9.

A prisoner in the custody of the king's messenger, on a warrant from the secretary of state, who is brought into K. B. by habeas . corpus to be bailed, but has not his bail ready, cannot be committed to the same custody he came in; but must be committed to the custody of the marshal, which will prevent the necessity of suing out a new haheas corpus; as he may be brought up from the prison of the court, by a rule of court, whenever he shall be prepared to give bail. 1 Burr. 460.

If a person, arrested in one county for a crime done in it, fly into another county, and be retaken there, he may be committed by a justice of the first county to the gaol of such county. H. P. C. 93. But by the better opinion, if he had before any arrest fled into such county, he must be committed to the gaol thereof by a justice of such county. 2 Hawk. P. C. c. 16. § 8: Dalt. c. 118. Also it seems to be laid down as a rule by some books, that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the same county or not. 2 Hawk. P. C. c. 16. § 8.—See post, stat. 24 G. 2. c. 55.

By stat. 6 G. 1. c. 19. vagrants and other criminals, offenders, and persons charged with small offences, may, for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper.

By stat. 24 G. 2. c. 55. if a person is apprehended upon a warrant indorsed, in another county, for an offence not bailable, or if he shall not there find bail, he shall be carried back into the first county, and be committed, or, if bailable, bailed by the justices in such first county.

As to the charges of commitment, it is

Vol. I.-47

enacted by stat. 3 Jac. 1. c. 10. that offenders ! committed are to bear their own charges, and the charges of those who are appointed to guard them: and if they refuse to pay, the charges may be levied by sale of their goods. And by stat. 27 G. 2. c. 3. if they have no goods, &c. within the county where they are apprehended, the justices are to grant a warrant on the treasurer of the county for payment of the charges. But in Middlesex the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

III. How they may be removed and discharged .- As prisoners ought to be committed at first to the proper prison, so ought they not to be removed thence, except in some special cases; and to this purpose it is enacted by 31 Car. 2. c. 2. "that if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal, or supposed criminal matter, that the said person shall not be removed from the said prison and custody, into the custody of any other officer or officers, unless it be by habeas corpus, or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common workhouse, or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys, or executes such warrant, shall forfeit to the party grieved 100l. for the first offence, 200l. for the second, &c. Hawk. P. C. c. 16. § 10.

A person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any other but by the king, till he be acquitted on his trial, or have an ignoramus found by the grand jury, or none to prosecute him on a proclamation for that purpose, by the justices of gaol delivery. But if a person be committed on a bare suspicion, without any appeal or indictment, for a supposed crime, where afterwards it appears that there was none; as for the murder of a person thought to be dead, who afterwards is found to be alive, it hath been holden that he may be safely dismissed without any farther proceeding; for that he who suffers him to escape, is properly punishable only as an accessory to his supposed offence; and it is impossible there should be an accessory where there can be no principal; and it would be hard to punish one for a contempt founded on a suspicion appearing in so uncontested a manner to be groundless. 2 Hawk. P. C. c. 16. § 22. But the safest way for the gaoler is to have the authority of some court or the property of the soil is generally in the magistrate, for discharging the prisoner.

If the words of a statute are not pursued in a commitment, the party shall be discharged by habeas-corpus. See tits. Bail, Imprisonment, Prisoner, &c.

COMMONALTY, populus, plebs, communitas.] In Art. super chartas, 28 Ed. 1. c. 1. the words Tout le Commune d' Engleterre signify all the people of England. 2 Inst.

539.

But this word is generally used for the middle sort of the king's subjects, such of the commons as are raised beyond the ordinary sort, and coming to have the managing of officers, by that means are one degree under burgesses, which are superior to them in order and authority; and companies incorporated are said to consist of masters, wardens, and commonalty, the first two being the chief. and the others such as are usually called of the livery. The ordinary people, and freeholders, or at best knights and gentlemen. under the degree of baron, have been of late years called communitas regni, or tota terræ communitas; yet anciently, if we credit Brady, the barons and tenants in capite or military men, were the community of the king. dom; and those only were reputed as such in our most ancient histories and records. Brady's Gloss. to his Introduct. to Engl. Hist.

COMMON, Communia.] A right or privilege, which one or more persons claim to take or use, in some part or portion of that which another man's lands, waters, woods, &c. do naturally produce; without having an absolute property in such lands, waters, woods, &c. It is called an incorporcal right, which lies in grant, as if originally commencing on some agreement between lords and tenants, for some valuable purposes: which by age being formed into a prescription continues, although there be no deed or instrument in writing which proves the original contract or agreement. 4 Co. 37: 2 Inst. 65: 1 Vent. 387.

By the 2 & 3 W. 4. c. 71. after thirty years' enjoyment, a right of common cannot be defeated, by merely showing that it commenced within time of memory; and after sixty years' enjoyment the right shall be absolute.

- I. Of the several Kinds of Commons.
- II. The Interest of the Owner of the Soil; wherein, of Approvement and Inclo-
- III. The Commoners' Interest in the Soil; and herein, of Apportionment and Extinguishment.
- I. Of the several Kinds of Commons .-There is not only common of pasture, but also common of piscary or fishing; common of estovers; common of turbary, which see under their several heads. The word common, however, in its most usual acceptation, signifies common of pasture. This is a right of feeding one's beast on another's land: for in those waste grounds, usually called commons, lord of the manor, as in common fields it is in

the particular tenants. This kind of com- town cannot then common: but though the mon is divided into common gross, common appendant, common appurtenant, and common

per cause de vicinage.

Common in gross is a liberty to have common alone, without any lands or tenements, in another person's land, granted by deed to a man and his heirs, or for life, &c. F. N. B. 31. 37: 4 Rep. 30.

Common appendant is a right belonging to a man's arable land, of putting beasts commonable into another's ground. And common appurtenant is belonging to an estate for all manner of beasts commonable or not commonable. 4 Rep. 37: Plowd. 161.

Common appendant and appurtenant are in a manner confounded, as appears by Fitzherbert; and are by him defined to be a liberty of common appertaining to, or depending on, a freehold; which common must be taken with beasts commonable, as horses, oxen, Rine, and sheep; and not with goats, hogs, and geese. But some make this difference, that common appurtenant may be severed from the land whereto it pertains; but not common appendant; which, according to Sir Edward Coke, had this beginning: when a lord enfcoffed another of arable land to hold of him in socage, the feoffee to maintain the service of his plough, had, at first, by the courtesy or permission of the lord, common in his wastes for necessary beasts to eat and compost his land, and that for two causes; one, for that it was tacitly implied in the feoffment, by reason the feoffee could not till or compost his land without cattle, and cattle could not be sustained without pasture; so by consequence, the feoffee had, as a thing necessary and incident, common in the waste and lands of the lord: and this may be collected from the ancient books and statutes: and the second reason of this common was, for the maintenance and advantage of tillage, which is much regarded and favoured by the law. F. N. B. 180: 4 Rep. 37.

Common per cause de vicinage, common by reason of neighbourhood; is a liberty that the tenants of one lord in one town have to common with the tenants of another lord in another town: it is where the tenants of two lords have used, time out of mind, to have common promiscuously in both lordships lying together and open to one another. 8 Rep. 78. And those that challenge this kind of common, which is usually called intercommoning, may not put their cattle in the common of the other lord, for then they are distrainable; but they may turn them into their own fields, and if they stray into the neighbouring common they must be suffered. Terms de la Ley. The inhabitants of one town or lordship may not put in as many beasts as they will, but with regard to the freehold of the inhabitants of the other: for otherwise it were no good neighbourhood, upon which all this depends.

If one lord encloses the common, the other

common of vicinage is gone, common appendant remains. 4 Rep. 38: 7 Rep. 5. Every common per cause de vicinage is a common appendant. 1 Danv. Abr. 799.

This is indeed only a permissive right intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits. And therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. 2

Comm. 34.

Common appendant is only to ancient arable land; not to a house, meadow, pasture, &c. It is against the nature of common appendant to be appendant to meadow or pasture: but if in the beginning land be arable, and of late a house hath been built on some part of the land, and some acres are employed to meadow and pasture, in such case it is appendant; though it must be pleaded as appendant to the land, and not to the house, pasture, &c. 1 Nels. Abr. 457. This may be common appendant, though it belongs to a manor, farm, or plough-land: and common appendant is of common right: but it is not common appendant unless it has been appendant time out of mind. 1 Danv. 746. It may be upon condition; be for all the year, or for a certain time, or for a certain number of beasts, &c. by usage: though it ought to be for such cattle as plough and compost the land to which it is appendant. Ibid. 797. Common appendant may be to common in a field after the corn is severed, till the ground is re-sown: so it may be to have common in a meadow after the hay is carried off the same, till candlemas, &c. Yelv. 185.

This common, which is in its nature without number, by custom may be limited as to the beastse common appurtenant ought always to be for those levant and couchant, and may be sans number. Plowd. 161. A man may prescribe to have common appurtenant for all manner of cattle, at every season in the year. 25 Ass. 8. Common by prescription for all manner of commonable cattle as belonging to a tenement, &c. must be for cattle levant and couchant upon the land (which is so many as the land will maintain), or it will not be good: and if a person grants common sans number, the grantce cannot put in so many cattle, but that the grantor may have sufficient common in the same land. 1 Danv. Abr. 798, 799. He who hath common appendant or appurtenant, can keep but a number of cattle proportionable to his land; for he can common with no more than the land to which his common belongs is able to maintain. 3 Salk. 93. Common appurtenant may be to a house, pasture, &c., though common appendant cannot; but it ought to be prescribed for as against common right: and uncommonable cattle, as hogs, goats, &c. are appurtenant: this common may be created by grant at this day; so may not common appendant. 1 Inst. 122: 1 Rol. Abr. 398.

of beasts may be granted over. 1 Danv.

In Scotland, in those districts where there is no coal, the inhabitants are chiefly supplied with fuel from the mosses with which the country abounds. Where one estate has only a small quantity of this moss, it is not unusual for the proprietor of a neighbouring estate, where there is a superfluity, to sell to the proprietor of the defective estate a perpetual liberty to his tenants to cut moss for fuel, on a certain annual rent, per fine or finnilty (which terms are synonymous), and this is called "an heritable moss tolerance." Dingwall v. Farquharson, Dom. Proc. Journals, 1797.

II. The Interest of the Owner of the Soil; wherein of Approvement and Inclosure.—The property of the soil in the common is entirely in the lord; and the use of it jointly in him and the commoners. The lord may, in respect of his interest in the soil of the waste commonable lands, have a right of common over common lands of another manor. Sefton v. Court, 5 Barn. & C. 921. And see 5 Taunt. 365: 1 Marsh. 50. A lord is entitled under an inclosure act to an allotment in respect of the demesnes of the manor over and above the allotment awarded to him by the act in respect of his rights as lord. Arundel v. Falmouth, 2 Maul. S. S. 440.

Lords of manors may depasture in commons where their tenants put in cattle; and a prescription to exclude the lord is against

law. 1 Inst. 122.

The lord may agist the cattle of a stranger in the common by prescription; and he may license a stranger to put in his cattle, if he leaves sufficient room for the commoners. Danv. 795: 2 Mod. 6. Also the lord may surcharge, &c. an overplus of the common; and if, where there is not an overplus, the lord surcharges the common, the commoners are not to distrain his beast, but must commence an action against the lord. F. N. B. 125. But it is said, if the lord of the soil put cattle into a close, contrary to custom, when it ought to lie fresh, a commoner may take the cattle damage-feasant; otherwise it is a general rule that he cannot distrain the cattle of the lord. 1 Danv. 807.

The lord may distrain where the common is surcharged, and bring action of trespass for any trespass done in the common. 9 Rep.

113.

A lord may make a pond on the common; though the lord cannot dig pits for gravel or coal, the statutes of approvement extending only to inclosure. 3 Inst. 204: 9 Rep. 112: 1 Sid. 106. If the lord makes a warren on the common, the commoners may not kill the conies; but are to bring their action, for they may not be their own judges. 1 Rol. 90. 405

The right of commoners in the common

Common appurtenant for a certain number | may be subservient to the right of the lord in the soil, so that the lord may dig claypits there, or empower others so to do, without leaving sufficient herbage for the commoners, it such a right can be proved to have been always exercised by the lord. 5 T. R. 411.

> So that the lord may, with the consent of the Homage, grant part of the soil of the common for building, if he has immemorially exercised such a right. 5 T. R. 417. n.

> By stat. 20 H. 3. c. 4. (Stat. of Merton.) lords may approve against their tenants, viz. inclose part of the waste, &c., and thereby discharge it from being common, leaving common sufficient; and neighbours as well as tenants, claiming common of pasture, shall be bound by it. If the lord incloses on the common, and leaves not common sufficient, the commoners may not only break down the inclosures, but may put in their cattle, although the lord ploughs and sows the land. 2 Inst. 88: 1 Rol. Abr. 406.

> Where the tenants of the manor have a right to dig gravel on the wastes, or to take estovers, there the lord has no right, under the stat. of Merton, to inclose and approve the wastes of the manor.-Yet a custom in a manor that any person being desirous of inclosing, may apply to the court, &c., first obtaining the consent of the lord, does not abridge the lord's common law-right of inclosing without any such application, provided he leave common sufficient for the tenants. 2 T. R. 391, 392.

> Any person who is seised in fee of part of a waste within a manor may approve, leaving a sufficiency of common, though he be not lord of the manor. 3 T. R. 445.

> The lord of a manor, or his grantee, may inclose and approve part of a common, against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig for sand, &c., if he leave sufficient common of pasture. 6 T. R. 741.

> An unqualified custom for the lord of the manor to inclose the waste is bad; but a custom to inclose, leaving a sufficiency of common, is good, even, as it seems, against common of turbary; but it lies on the lord to show that a sufficiency is left. A commoner may throw down the whole of a fence inclosing any part of the common wrongfully erected, even by the lord. Arlett v. Ellis, 7 B. & C. 340.

> There can be no approvement by the lord in derogation of a right of common of turbary. 1 Taunt. 435. sed vide last case.

> By stats. 31 G. 2. c. 41: 22 G. 3. c. 36. owners of common, with the consent of the majority, in number and value, of the commoners; the majority of the commoners, with consent of the owners; or any persons with the consent of both, may inclose any part of a common for the growth of wood.
>
> By stat. 13 Geo. 3. c. 81. § 21. rams are not

gust to the 25th of November.

III. The Commoners' Interest in the Soil; and herein of Apportionment and Extinguishment.—A commoner hath only a special and limited interest in the soil, but yet he shall have such remedies as are commensurate to his right, and therefore may distrain beasts damage-feasant, bring an action on the case, &c.; but not being absolute owner of the soil, he cannot bring a general action of trespass for a trespass done upon the common. See Bridg. 10, 11: Godb. 123, 124: 2 Leon. 201, 202.

Common for cattle levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land. Scholes v. Hargrave, 5 T. R. 46. And see 8 T. R. 396.

A commoner cannot regularly do any thing on the soil which tends to the melioration or improvement of the common, as cutting down of bushes, fern, &c. 1 Sid. 251: 12 H. 8. c. 2: 13 H. 8. c. 115. Therefore if a common every year in a flood is surrounded with water, the commoner cannot make a trench in the soil to avoid the water, because he has nothing to do with the soil, but only to take the grass with the mouth of the cattle. Rol. Abr. 405: 2 Bulst. 116.—But see ante, II. and post.

Every commoner may break the common if it be inclosed; and although he does not put his cattle in at the time, yet his right of commonage shall excuse him from being a trespasser. Lit. Rep. 38. See 1 Rol. Abr. 406. That is, supposing the inclosure made by the lord, and that there is not sufficient common; or that the inclosure is made by any other person than the lord.

A commoner cannot justify cutting down trees planted by the lord on the waste though there be not sufficiency of common left; but his remedy is by action on the case, or by assize. 6 T. R. 483. (Affirmed in Cam. Scacc. 1 B. & P. 13.)

If a tenant of a freehold ploughs it, and sows it with corn, the commoner may put in his cattle, and therewith eat the corn growing upon the land; so if he lets his corn lie in the field beyond the usual time, the other commoners may notwithstanding put in their beasts. 2 Leon. 202, 203.

The commoner cannot use common but with his own proper cattle; but if he hath not any cattle to manure the land, he may borrow other cattle to manure it, and use the common with them; for by the loan, they are in a manner made his own cattle. 1 Danv. 798. Grantee of common appurtenant, for a certain number of cattle, cannot common with the cattle of a stranger; he that hath common in gross, may put in a stranger's cattle, and use the common with such cattle. Ibid. 803. Common appendant or appurtenant cannot be erroneously, occasioned this unmeasured right

to remain on commons from the 25th of Au- | made common in gross; and approvement extends not to common in gross. 2 Inst. 86.

A commoner may distrain beasts put into the common by a stranger, or every commoner may bring action of the case, where damage is received. 9 Rep. 11. But one commoner cannot distrain the cattle of another commoner, though he may those of a stranger, who hath no right to the common. 2 Lutw.

Wherever there is colour of right for putting in cattle, a commoner cannot distrain; where there is no colour he may: so he may distrain a stranger's cattle, but not those of a commoner, though he exceeds his number. Where writ of admeasurement lies, he cannot distrain.—Quære, whether he may distrain cattle surcharged, where the right of common is for a number certain. 4 Burr. 2426: 1 Black. Rep. 673.

The usual remedies for surcharging the common are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord; or, lastly, by a special action on the case for damages, in which any commoner may be plaintiff. Freem. 273. But the ancient and most effectual method of proceeding is by writ of admeasurement of pasture. This lies, either where a common appurtenant or in gross is certain as to number, or where a man has common appendant or appurtenant to his land, the quantity of which common has never yet been ascertained. In either of these cases, as well the lord as any of the commoners, is entitled to this writ of measurement; which is one of those writs that are called vicontiel (2 Inst. 369: Finch. L. 314), being directed to the sheriff (vicecomiti), and not to be returned to any superior court till finally executed by him.

It recites a complaint, that the defendant hath surcharged (superoneravit) the common; and therefore commands the sheriff to admeasure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit all the commoners shall be admeasured, as well those who have not as those who have surcharged the common; as well the plaintiff as defendant. F. N. B. 125. The execution of this writ must be by a jury of twelve men, who are upon their oaths to ascertain, under the superintendance of the sheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common than are sufficient to manure and stock the land to which his right of common is annexed; or, as our ancient law expresses it, such cattle as only are levant and couchant upon his tenement (Bro. Abr. 1. Prescription 28); which being a thing uncertain before admeasurement, has frequently, though of common to be called a common without, against the owner. Cro. Jac. 195. This kind of stint, or sans nombre (Hardr. 117), a thing which, though possible in law, does in fact very rarely exist. Lord Raym. 407.

If, after the admeasurement has thus ascertained the right, the same defendant surcharges

the common again, the plaintiff may have a writ of second surcharge (de secunda superoneratione), which is given by the stat. Westm. 2. 13 Ed. 1. c. 8; and thereby the sheriff is directed to inquire, by a jury, whether the defendant has, in fact, again surcharged the common, contrary to the tenor of the last admeasurement; and if he has, he shall then forfeit to the king the supernumerary cattle put in, and also shall pay damages to the plaintiff. F. N. B. 126: 2 Inst. 370. This process seems highly equitable, for the first offence is held to be committed through mere inadvertence, and therefore there are no damages or forfeiture on the first writ, which was only to ascertain the right which was disputed; but the second offence is a wilful contempt and injustice, and therefore punished, very properly, with not only damages, but also forfeiture. And herein the right, being once settled, is never again disputed; but only the fact is tried, whether there be any second surcharge or no; which gives this neglected proceeding a great ad- have an action for the injury, by entering on vantage over the modern method by action the common, &c. 1 Rol. 1br. 89. 398: 2 Leon. on the case, wherein the quantum of common belonging to the defendant must be proved upon every fresh trial, for every repeated offence.

This injury, by surcharging, can, properly speaking, only happen where the common is appendant or appurtenant, and of course limited by law; or where, when in gross, it is expressly limited and certain; for where a man hath common in gross, sans nombre, or without stint, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts. 1 Rol. Abr. 399. For the law will not suppose that, at the original grant of the common, the lord meant to exclude himself.

One commoner who has surcharged may nevertheless maintain an action against another for surcharging the common. 4 T. R. 471.

There is yet another disturbance of common, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit, to which he is by law entitled. This may be done either by creeting fences, or by driving the cattle off the land, or by ploughing up the soil of the common. Cro. Eliz. 198. Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and has given him his remedy by action mon, which destroys the grass, and carrying

disturbance does indeed amount to a disseisin. and if the commoner chooses to consider it in that light, the law has given him an assise of novel disscisin, against the lord, to recover the possession of his common. F. N. B. 179.— Or it has given a writ of quod permittat against any stranger as well as the owner of the land. in case of such a disturbance to the plaintiff as amounts to a total deprivation of his com. mon: whereby the defendant shall be compelled to vermit the plaintiff to enjoy his com. mercus he ought. Finch. L. 275: F. N. B. 123. But if the commoner does not choose to bring a real action to recover seisin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assise, or a quod permittat. Cro. Jac. 195. See 3 Comm. 238.

Twenty years adverse possession of a waste inclosed is a bar to the entry of a commoner. 2 Taunt. 156: 2 B. & C. 921.

If any commoner incloses, or builds on the common, every commoner may have an action for the damage. Where turf is taken away from the common, the lord only is to bring the action: but it is said the commoners may 201.

If a commoner who hath a freehold in his common be ousted of, or hindered therein, that he cannot have it so beneficially as he used to do; whether the interruption be by the lord or any stranger, he may have an assise against him; but if the commoner hath only an estate for years, then his remedy is by action on the case. And if it be only a small trespass, that is little or no loss to the commoner, but he hath common enough besides, the commoner may not bring any action. 4 Rep. 37: 8 Rep. 79: Dyer, 316.

A commoner may maintain an action on the case for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle: though his proportion of the damage amount only to a farthing: at least the smallness of the damage found is no ground for a nonsuit. 2 T. R. 154.

In an action for disturbance of plaintiff's common, if the declaration state that plaintiff is possessed of a messuage and land, and by reason thereof ought to have common, the allegation is divisible, and proof that plaintiff is possessed of land only, and a right of common in respect of it is sufficient. Rickets v. Salwey, 2 Barn. & A. 360.

Plaintiff claimed a right of common for all commonable cattle: the proof was that he had turned on all the commonable cattle he kept, but that he had never kept sheep. This is evidence for the jury to prove the right claimed. 4 Barn. & Cres. 161.

A commoner cannot dig clay on the com-

it away doth damage to the ground; so that common appendant for a certain number of the other commoners cannot enjoy the common, in tam amplo modo as they ought. Godb. Also a commoner may not cut bushes, dig trenches, &c. in the common, without a custom to do it. 1 Nels. 462. If he makes any thing de novo he is a trespasser: he can do nothing to impair the common; but may reform a thing abused, fill up holes, &c. 1 Browl. 208.

A commoner may abate hedges erected on a common; for though the lord hath an interest in the soil by abating the hedges, the commoner doth not meddle with it. 2 Mod. **65**: 7 B. & C. 340. Any man may by prescription have common and feeding for his cattle in the king's highway, though the soil doth belong to another. But the occupation of common by usurpation, will not give title to him that doth occupy it, unless he hath had

it time beyond memory.

Upon agreement between two commoners to inclose a common, a party having interest not privy to the agreement, will not be bound; but one or two wilful persons shall not hinder the public good. Chan. Rep. 48. Commons must be driven yearly at Michaelmas, or within fifteen days after: infected horses, and stone-horses under size, &c. are not to be put into commons, under forfeitures by stat. 32 H. 8. c. 13. New erected cottages, though they have four acres of ground laid to them, ought not to have common in the waste. 2 Inst. 740. In law proceedings, where there are two distinct commons, the two titles must be shown; cattle are to be alleged commonable; and common ought to be in lands commonable: and the place is to be set forth where the messuage and lands lie, &c. to which the common belongs. 1 Nels. 462, 463.

Common appendant, because it is of common right, shall be apportioned by the commoner's purchase of part of the land in which he hath such common; but common apurtenant shall be extinct by the commoner's purchase of part of the land, in which, &c. Both common appendant and appurtenant shall be apportioned by alleviation of part of the land to which the common is appendant or appurtenant. Co. Lit. 122: Hob. 235: 8 Co. 78: Owen, 122: 4 Co. 37: Cro. Eliz.

A release of common in one acre is an extinguishment of the whole common. See 4

If A. hath common in the lands of B. as appurtenant to a messuage, and after B. enfeoffs A. of the said lands, whereby the common is extinguished; and then A. leases to B. the said messuage and lands, with all commons, &c. used or occupied with the said messuage; this is a good grant of a new common for the time. Cro. Eliz. 570. If several persons are seised of several parts of a common, and a commoner purchases the inheritance of one part, his entire common is restrained by special covenant; and every teextinct. 1 And. 159. When a man hath nant for years hath three kinds of estovers

cattle, and to a certain parcel of land, if he sell part of it, the common is not extinguished; for the purchaser shall have common pro rata: but it is otherwise in common appurtenant. 8 Rep. 78: 1 Nels. 460.

Fitz. Abr. tit. comm. per tot.

By stat. 13 G. 3. c. 81. in every parish where there are common field dands, all the arable lands lying in such fields shall be cultivated by the occupiers, under such rules as 3-4ths of them in number and value, (with the consent of the land and tithe owners, [the latter not to receive any fines, only rents. § 23.) shall appoint by writing under their hands: the expence to be borne proportionably, § 1, 2. 4. 7.—Under the management of a field-master, or field reeve, to be appointed annually in May. § 3. 5, 6.

Persons having right of common, but not having land in such fields, and persons having sheep-walks, may compound for such right, by written agreement, or may, with their consent, have parts allotted them to common upon; § 8, 9, 10; and the balks, slades, and meres may be ploughed up, § 11-14.

Lords of manors, with the consent of 3-4ths of the commoners, on the wastes and commons within their manors, may demise (for not more than four years) any part of such wastes, &c. not exceeding 1-12th part; and the clear rents reserved for the same, shall be applied in improving the residue of such wastes. § 14.

In every manor where there are stinted commons, in lieu of demising part thereof, assessments on the lords of such manors, and the owners and occupiers of such commons may be made, and the money employed in the improvement of the commons, under the direction of the majority; which (or in some instances 2-3ds) may regulate the depasturing, opening, shutting-up, breaking, and unstocking the commons, and the kind of cattle to be allowed the commoners. § 16.

All rights relative to commons, previous to this act, are saved, except as against persons who became subject to regulations made under the statute. § 27.

As to common in general, see farther Com.

Dig. and Bac. Ab. tit. Common. (7th ed.) COMMON OF ESTOVERS, or estouviers, that is, necessaries, from estoffer to furnish.] liberty of taking necessary wood for the use or furniture of a house, or farm, from off another's estate. 2 Comm. 35. Or in the language of the law, for house-bote, plough-bote, and hay-bote. See tit. Bote. What botes are necessary tenants may take, notwithstanding no mention be made thereof in their leases; but if a tenant make more house-bote than is needful, he may be punished for waste. Terms de la Ley. Tenant for life may take upon the land demised reasonable estovers, unless

incident to his estate. 1 Inst. 41. When a These several species of common do, howhouse, having estovers appendant or appurted ever, all originally result from the same nenant, is blown down by wind, if the owner rebuilds it in the same place and manner as before, his estovers shall continue: so if he alters the rooms and chambers, without making new chimneys; but if he erect any new chimneys, he will not be allowed to spend any estovers in such new chimneys. 4 Rep. 87: 4 Leon. 383. If one have a dwelling-house whereunto common of estovers doth belong, and the house by fire is burnt down, and a new one built near to the place, or in the place in another form, the estovers are gone: but if the old house be only some of it down, it is otherwise; and in all cases where the alterations to a house do no prejudice to the tertenant or owner of the land or wood, the estovers will remain. F. N. B. 180. Where a man hath estovers for life, if the owner cut down all the wood, that there is none left for him, he may bring an assise of estovers; and if the tenant have but an estate for years, or at will, he may have an action on the case. Moor. Ca. 65: 9 Rep. 112. If the tenant who hath common of estovers, shall use them to any other purpose than he ought, he that owns the wood may bring trespass against him: as where one grants twenty loads of wood to be taken yearly in such a wood ten loads to burn, and ten to repair pales; here he may cut and take the wood for the pales, though they need no amending; but then he must keep it for that use. 9 Rep. 113: F. N. B. 58. 159.

COMMON OF PASTURAGE, is the right of pasturing the goods and cattle of the dominant tenement, upon the ground of the servient.

Scotch Dict.

COMMON OF PISCARY, is a liberty of fishing in another man's water. Common of Piscary to exclude the owner of the soil, is contrary to law: though a person by prescription may have a separate right of fishing in such water, and the owner of the soil be excluded; for a man may grant the water, without passing the soil; and if one grant separaliam piscariam, neither the soil nor the water pass, but only a right of fishing. 1 Inst. 4. 122. 164: 5 Rep. 34. See Fish and Fishery.

COMMON OF TURBARY, is a license to dig turf upon the ground of another, or in the lord's waste. This common is appendant or appurtenant to a house, and not to lands; for turfs are to be burnt in the house; and it may be in gross; but it does not give any right to the land, trees, or mines. It cannot exclude the owner of the soil. 1 Inst. 4. 122: 4 Rep.

There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much farther; common of pasture being only a right of feeding on the herbage or vesture! of the soil which renews annually; but common of turbary, and those just mentioned, are a right of carrying away the very soil itself.—

cessity as common of pasture, viz. for the maintenance and carrying on of husbandry: common of piscary being given for the sus-tenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds. 2 Comm. 34, 35.

COMMON BENCH, Bancus communis, from the Sax. banc, bank, and thence metaphorically a bench, high seat or tribunal.] The Court of Common Pleas was anciently called Common Bench, because the pleas of controversies between common persons were there tried and determined. Camd. Britan. 113. In law books and references the Court of Common Pleas is written C. B. from Communi Banco (or C. P.) and the justices of that court are styled Justiciarii de Banco. See tit.

Common Pleas.

COMMON DAY OF PLEA IN LAND, signifies an ordinary day in court as Octabis Hilarii, Quindena Paschæ, &c. It is mentioned in the stat. 51 H. 3. st. 2. and st. 3. Concerning general days in bank, see tit. Days in Bank.

COMMON FIELD LAND. See tit. Com-

COMMON FINE, finis communis.] A small sum of money, which the resiants within the liberty of some leets pay to the lords, called in divers places head silver or head pence, in others cert money; and was first granted to the lord, towards the charge of his purchase of the court-leet, whereby the resiants have the ease to do their suit within their own manors, and are not compellable to go to the sheriff's turn: in the manor of Sheepshead in the county of Leicester, every resiant pays 1d. per poll to the lord at the court held after Michaelmas, which is there called common fine. For this common fine the lord may distrain: but he cannot do it without a prescription. 11 Rep. 44. There is also common fine of the county. See Fleta, lib. 7. c. 48. and stat. 3 Ed. 1. c. 18.

COMMONS HOUSE OF PARLIAMENT, is the Lower House of Parliament, so called, because the Commons of the realm, that is the knights, citizens, and burgesses returned to parliament, representing the whole body of the Commons, do sit there. See tit. Parlia-

COMMON INTENDMENT, is common meaning or understanding, according to the subject matter, not strained to any extraordinary or foreign sense: bar to common intendment is an ordinary or general bar, which is commonly an answer to the plaintiff's declaration. There are several cases in the law where common intendment, and intendment take place; and of common intendment a will shall not be supposed to be made by collusion. Co. Lit. 78. See Co. Lit. 303. a, b, &c.

COMMON LAW, Lex Communis.]

taken for the law of this kingdom simply, preservation of the peace: and this is what without any other laws; as it was generally holden before any statute was enacted in par-liament to alter the same; and the king's courts of justice are called the Common Law Courts. The Common Law is grounded upon the general customs of the realm; and includes in it the law of nature, the law of God, and the principles and maxims of the law; it is founded upon reason; and is said to be the perfection of reason, acquired by long study, observation, and experience, and refined by learned men in all ages. And it is the common birth-right that the subject hath for the safeguard and defence, not only of his goods, lands, and revenues; but of his wife and children, body, fame, and life also. Co. Lit. 97. 142: Treatise of Laws, p. 2.

According to Hale, the common law of England is the common rule for administering justice within this kingdom, and asserts the king's royal prerogatives, and likewise the rights and liberties of the subject: it is generally that law, by which the determinations in the king's ordinary courts are guided; and this directs the course of descents of lands; the nature, extent, and qualification of estates; and therein the manner and ceremonies of conveying them from one to another; with the forms, solemnities, and obligation of contracts; the rules and directions for the exposition of deeds and acts of parliament; the process, proceedings, judgments, and executions of our courts of justice; also the limits and bounds of courts, and jurisdictions; the several kinds of temporal offences and punishments, and their application, &c. Hale's Hist. of the Common Law, p. 24. 44, 45.

As to the rise of the common law, this ac-

count is given by some ancient writers: after the decay of the Roman empire, three sorts of the German people invaded the Britons, viz. the Saxons, the Angles, and the Jutes; from the last sprung the Kentish men, and the inhabitants of the Isle of Wright; from the Saxons came the people called the East, South, and West Saxons; and from the Angles, the East Angles, Mercians, and Northumbrians. These people having different customs, they inclined to the different laws by which their ancestors were governed; but the customs of the West Saxons and Mercians, who dwelt in the midland counties, being preferred before the rest, were for that reason called jus Anglorum; and by these laws those people were governed for many ages: but the East Saxons having afterwards been subdued by the Danes, their customs were introduced, and a third law was substituted, which was called Dane lage; as the other was then styled West Saxon lage, &c.
At length the Danes being overcome by the Normans, William called the Conqueror, upon consideration of all those laws and customs, abrogated some, and established others; to which he added some of his own country laws, which he judged most to conduce to the

we now call the common law.

But though we usually date our common law from hence, this was not the original of the common law; for Ethelbert, the first Christian king of this nation, made the first Saxon laws, which were published by the advice of some wise men of his council: and King Alfred, who lived 300 years afterwards, collected all the Saxon laws into one book, and commanded them to be observed through the whole kingdom, which before only affected certain parts thereof; and it was therefore properly called the common law, because it was common to the whole nation: and soon after it was called the folc-right, i. e. the people's right.

Alfred was styled Anglicarum legum con ditor: and when the Danes, on the conquest of the kingdom, had introduced their laws, they were afterwards destroyed; and Edward the Confessor out of the former laws composed a body of the common law; wherefore he is called by our historians Anglicarum legum restitor. Blount. In the reign of Edw. 1. Britton wrote his learned book of the common law of this realm; which was done by the king's command, and runs in his name, answerable to the Institutions of the Civil Law, which Justinian assumes to himself, though composed by others. Staundf. Prerog. 6.21. But Justinian ought to be entitled to the honor, as the Institutes were composed by his direction. This Britton is mentioned by Gwin to have been bishop of Hereford.

Bracton, a great lawyer, in the time of Hen. III. wrote a very learned treatise of the common law of England, held in great estimation; and he was said to be lord chief justice of the kingdom. Also the famous and learned Glanvil, lord chief justice in the reign of Hen. II. wrote a book of the common law, which is said to be the most ancient composition extant on that subject. Besides these, in the time of Ed. IV. the renowned lawyer Littleton wrote his excellent book of English Tenures. In the reign of King James the First, the great oracle of the law, Sir Edward Coke, published his learned and laborious Institutes of our law, and commentary on Littleton. About the same time likewise Dr. Cowel, a civilian, wrote a short Institute of our laws. In the reign of King George the First, Dr. Tho. Wood, a civilian and common lawyer, and at last a divine, wrote an Institute of the laws of England, which is something after the manner of the Institutes of the Civil Law.

To conclude the whole of this head, the late learned judge Blackstone in the reign of George the Third, published his Commenta-ries on the Laws of England, the best analytic and most methodic system of our laws which ever was published. It is equally adapted for the use of students, and of those gentlemen who choose to acquire that knowledge of our laws which is, in fact, essentially necessary for every one. See particularly

those Commentaries, vol. 1. p. 637. and vol. 4. | Clerk of the Treasury, Clerk of the Seal, of

p. 411. on this subject.

COMMON PLEAS, communia placita.]— Is one of the king's courts now constantly held in Westminster Hall; but in ancient time was moveable, as appears by Magna Charta, cap. 11. Before this charter, of King John and Henry III. there were but two courts, called the King's Court, viz. the King's Bench and the Exchequer, which were then styled Curia Domini Regis, and Aula Regis, because they followed the court of the king: and upon the grant of the great charter the court of Common Pleas was erected and settled in one certain place, i. e. Westminster Hall; and after that all the writs ran Quod sit coram justiciariis meis apud Westm.; whereas before, the party was required by them to appear Coram me vel justiciariis meis, without any addition of place, &c. But Sir Edward Coke is of opinion, in his preface to the eighth report, and I Inst. 71. b. that the court of Common Pleas existed as a distinct court before the Conquest; and was not created by Magna Charta, at which time there were Justiciarii de Banco, &c. Though before this act Common Pleas might have been held in Banco regis; and all original writs were returnable there.

According to Madox the origin of the court of Common Pleas is of a much later date than that assigned by Lord Coke. He so far agrees with Lord Coke as to admit that the Magna Charta of Hen. III. rather confirmed than erected the Bank or Common Pleas; and that such a court was in being several years before the Magna Charta of 17 of King John, though it was then first made stationary: but in other respects Lord Coke and Mr. Madox differ widely; for the latter thinks that some time after the conquest there was one great and supreme judicature, called the Curia Regis, which he supposes to have been of Norman and not Anglo-Saxon original, and to have exercised jurisdiction over common as well as other pleas: that the Common Pleas and Exchequer were gradually separated from the Curia Regis, and became jurisdictions wholly distinct from it; and that the separation of the Common Pleas began in the reign of Richard I. or early in the reign of King John, and was completed by Hen. III. See Mad. Hist. Exc. 63. 549: folio ed.: 3 Com. 37: 4 Inst. 99: 1 Inst. 71. b. and the note

By the 2 and 3 W. 4. c. 39. the act for uniformity of process in the superior courts, the mode of proceeding is now in the Common Pleas and in the other courts: 1. By writ of summons if the defendant is not held to bail. 2. By writ of capias if he is held to bail. 3. By writ of detainer in case of a prisoner.

The other officers of the Common Pleas are the Custos Brevium, three Prothonotaries and their Secondaries, the Clerk of the Warrants, Clerk of the Essoins, fourteen Filazers,

Outlawries, and the Clerk of the Inrolment of Fines and Recoveries, Clerk of the Errors, The Custos Brevium, is the chief clerk in this court, who receives and keeps all writs returnable therein; and all records of Nisi Prius, which are delivered to him by the clerks of the assize of every circuit, &c., and and he files the rolls together, and carries them into the treasury of records: he also makes out exemplifications, and copies of all writs and records, &c. The Prothonotaries enter and enrol all declarations, pleadings, judgments, &c., and they make out all judicial writs of execution, writs of privilege, procedendos, &c. The Secondaries are assistants to the Prothonotaries in the execution of their offices: and they take minutes, and draw up all orders and rules of Court. The Filazers, who have the several counties of England divided among them, make out all mesne process, as capias, alias, pluries, &c. between the original writ and the declaration: and they make all writs of view, &c. The Exigenters appointed for several counties, make out all exigents and proclamations in order to outlawry. The Clerk of the Warrants enters all warrants of attorney, enrols deeds of bargain and sale, and estreats all issues. The Clerk of the Essoins keeps the roll of the essoins wherein he enters them, and non-suits, &c. The Clerk of the Juries makes out all writs of habeas corpora jurator', for juries to appear; and he enters the continuances till the verdict given. The Clerk of the Treasury keeps the records of the court, and makes exemplifications of records, copies of issues, judgments, &c. The Clerk of the Seals seals all writs and mesne process; also writs of outlawry and supersedeas, and all patents. The Clerk of the Outlawries makes out the writs of capias utlagatum. The Clerk of the Errors is for the allowance of writs of error, &c. The Clerk of the Involments of fines and recoveries, returns all writs of covenant, writs of entry and seisin, and enrols and exemplifies fines, &c. The Clerk of the King's silver enters the substance of the writ of covenant: and the Chirographer ingrosseth all fines, and delivers the indentures to the parties, &c.

To these officers may be added, a proclamator, a keeper of the court, cryer, and tipstaffs, besides the warden of the Fleet. There are also attornies of this court, whose number is unlimited; none may plead at the bar of the court in term time, or sign special pleadings,

but serjeants at law.

COMMON PRAYER, Preces Publica.] The liturgy or prayers used in our church. It is the particular duty of clergymen, every Sunday, &c. to use the public form of prayer prescribed by the Book of Common Prayer; and if any incumbent be resident upon his living, as he ought to be, and keep a curate, four Exigenters, a clerk of the Juries, the he is obliged, by the act of uniformity, once Chirographer, Clerk of the King's Silver, the every month at least, to read the common prayers of the church, according as they are ties belong to the same. Reg. Orig. 187. But directed by the Book of Common Prayer, in little obedience would perhaps be now paid to his parish church, in his own person; or he such a writ, was any officer to dare to issue shall forfeit 5l. for every time he fails therein. it; for the Court of Exchequer seems, by pre-Stat. 13 and 14 Car. 2. c. 4. Also by that scription, to have attained a concurrent jurisstat. the Book of Common Prayer is to be provided in every parish, under the penalty of 3l. a month; and the common prayer must be read before every lecture; the whole appointed for the day, with all the circumstances and ceremonies, &c. Ministers, before all sermons, are to move the people to join in a short prayer for the Catholic church; and the whole congregation of Christian people, &c. for the king and royal family; the ministers of God's word, nobility, magistrates, and whole commons of the realm, &c.; and conclude with the Lord's Prayer, Can. 55. fusing to use the Common Prayer, or using any other open prayers, &c. is punishable by stat. 1 Eliz. c. 2. See tits. Church, Churchwarden, Parson, Service, and Sacrament.

COMMON WEAL, is understood in our law to be bonum publicum, and is a thing much favoured; and therefore the law doth tolerate many things to be done for common good which otherwise might not be done; and hence it is, that monopolies are void in law; and that bonds and covenants to restain free trade, tillage, or the like, are adjudged void. 11 Co. Rep. 50: Ployd. 35: Shep. Epit. 270.

COMMORANCY, commorantia from commoro.] An abiding, dwelling, or continuing in any place; as an inhabitant of a house in a vill, &c. Commorancy consists in usually lying in a certain place. 4 Comm. 273. See tit. Poor.

COMMORTH, or COMORTH, comortha.] From the Brit. cymmorth, i. e. subsidium, a contribution which was gathered at marriages, and when young priests said or sung the first masses, &c. See stat. 4 H. 4. c. 27. But stat. 26 H. S. c. 6. prohibits the levying any such in Wales, or the Marches, &c. Cowel.

COMMOTE, in Wales, is half a cantred or hundred, containing fifty villages. Stat. Wallie. 12 Ed. 1. Wales was anciently divided into three provinces; and each of these were again subdivided into cantreds, and every cantred into commotes. Doderige's Hist. Wal. fol. 2. Commote also signifies a great seignory or lordship, and may include one or divers manors. Co. Lit. 5.

The commoners, or COMMONANCE. tenants, and inhabitants, who had the right of common, or commoning in open field, &c. were formerly called the communance. Cowel.

COMMUNE CONCILIUM REGNI AN-GLIÆ. The common council of the king and people assembled in parliament.

COMMUNIA PLACITA NON TENEN-DA IN SCACCARIO. An ancient writ directed to the treasurer and barons of the Exchequer, forbidding them to hold plea between common persons (i. e. not debtors to the king, who alone originally sued and were sued there) in that court, where neither of the par- the civil law, made by delegates or commis-

diction in civil suits with the other courts in Westminster-hall. See tits. Courts, Exchequer. And now, by the act for uniformity of process, 2 and 3 W. 4. c. 39. the Exchequer, like the other courts, can only entertain suits at common law commenced by writ of summons, where not bailable, or by writ of capias, where bailable. See Appendix to the act.

COMMUNI CUSTODIA. A writ which anciently lay for the lord, whose tenant holding by knight's service died, and left his eldest son under age, against a stranger that entered the land, and obtained the ward of the body. F. N. B. 89: Reg. Orig. 161. Since the stat. 12 Car. 2. c. 24. hath taken away wardships, this writ is become of no use.

COMMUNITY, of the kingdom. See tit.

Commonalty.

COMPANAGE, Fr.] All kind of food, except bread and drink; and Spelman interprets it to be quiquid cibi cum pane sumitur. In the manor of Feskerton, in the county of Nottingham, some tenants, when they performed their boons or work-days to the lords, had three boon loaves with companage allowed them. Reg. de Thurgarton, cited in Antiq. Nottingham.

COMPANION OF THE GARTER, is one of the knights of that most noble order; at the head of which is the king, as sovereign. See stat. 24 H. 8. c. 13. and tit. Garter.

COMPASS, an instrument used in navigation, by the direction and assistance whereof vessels are steered to the most distant parts of the world. It was invented soon after the close of the holy war, and thereby navigation was rendered more secure as well as more adventurous, the communication between remote nations was facilitated, and they were brought nearer to each other. See Roberts' Hist. Emp. C. V. v. 1. 78. See tit. Longitude.

COMPELATIVUM, an adversary or accuser. Leg. Athelstan.

COMPENSATION, for the apprehension

of criminals. This, by stat. 7 G. 4. c. 64. § 28. may be allowed to persons active towards the apprehension of persons charged with murder, maliciously shooting or attempting so to do, stabbing or cutting, poisoning or administering any thing to procure miscarriage, rape, burglary, felonious housebreaking, robbery, arson, horse-stealing, bullock-stealing, sheep-stealing, or being accessary before the fact to any of these offences, or with receiving stolen property. By § 29. the order for such compensation is to be paid by the sheriff of the county; and by § 30. if any man be killed in endeavouring to apprehend any such offender, the court may order a sum to be paid to his wife, child, father, or mother, according to the circumstances of the case.

COMPERTORIUM, a judicial inquest in

sioners, to find out and relate the truth of a tfine. But it is no offence to compound a mis-

cause. Paroch. Antiq. 575.

COMPOSITION, compositio.] An agreement or contract between a parson, patron, and ordinary, &c. for money or other thing in lieu of tithes. Land may be exempted from the payment of tithes, where compositions have been made; and real compositions for tithes are to be made by the concurrent consent of the parson, patron, and ordinary. Real compositions are distinguished from personal contracts; for a composition called a personal contract is only an agreement between the parson and the parishioners, to pay so much instead of tithes; and though such agreement is confirmed by the ordinary, yet (if the parson is not a party) that doth not make it a real composition, because he ought to be a party to the deed of composition. Murch's Rep. 87. The compositions for tithes made by the consent of the parson, patron, and ordinary, by virtue of stat. 13 Eliz. c. 10. shall not bind the successor, unless made for twenty-one years, or three lives, as in case of leases of ecclesiastical corporations, &c. Compositions were at first for a valuable consideration, so that though, in process of time, upon the increase of the value of the lands, such compositions do not amount to the value of the tithes, yet custom prevails, and from hence arises what we call a modus decimandi. Hob. 29. See farther tit. Tithes.

The word composition hath likewise another meaning, i. e. decisio litis. Compositions were in ancient times allowed for crimes and offences, even for murder.-An expedient employed by the civil magistrate, in order to set some bounds to the violence of private revenge. This custom may be traced back to the ancient Germans. Tucit. de Morib. Ger. c. 21: Lord Kaim's Hist. Law. Tr. 1. p. 41,

COMPOSITIO MENSURARUM, is the title of an ancient ordinance for measures not

printed.

COMPOUNDING FELONY, or theft-bote, is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. 4 Bl. Com. 133. It was formerly held to make a man an accessary; but is now punished only with fine and imprisonment. P. C. c. 59. § 6: 2 Hall's Hist. 400. To take any reward for helping a person to stolen goods, without bringing the offender to justice, is made felony by 7 and 8 G. 4. c. 29. § 58. And to advertise a reward for the return of things stolen, or printing or publishing such advertisement, incurs a penalty of 50l. by § 59. of the same statute. See tits. Advertisement; and also Felony, Misprision.

COMPOUND QUI TAM ACTIONS. By 18 Eliz. c. 5. no informer shall compound, or agree with the defendant, but after answer made in court, nor after answer but by consent of the court, on pain of pillory, and disability to sue in any penal statute, and 10l. fly, but according to the nearest and most

demeanor, for the party injured may maintain an action to recover compensation in damages. Cr. C. C. 9th Ed. p. 140. And compounding offences only cognizable before magistrates on summary jurisdiction is not within the statute of Eliz. 1 B. & A. 286.

COMPRINT. A surreptitious printing of

another bookseller's copy, to make gain thereby, which was contrary to common law, and is now restrained by statute. See tit. Literary

Property.

COMPROMISE, compromissum.] A mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators; and West says it is the faculty or power of pronouncing sentence between persons at variance, given to arbitrators by the parties' private consent. West Symb. § 1.

Any adjustment of claims in dispute by mutual concession, without resort to the law, is a compromise. As to the effect of a compromise on the attorney's lien for costs, see

Tidd, 338. (9th ed.)

COMPTROLLER, is one who observes and examines the accounts of collectors of

public money. Scotch Dict.

Comptroller of the Pipe, is an officer of the Exchequer, that writeth out summonses twice every year to the sheriffs, to levy the farms and debts of the Pipe, and also keepeth a contra-rollment of the Pipe. Scotch Dict.

COMPURGATOR. One that by oath justifics another's innocence. Compurgators were introduced as evidence in the jurisprudence of the middle ages. Their number varied according to the importance of the subject in dispute, or the nature of the crime with which a person was charged. Du Cange, voc. Juramentum, vol. 3. p. 1599. See Outh, and 3 Comm. 342: 4 Comm. 361. 407. See

also tits. Clergy, Wager of Law. COMPUTATION, computatio.] account and construction of time; and to the end neither party to an agreement, &c. may do wrong to the other, nor the determination of time be left at large, it is to be taken according to the just judgment of the law. A deed dated the 20th day of August, to hold from the day of the date, shall be construed to begin on the 21st day of August; but if in the habendum it be to hold from the making, or from thenceforth, it shall begin on the day delivered. 1 Inst. 46: 5 Rep. 1. If an indenture of lease dated the 4th day of July, made for three years from thenceforth, be delivered at four of the clock in the afternoon of the said 4th day of July, the lease shall end the 3d day of July in the third year; and the law in this computation rejects all fractions or divisions of the day. See Day, Month, Year, Time, Age, &c. &c.

Computation of miles after the English manner is allowing 5280 feet, or 1760 yards to each mile; and the same shall be reckoned not by straight lines, as a bird or arrow may

usual way. Cro. Eliz. 212. See Mile. Where a sum of money, without adding any thing the assignor of a public-house in London covenanted, that he would not keep a publichouse within the distance of half a mile from the premises assigned, it was held that the half-mile, as mentioned in the covenant, imported half a mile measured by the nearest way of access between the premises assigned, and any public-house afterwards kept by the assignor. Leigh v. Hind, 9 Barn. & C. 774: and see 2 Stark. Ca. 89. And as to the computation of miles under the reform act, § 27. which requires residence within seven miles. see Russell on the Act. N. B. The revising barristers under the act held different opinions as to the mode of computation, some holding it should be the straight line, as the bird flies, others by the nearest mode of ac-

COMPUTO, Lat.] A writ to compel a bailiff, receiver, or accountant, to yield up his accounts: it is founded on the statute of Westm. 2. cap. 12. And also lies against guardians, &c. Reg. Orig. 135. There is also a rate to compute principal and interest granted in actions on bills and notes, which refers it to the master to compute the principal and interest due in case judgment by default, and thereby saves, the expence of a writ of inquiry before a sheriff's jury.

CONCEALERS, concelators, so called à concelando, as mons à movendo, by an antiphrasis.] Such as were used to find out concealed lands, i. e. such lands as are privily kept from the king by common persons, having nothing to show for their title or estate therein. See stat. 39 Eliz. c. 23. There are concealers of crime; and as to concealing treason, &c. see tit. Misprision.

CONCESSI, I have granted. A word of frequent use in conveyances, creating a covenant in law, as dedi (I have given,) makes a warranty. Co. Lit. 384. This word is of a general extent, and said to amount to a grant,

feoffment, lease and release, &c. 2 Saund. 96. CONCESSIT SOLVERE. This is an action of debt upon simple contract, and lies by custom in the courts of the cities of London and Bristol, and the great sessions in Wales. Sti. 198. Paschall v. Sparing. The courts of great session in Wales are abolished by 1 W. 4. c. 70. § 13. The present form of declaring in this action in London is, that the defendant, in consideration of divers sums of money before that time due and owing from the said defendant to the said plaintiff, and then in arrear and unpaid, granted and agreed to pay (concessit solvere) to the said plaintiff 1001. where and when the same should afterwards be demanded, yet, &c. And this general form has been held good upon a writ of error. 1 Rol. Abr. 564. pl. 21: 2 Lord Raym. 1. 32. Story v. Atkins. In the court of great sessions in Wales, the form of declaring in this action is still more general; for there it is sufficient merely to state that the defendant, on,

more. But to prevent a surprise upon the defendant from this very general way of declaring, it is necessary for the plaintiff to give notice in writing of the particular cause of action. It is observable, however, that in a case, 39 H. 6. 29. abridged Bro. London, 15. it is said that it was agreed for law, that in debt in London upon a concessit solvere by the custom, the declaration shall be, that for merchandizes to him before sold he granted to pay 101., so that the merchandize must be mentioned in this action of debt, or the defendant may wage his law. Bro. Ley, Gager, 69. It does not lie against executors or administrators, because as they are presumed to be ignorant of the contract made by their testator or intestate, they cannot wage their law. 9 Rep. 87. b. Pinchon's case, Sti. 199: Hodges v. Jane, ibid. 228: Oreswich v. Amery. However, if the action be brought against an executor or administrator, he must demur; for it cannot be taken advantage of in arrest of judgment, or upon error. Plowd. 182. Norwood v. Read: Vaugh. 97. 100. and the authorities there cited: by the custom of London, indeed, a defendant cannot wage his law in this action; 1 Wils. 277. Gunn v. Mackherry; and therefore it lies there against an executor or administrator, upon a contract made with the deceased. 8 Rep. 126. a. The city of London's case, 5 Rep. 82. b.: Snelling's case, Cro. Eliz. 409. S. C. See Williams v. Saunders, 1 Co. n. 2.

CONCIONATORES. Common-council men, freemen, called to the hall or assembly, as most worthy .- Quodam tempore cum convenissent concionatores apud London, &c.

Histor. Elien. edit. Gale, c. 46.

CONCLUSION, conclusio.] Is when a man by his own act upon record hath charged himself with a duty or other thing, or confessed any matter whereby he shall be concluded: as if a sheriff returns that he hath taken the body upon capias, and hath not the body in court at the day of the return of the writ; by this return the sheriff is concluded from plea of escape, &c. Terms de la Ley. In another sense, this word conclusion signifies the end of any plea, replication, &c., and a plea to the writ is to conclude to the writ; a plea in bar, to conclude to the action, &c. See tit. Pleading.—And as to the conclusion of Deeds, see tit. Deeds.

CONCORD, concordia.] Is an agreement made between two or more upon a trespass committed, and is divided into concord executory and concord executed. Ploud. 5, 6.8. These concords and agreements are by way of satisfaction for the trespass, &c. See tits.

Accord, Satisfaction.

Concord is also an agreement between parties, who intend the levying of a fine of lands one to the other, how and in what manner the lands shall pass: it is the foundation and substance of the fine taken and acknowledged &c. at, &c. granted to pay to the plaintiff such by the party before one of the judges of C. B., or by commissioners in the country. See, to be paid at such a feast, upon condition if tit. Fine.

CONCUBARIA, a fold, pen, or place where cattle lie. Cowel.

CONCUBEANT, lying together. Stat. 1 H. 7. c. 6.

CONCUBINAGE, concubinatus.] In common acceptation, the keeping of a harlot or concubine; but in a legal sense, it is used as an exception against her that sueth for dower, alleging thereby that she was not a wife lawfully married to the party in whose land she seeks to be endowed, but his concubine. Brit. c. 107: Bract. lib. 4. tract. 6. c. 8. There was a concubinage allowed in Scripture to the patriarchs, secundum legem matrimonii, Blount.

CONDERS, from the Fr. conduire, to conduct. Such as stand upon high places near the sea-coast, at the time of herring-fishing, to make signs with boughs, &c. to the fishermen at sea, which way the shoals of herrings pass; for this may be better discovered by such as stand upon some high cliff on the shore, by reason of a kind of blue colour which the herrings casue in the water, than by those that are in the ships or boats for fishing. These are otherwise called huers and balkers, directors and guiders. See stat. 1 Jac. 1. c. 23.

CONDITION .- Conditio.] A restraint annexed to a thing, so that by the non-performance, the party to it 'shall receive prejudice and loss; and by the performance, commodity and advantage. Or it is a restriction of men's acts, qualifying or suspending the same, and making them uncertain whether they shall take effect or not. Also it is defined to be what is referred to an uncertain chance, which may happen or not happen. West's Symb. part 1. lib. 2. § 156.

A condition is also defined to be a kind of law or bridle, annexed to one's act, staying or suspending the same, and making it uncertain whether it shall take effect or no; or it is a modus, a quality, annexed by him that hath estate, interest, or right to the land, &c. whereby an estate, &c. may either be created, defeated, or enlarged, upon an uncertain event. This differs from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue. Shep. Touchst. 117. See tit. Limitation.

A condition may be also considered as one of the terms upon which a grant may be made: in this sense a condition in a deed is a clause of contingency, on the happening of which the estate granted may be defeated. 2 Comm. 299.

Of conditions there are divers kinds. viz. conditions in deed, or express; and in law, or implied; conditions precedent, and subsequent; conditions inherent, and collateral, &c.

A condition in a deed, or express, is that which is joined by express words to a feoffment, lease, or other grant; as if a man makes the lessee fail in payment at the day, then it shall be lawful for the lessor to enter. Condition in law, or implied, is when a person grants another an office, as that of keeper of a park, steward, bailiff, &c., for term of life: here, though there be no condition expressed in the grant, yet the law makes one, which is, if the grantee do not justly execute all things belonging to the office, it shall be lawful for the grantor to enter and discharge him of his office. Lit. lib. 3. c. 5.

Condition precedent is when a lease or estate is granted to one for life, upon condition that if the lessee pay to the lessor a certain sum at such a day, then he shall have fee simple; in this case the condition precedes the estate in fee, and on performance thereof gains the fee simple. Condition subsequent is when a man grants to another his manor of Dale, &c. in fee, upon condition that the grantee shall pay to him at such a day such a certain sum, or that his estate shall cease: here the condition is subsequent, and following the estate, and upon the performance thereof continues and preserves the same; so that a condition precedent doth get and gain the thing or estate made upon condition by the performance of it; as a condition subsequent keeps and continues the estate by the performance of the condition 1 Inst.201.327: Terms de la Ley. If one agree with another to do such an act, and for the doing thereof the other shall pay so much money; here the doing the act is a condition precedent to the payment of the money, and the party shall not be compelled to pay till the act is done: but where a day is appointed for the payment of money, which day happens before the thing contracted for can be performed, there the money may be recovered before the thing is done; for here it appears that the party did not intend to make the performance of the thing a condition precedent. 3 Salk. 95. See post, I. IV.

Inherent conditions are such as descend to the heir with the land granted, &c.

A collateral condition is that which is annexed to any collateral act.

Conditions are likewise affirmative, which consist of doing; negative, which consist of not doing: some are farther said to be restrictive, for not doing a thing; and some compulsory, as that the lessee shall pay the rent,

Also some conditions are single, to do one thing only; some copulative, to do divers things; and others disjunctive, where one thing of several is required to be done. Lit. 201. See farther Shep. Touch. 117. &c.

As to certain estates on condition expressed or implied, see more particularly tits. Mortgage, Statute-Merchant, Elegit.

Among these several kinds of conditions, the cases which most frequently occur fall under the distinctions of conditions precedent a lease of lands to another, reserving a rent and subsequent. We shall, therefore, speak of them more at large under the following, Co. Lit. 215. So if any tenants for years, for divisions; wherein shall be considered, in the first place, generally,

I. 1. Of Estates on Conditions implied; and 2. On conditions expressed .-Then more particularly,

II. To what Conditions may be annexed: what Conditions are good; and by what Words they may be created.

III. What shall be a good Performance of a Condition; and in what Manner the Breach of it must be taken Advantage of.

IV. Of Conditions precedent and subsequent.

I. 1. Of Estates on Conditions implied.— Estates upon condition implied in law are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution; although no condition be expressed in words. As if a grant be made to a man of an office generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, Lit. § 378.); on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant to another person. Lit. § 379. For an office, either public or private, may be forfeited by misuser, or non-user, both of which are breaches of this implied condition. By mis-user or abuse; as if a judge takes a bribe, or a parkkeeper kills deer without authority. By nonuser, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture; unless some special damage is proved to be occasioned thereby. Co. Lit. 233. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention; but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief, upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them, and therefore they may be lost and forfeited, like offices, either by abuse or by neglect. 9 Rep.

Upon the same principle proceed all the forfeitures which are given by law of lifeestates and others, for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenant for life or years enfeoff a stranger in fee simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz. that they shall not attempt to create a greater Littleton, § 380. 1 Inst. 234. denominates estate than they themselves are entitled to.

life, or in fee, commit a felony, the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feudal donation.

2. On Conditions expressed.—An estate on condition expressed in the grant itself, is where an estate is granted either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualifi-

cation or condition. Co. Lit. 201.

These conditions are, therefore, either precedent or subsequent. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A. upon his marriage with B., the marriage is a precedent condition, and till that happens no estate is vested in A. Show. P. C. 83. &c. Or if a man grant to his lessee for years, that upon payment of an hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee simple passeth not till the hundred marks be paid. Co. Lit. 217. But if a man grant an estate in fee simple, reserving to himself and his heirs a certain rent, and that, if such rent be not paid at the times limited, it shall be lawful for him or his heirs to re-enter, and avoid the estate: in this case the grantce and his heirs have an estate upon condition subsequent, which is defeasible, if the condition be not strictly performed. Lit. § 225. See post, IV.

To this class may also be referred all base fees and fee simples conditional at the common law. Thus an estate to a man and his heirs, tenants of the manor of Dale, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the stat. of Westm. 2. it remains, as at common law, a fee simple, on condition that the grantee has heirs of his body. Upon the same principle depend all determinable estates of freehold, as durante viduitate, &c. These are estates upon condition that the grantee do not marry, and the like: and on the breach of any of these subsequent conditions, by the failure of the contingencies, by the grantee not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole, the estates which were respectively vested in each grantee are wholly determined and

A distinction is, however, made between a condition in deed and a limitation, which also a condition in law. For when an estate

words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation: as when land is time certain, and may determine sooner (as a granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he have made 500l., and the like; in such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500l.); and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. See 10 Rep. 41. But when an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of 40l. by the grantor, or so that the grantee continues unmarried, or provided he goes to York, &c.), the law permits it to endure beyoud the time when such contingency happens, unless the grantor or his heirs or assigns, take advantage of the breach of the condition, and make either an entry or a claim, in order to avoid the estate. Lit. § 347: Stat. 3 H. 8. c. 34. See 10 Rep. 42. Yet though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A. to B., on the condition that within two years B. intermarry with C., and on failure thereof then to D. and his heirs); this law construes to be a limitation, and not a condition; 1 Vent. 202; because if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry, and so D.'s remainder might be defeated by their neglecting to enter; but when it is a limitation the estate of B. determines, and that of D. commences, and he may enter on the lands the instant the failure happens. So also, if a man by his will devises lands to his heir at law, on condition that he pays a sum of money, and, for non-payment, devises it over, this shall be considered as a limitation; otherwise no ad-vantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition. Cro. Eliz. 205: 1 Rol. Abr. 411.

In all these instances of limitations or conditions subsequent it is to be observed, that so long as the condition, either expressed or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold; provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold; Co. Lit. 42: because the estate is capable to last for

is so expressly confined and limited by the ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is, at the utmost, a chattel interest, which must determine at a grant for ninety-nine years, provided A. B. and C., or the survivor of them, shall so long live, this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God, or the act of the feoffer himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to to be performed after the estate is vested, the estate shall become absolute in the tenant. As if a feoffment be made to a man in fee simple, on condition, that unless he goes to Rome in twenty-four hours; or unless he marries with A. B. by such a day (within which time the woman dies, or the fcoffer marries her himself); or unless he kills another; or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determined: here the condition is void, and the estate made absolute in the feoffee; for he hath, by the grant, the estate vested in him, which shall not be defeated afterwards, by a condition either impossible, illegal, or repugnant. Co. Lit. 206. But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another, or goes to Rome in a day, he shall have an estate in fee; here the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant, for he hath no estate until the condition be performed. Ibid. 2 Comm. 152-157.

II. To what Conditions may be annexed; what Conditions are good; and by what Words they may be created. Conditions may be annexed to any estate, whether in fee simple, fee tail for life, or years; they run with the estate, and bind in the hands of whomsoever they come. Lit. Rep. 128. But a condition may not be made but on the part of the lessor, donor, &c.; for no man may annex a condition to an estate, but he that doth create the estate itself. Conditions are good to enlarge or limit estates. There are four incidents, which conditions to create and increase an estate ought to have. 1. They should have a particular estate, as a foundation whereupon the increase of the greater estate shall be built. 2. Such particular estate shall continue in the lessee or grantee until the increase happens. 3. It must vest at the time the contingency happens, or it shall never vest. 4. The particular estate and increase must take effect by the same deed, or by several deeds delivered at the same time. 8 Rep. 75.

Conditions to create estates shall be favour-

ably construed; but conditions which tend to shall have the fee. 8 Rep. 73. But if a man destroy, or restrain an estate, are to be taken strictly. A feoffment upon condition that the feoffee shall not alien is void; but a condition in a feoffment not to alien for a particular time, or to a particular person, may be good. Hob. 13. 261. And if a condition is, that tenant in tail shall not alien in fee, &c., or tenant for life or years not alien during the term, these conditions are good. Where the reversion of an estate is in the donor, he may restrain an alienation by condition. 10 Rep. 39: 1 Inst. 222. If one make a gift in tail, on condition that the donee or his heirs shall not alien, this is good to some intents, and void to others; for if he make a fcoffment in fee, or any other estate by which the reversion is discontinued tortiously, the donor may enter; but it is otherwise if he suffer a common recovery. 1 Inst. 223.

A liberty inseparable from an estate cannot be restrained; and therefore a condition that a tenant in tail shall not levy a fine within the stat. 4 H. 7. c. 24. or suffer a recovery; or not make a lease within the stat. 32 H. 8. c. 36. is void and repugnant. But if the condition restrain levying a fine at common law, it may be good. 2 Danv. Abr. 22. A gift in tail, or in fee, upon condition that a feme shall not be endowed; or baron be tenant by the courtesy, is repugnant and void. So is a condition in a lease, &c. that the lessee shall not take the profits; and where a man grants a rent charge out of land, provided it shall not charge the lands. Co. Lit. 146.

Conditions repugnant to the estate, impossible, &c. are void; and if they go before the estate, the estate and condition are void; if to follow it, the estate is absolute, and the condition void. 1 Inst. 206: 9 Rep. 128. if at the time of entering into a condition, a thing be possible to be done, and become afterwards impossible by the act of God, the estate of a feoffee (created by livery) shall not be avoided. 2 Mod. 204. See ante, I. 2.

Where a condition is of two parts, one possible, and the other not so, it is a good condition for performing that part which is possible. Cro. Eliz. 780. Though if a condition is of two parts disjunctive, and one part becomes impossible, by the act of God, the person bound is not obliged to perform the other. 1 Rol. Abr. 446. l. 45: 2 Mod. 202, 203. If a condition be in the copulative, and is not possible to be performed, it is said it may be taken in the disjunctive. 1 Danv. Abr. 73.

Where an estate is to be wholly created upon a condition impossible to be performed, there the estate shall never come in esse. 1 Leon. c. 311. A woman makes a feoffment to a man that is married, upon condition that he shall marry her; this condition is not impossible, for the man's wife may die, and then he may marry her. 2 Danv. 25. A reversion may be granted in tail upon condition, that if the grantee pays so much, he tions against law are void; but what may be

grants lands, &c. for years, upon condition that, if the lessee pay 20s. within one year, he shall have it for life; and that if he after the year pay 20s. he shall have the fee; though both sums are paid, he shall have but an estate for life: the estate for life; at the time of the grant, being only in contingency, and a possibility cannot increase upon a possibility, nor can the fee increase upon the estate for years. 8 Rep. 75.

If a lease be made to two, with condition to raise a fee, and one dies, the survivor may perform the condition, and have the fee; but if they make partition, the condition is destroyed. 8 Rep. 75, 76. If a fcoffee grant the reversion of part of the land, on a lease for years, on which a rent upon condition is reserved, all the condition is confounded and gone; though if the lessee assign part, the condition remains, for he cannot discharge the estate of the condition. 2 Danv. Abr. 119. A man makes a feoffment upon condition, and after levies a fine to a stranger; the condition is gone. Ibid. 120. If a feoffee, upon condition to infcoff another, infcoff a stranger; or if it be to re-infeoff the feoffor, and he grant the land to another person, upon condition to perform the condition, the condition is broken, because the feoffee hath disabled himself to do it; so where such feoffee, upon condition to re-infeoff, &c., takes a wife, that the land is subject to the dower of the wife; and so if the land is recovered, and execution sued out by another, the condition is broken. Co. Lit. 221: 1 Danv. 79.

If one disseise the feoffee, or any other

who hath land by just title, and thereof in-feoff a stranger on condition, and the land is lawfully recovered from him that hath the title; by this the condition is destroyed; and if a disseisor make a feoffment in fee upon condition, and after the disseisee doth enter upon the feoffee, this doth extinguish the condition. Perk. § 821. If the feoffee makes a feoffment of all or part of the land to the feoffor before the condition is broken, the condition is gone for ever; and if he make a lease for life or years only, then the condition will be suspended for that time. Co. Lit. 218. But it is otherwise where the feoffment or lease for life or years are made to any other but the feoffor. *Ibid*. Where the con-dition of a feoffment is, that if the feoffor or his heir pay a certain sum of money to the feoffce such a day, and before that day the feoffor dieth without heir; or if the feoffment be made by a woman on condition to pay her 101,, or that the feoffee infeoff her by a certain day, and they intermarry before the day, and the marriage doth continue till after it; in these cases the condition is gone. Perk. § 763, 764.

A condition that would take away the whole effect of a grant is void; and so it is if it be

Vol. I.—49

prohibited by law may be prohibited by deed. tion, as where a lease is made for years, if 1 Inst. 206. 220. He that taketh an estate in remainder is bound by condition in a deed,

though he doth not seal it.

Conditions in restraint of marriage have not generally been favoured, as contrary to sound policy; but where a legacy has been given over to another, there the condition has always been held good; and it seems that such conditions as only reasonably restrain children from imprudent marriages will be always supported; that is to say, where they operate only as particular, not as universal, restrictions. In the case of Scott v. Tyler, 2 Bro. C. R. 431. &c. it was determined, after very long arguments, that a condition annexed to a legacy, that the legatee should not marry under twenty.one, without consent of her mother (or rather that the legacy should vest previous to twenty-one, if the legatee married with such consent), was a valid condition.-And upon marriage without such consent, it was determined to go to the mother under a gift of general residue.-See the first paragraph of Div. III. of this title.-And the cases of Peyton v. Bury, 2 P. Wms. 626. and the following cases cited in Mr. Cox's and the following cases cited in Mr. Cox's note there, viz. Bellases v. Ermine, 1 C. C. 22: Fry v. Porter, 1 C. C. 138: Jervoise v. Duke, 1 Vern. 19: Stratton v. Grymes, 2 Vern. 357: Aston v. Aston, 2 Vern. 452: Creagh v. Wilson, 2 Vern. 572: Gillet v. Wray, 1 P. Wms. 284: Piggot v. Morris, S. C. C. 26: Semphill v. Bayly, Prt. Ch. 562: King v. Withers, Gilb. 26: Harvey v. Aston, Talb. 212: Com. Rep. 726: and 1 Atk. 361; Pullen v. Ready, 1 Wils. 21: Underwood v. Morris, 2 Atk. 184: Daley v. Deshouverie, 2 Atk. 265: Elton v. Elton, 1 Wils. 159: Adk. 265: Elton v. Elton, 1 Wils. 159: Chauncy v. Graydon, 2 Atk. 616: Reynish v. Martin, 3 Atk. 330: Wheeler v. Bingham, 3 Atk. 364: 1 Wils. 135: Long v. Dennis, 4 Burr. 2052: Himings v. Munckley, 1 Bro. C. R. 303.—But where a legacy is given on consideration that the legatee should not marry without consent, and there is no devise over, the condition is void. See 4 Burr. 2055: Com. Rep. 739. and the cases there cited. The case of Scott v. Tyler, above mentioned, and Amos v. Horner, 1 Eq. Ab. 112. p. 9. have determined that a bequest of the residue, notwithstanding some contradictory authorities, is equivalent to a limitation over, where the condition is precedent and never performed. As to the invalidity of a legacy in perfect restraint of matriage, see *Knap* v. *Noyes*, *Ambl.* 662. and *Elton* v. *Elton*, 1 *Wils*. 159. And the rule of the ecclesiastical law is, that where a portion is given in consideration that a daughter should never marry, the condition is void. Swimb.—See also Rose's notes on Com. Rep. 728. and the cases there cited; and at large on this subject, Fon-blanque's Treatise of Equity, i. 245, &c. and this Dict. tit. Marriage.

The word "if" will not always make a

A. B. lives so long. And this is contrary to a condition; for a stranger may take advantage of an estate determined thereby, &c. Co. Lit. 236: Dyer, 300. Sub conditione is the most proper word to make a condition: proviso is as good a word, when not dependent upon another sentence; but in some cases, the word proviso may make no condition, but be only a qualification or explanation of a covenant. 2 Danv. 1, 2. And neither the word proviso, nor any other, makes a condition, unless it is restrictive. Plowd. 34: 1 Nels. 466.

Regularly the word "for" does not import a condition, though it has the force of a condition when the thing granted is executory. and the consideration of the grant is a service, or some such thing, for which there is no remedy other than the stopping the thing granted; as in the case of an annuity granted pro consilio, or for executing the office of a steward of a court or the service of a captain or keeper of a fort: here the failure of giving counsel, or performing the service, is a kind of eviction of that which is to be done for the annuity, the grantor having no means either to exact the counsel, or recompence for it, but by stopping the annuity; and in these cases the condition is not precedent, and therefore the performance thereof need not be averred when the annuity is demanded. Per Hobart, C. J. Hob. 41. Mich. 10 Jac. in the case of Cowper v. Andrews.

As the intent of the testator chiefly governs in wills, such construction is always made of the words as will best support his intent, and therefore these words, ad faciendum, faciendo, ea intentione, ad effectum, &c. in a will create a condition. Co. Lit. 204. a. See tits. Devise, Will.

A grant to one to the intent he shall do so and so, is no condition, but a trust and confidence. Dyer, 138. Some words in a lease do not make a condition, but a covenant, upon which the lessor may bring his action. A lease being the deed of lessor and lessee, every word is spoken by both; and a condition may be therein, though it sounds in covenant. 1 Nels. 464. A covenant not to grant, sell, &c. may be a condition; and covenant that, paying the rent, the lessee shall enjoy the land, is conditional. 2 Danv. 2. 6. Where words are indefinite, and proper to defeat an estate, they shall be taken to have the force of a condition. Palm. 503. By a memorandum of agreement in consideration of the rents and conditions thereinafter contained, A. was to have, hold, and occupy as on lease, certain premises therein specified, at a certain rent per acre; and it was stipulated that no buildings should be included or leased by the agreement; and it was farther agreed and stipulated that A. should take at the rent aforesaid certain other parcels as the same might fall in; and, lastly, it was stipulated and condicondition; but sometimes it makes a limita- tioned that A. should not assign, transfer, or

underlet any part of the premises; it was | breach of the condition without any entry. held that by the last clause a condition was created, for breach of which the lessor might enter. Doe, d. Henniker, v. Wall, 8 Barn. & C. 308: and see 2 Bing. 13.

What shall be a good Performance of a Condition; and in what Manner the Breach of it must be taken Advantage of.— A condition may be well performed, when it is done as near to the intent as may be: for if the condition of a feoffment be that the feoffee shall make an estate back to the feoffor and his wife, and the heirs of their two bodies, remainder to the right heirs of the feoffor; in this case, if the feoffor die before, the estate shall be made to the wife without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife, &c. Co. Lit. 219: 8 Rep. 69. If a condition be performed in substance and effect, it is good, although it differs in words; and where it is to deliver letters patent, and the party bound having lost them, delivers an exemplification, &c. 2 Danv. 40. Though payment of the money before the day is payment at the day, in performance of a condition; yet a feoffor, &c. cannot re-enter, and revest his old estate by force of the condition, till the day whereon the condition gives him power to re-enter. Ibid. 121. If a man seised of land in right of his wife make a feoffment in fee on condition, and dies; if the heir of the feoffor enters for the condition broken, and defeats the feoffment, his estate vanishes, and presently it is vested in the wife. Co. Lit. 202. And if a person seised of land, as heir on the part of his mother, makes a feoffment on condition and dieth; though the heir on the part of the father, who is heir at common law, may enter for the condition broken, the heir on the part of the mother shall enter upon him, and enjoy the land. 1bid. 12.

Where there is a condition in a feoffment or lease, that if no distress can be found, the feoffor, &c. shall re-enter; if the place is not open to the distress, as if there be only a cupboard in the house, which is locked, &c. it is all one as if there was no distress there, and the feoffor, &c. may enter. 2 Danv. 46. When a rent is to be paid upon condition at a certain day, the lessor cannot enter for the condition broken, before demand of the rent. Ibid. 98. And the lessor ought to demand the rent at the day, or the condition shall not be broken by the non-payment of the rent. A re-entry, may be given on a feoffment, &c. though none be reserved: if one make a lease for life or feoffment upon condition, that if the feoffee or lessee does such an act, the estate shall be void: now although the estate cannot be void before entry, this is a good condition, and shall give an entry to the less-or, &c. by implication. 1 Rol. Abr. 408. A lease for life on condition, being a freehold, to infants and feme coverts, upon condition, cannot cease without entry; but if it be a shall bind them, because the charge is on the

1 Inst. 214. If a lease for years is, that, on breach of the condition, the term shall cease, the term is ended without entry; but where the words are, that the lease shall be void, it is otherwise. Cro. Car. 511: 3 Rep. 64. Regularly, where one will take advantage of a condition, if he may enter, he must do it; and if he cannot enter, he must make a claim. Co. Lit. 218. Where on condition broken, lessor brings an ejectment, entry is not necessary: if tenant defends, he is bound by the rule to confess entry.

No one can reserve the power or benefit of re-entry, on breach of a condition to any other but himself, his heirs, executors, &c., parties and privies, in right and representation: privies in law, grantees of reversions, &c. are to have no advantage by it. But by the stat. 32 H. 8. c. 28. grantees of reversions may take advantage against lessees, &c. by action. 1 Inst. 214, 215: Plowd. 175. Where one doth enter for a condition broken, it generally makes the eatate void ab initio, and the party comes in of his first estate; and he shall have the land in the same manner it was when he parted with it; and his possession at the time of making the condition; therefore he shall avoid all subsequent charges on the lands. 4 Rep. 120: Plowd. 186: Co. Lit. 233. If one enters on a condition performed, he shall avoid all incumbrances upon the land after the condition made: and a condition when broken, or performed, &c. will defeat the whole estate. So that if there be a lease for life, remainder in fee on condition that the lessee for life shall pay 201. to the lessor; if he pay not this money, the estate in remainder will be avoided also. Dyer, 127: 8 Rep. 90. But this may be otherwise by special limitation to an use: and if tenant for life and he in remainder join in a feoffment on condition, that if, &c. then the tenant for life shall re-enter; this may be good without defeating the whole estate; though regularly a condition may not avoid part of an estate, and leave another part entire, nor can the estate be void as to some persons, and good as to others. 8 Rep. 190: 1 Inst. 214.

Lessee for life makes a feoffment on condition, and enters for the condition broken; by this he shall be restored to his estate for life, and reduce the reversion to the lessor; and the rent due to the lessor shall be revived: but in this case the lessee will not be in the same course as he was before; for his estate is subject to a forfeiture, though he be tenant for life still. Roll. 474: Shep. Abr. 405.

Tenants by the curtesy tenant in tail after posibility of issue extinct, tenants in dower, for life, or years, &c. hold their estates subject to a condition in law, not to grant a grealease for years, the lease is void ipso facto, on land. 2 Danv. 30. A release of all a man's

right may be upon condition; a lessee may | v. Brownell, Finch. 178: Pitcairne v. Bruce, surrender upon condition: a contract may be upon condition, &c. But a parson cannot resign upon condition, any more than be admitted upon condition: and a condition cannot be

released on condition. 9 Rep. 85.

No person shall defeat any estate of freehold upon condition without showing the deed wherein the condition is contained, but of chattels real or personal, &c., a man may plead that such grants or leases were made upon condition without showing the deeds; and in the case of a condition to avoid a freehold, though it may not be pleaded without the deed, it may be given in evidence to a jury, and they may find the matter at large. Lit. 374: 5 Rep. 40. A condition may be apportioned by act of law, or of the lessee. 4 Rep. 120. But a man cannot by his own act divide, or apportion a condition, which goes to the destruction of an estate. 1 Nels. Abr. 474. condition in a will is a thing odious in law, which shall not be created without sufficient words. 2 Leon. 40. A devise to the heir at law, provided he pay to A. B. 201., is a void condition, because there is no person to take advantage of the non-performance. 1 Lutw. 797. Yet conditional devises, as well of lands as of goods, are allowed by our law, and not being performed, the heir or executors shall take advantage of them. 1 Nels. 467.

Where there are negative and affirmative conditions, the pleader must show, not only that he has not broken the negative ones, but also that he has performed the affirmative ones. Fletcher v. Richardson, Hardw. 322.

As to relief against the breach of conditions, some say that in all cases of penalty or forfeiture that lie in compensation, equity will relieve; for where they can make compensation, no harm is done. So that although an express time be appointed for the performance of a condition, the judge may, after that day is past, allow a reasonble space to the party, making reparation for the damage, if it be not very great, nor the substance of the covenant destroyed by it. See Fonblanque's Treat. Eq. i. 387, and the cases there cited.

The substantial distinction which governs the interference of courts of equity in cases of conditions broken, is not whether the condition be precedent or subsequent, but whether compensation can or cannot be made: and therefore, where A. conveyed lands to B. &c. upon trust, that if C., the son of A., within six months after the death of A., should secure to trustees 500l. for the younger children of C., then after such security given to convey to C. and his heirs; and until the time for giving such security in trust for the eldest son of C., and in default of such security, to convey to such eldest son and his heirs; C. died before such security given; yet this condition precedent being only in the nature of a penalty, the intent of the trust shall be regarded, which

Finch. 403: Woodman v. Blake, 2 Vern. 222: Bertie v. Falkland, 2 Vern. 339: Hayward v. Angell, 1 Vern. 222: Bland v. Middleton. 2 C. C. 1: Francis's Maxims, p. 49.

But though equity will, under some circumstances, relieve against the breach of a condition precedent, where damages are certain; yet it seems, that they will not where the damages accrued are contingent, and cannot be estimated. Sweet v. Anderson, 5 Vin. 93. pl. 15. See Treatise of Equity, p. 209. 387. 391.

IV. Of Conditions precedent and subsequent.—There are no precise technical words required in a deed, to make a stipulation a condition precedent or subsequent; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate as either the one or the other according to the nature of the transaction. Ashhurst, J., 1 Term Rep. 645 .- Farther as to the nature of conditions precedent and subsequent, see 3 Atk. 364: 2 P. Wms. 419. 626: 1 Vern. 83: 3 C. C. 130: 3 Lev. 132: Fearne on Cont. Rem.: 2 Burr. 899: 4 Burr. 1930: 1 Wils. 105. 136: 2 Bro. C. R. 67. and Ib. 431. 489: Bac. Ab. tit. Pleas and Pleading. B. 5. 1 (7th ed.): and 1 Wils. Saunders, 320. b. c. d. A condition annexed to a legacy, that the legatee should marry with consent of her mother, was held to be valid. In 1 Eq. Ab. 108. it is said that conditions precedent are such as are annexed to estates, and must be punctually performed before the estate can A condition subsequent is when the estate is executed; but the continuance of such estate depends on the breach or performance of the condition. The two most material points of discussion respecting the doctrine and different operations at law, and in equity, of conditions precedent and subsequent arise, 1. From cases where conditions are annexed to devises making them void on the marriage of the devisee without consent. See ante, II.and tit. Marriage: and 2. From cases arising on the vesting of portions and legacies made payable at a future time. See tits. Devise. Legacy, Portions.

Conditions precedent are such as must be punctually performed before the estate can vest; but on a condition subsequent, the estate is immediately executed: yet the continuance of such estate dependeth on the breach or performance of the condition. Co. Lit. 218: Eq. Ab. 108: 14 East, 601. As if I grant, that if A. will go to such a place, about my business, he shall have such an estate, or that he shall have 101., &c., this is a condition precedent. 1 Rol. Abr. 414. So if I retain a man for 40s. to go with me to Rome, this is a condition precedent, for the duty commences by going to Rome. 1 Rol. Abr. 914. So if a man by was to secure 500l. to the younger children. will devises certain legacies, and then devises Wallis v. Crimes, 1 C. C. 89. See Glascock all the residue of his estate to his executor, after debts, legacies, &c. paid and discharged, | Mutford, and Lothingland Hundred, 3 East, this is a condition precedent; so that the executor cannot have the residue of the estate before the debts and legacies are discharged. 1 Rol. Abr. 415: 1 Jones, 327: Cro. Car. 335.

But if a man devises a term to A., and if his wife suffers the devisee to enjoy it for three vears, that she shall have all his goods as executrix; but if she disturbs A., then he makes B. executor, and dies, his wife is executrix presently; for though in grants the estate shall not vest till the condition precedent is performed, yet it is otherwise in a will, which must be guided by the intent of the parties; and this shall not be construed as a condition precedent, but only as a condition to abridge the power of being executrix, if she performed it not. Cro. Eliz. 219.

Where a testator devised his estate to trustees to pay the rents to his son while unmarried, and in case of his marriage with consent of the trustees to convey to him, but in case of his marriage against their consent, then to sell the estate and divide the proceeds amongst other persons, and the son married without the knowledge of the trustees, and both of them disapproved when they knew it, the devise over was held to take effect, since the marriage with consent was a condition precedent. Long v.

Ricketts, 2 Sim. & Stu. 179.

Where the one promise is the consideration of the other, and where the performance and not the promise is, must be gathered from the words and nature of the agreement, and depends entirely thereupon; for, if there was a positive promise that one should release his equity of redemption, and on the other side, that the other would pay 71, then the one might bring his action without any averment of performance; but where the agreement is, that the plaintiff should release his equity of redemption, in consideration whereof the defendent was to pay him 7l., so that the release is the consideration, and therefore being executory, it is a condition precedent, which must be averred. 12 Mod. 455. 460. Thorp v. Thorp.

So in an action against the hundred for damage sustained by the wilful burning of the party's barn, it was considered to be a precedent condition that the party grieved should, within the time limited, give in his examination upon oath before a magistrate, whether or not he knew the offender or offenders, or any of them: and an examination on oath, in which the party only swore that he suspected that the fact was done by some person or persons to him unknown, is not sufficient within the statute; still less in support of an averment in the declaration, that he gave in such examination, &c., in and by which it appeared that the plaintiff did not know the person or persons who committed the fact. For non constat by the terms of such examination, that the plaintiff did not know some of the offenders if there were several.

By the proposals of the Phænix Company, it is stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister and church-wardens, &c. importing that they knew the character, &c. of the assured, and believe that he really sustained the loss without fraud;" the procuring such certificate is a condition precedent to the right of the assured to recover on the policy; and it is immaterial that the minister, &c. wrongfully refused to sign the certificate. Worsly v. Wood, in error. 6 Term Rep. 720.

If there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do for another thing, and that day happens to incur before the time, the thing for which the promise, agreement, or covenant is made, is to be performed by the tenor of the agreement; there, though the words be, that the party shall pay the money, or do the thing for such a thing, or in consideration of such a thing; after the day is past the other shall have action for the money, or or other thing, though the thing for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a condition precedent; and therefore they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. Per Holt, C. J. 12 Mod. 461: Pasch. 13 W. 3. Thorp v. Thorp.

M. agrees to give A. so much for the use of a coach and horses for a year, and A. agreed farther with M. to keep the coach in repair; it was averred the coach and horses were delivered to M. but nothing of the repair; and Holt, C. J. held upon this evidence, that repairing was not a condition precedent, and therefore need not be averred. Per Holt, C. J. at Guildhall, and judgment pro querente. 12 Mod. 503. Pasch. 13 W. 3. Atkinson v. Morris.

But if the agreement had been, that A. had agreed to give M. a coach and horses for a year, and to repair the coach, and that for that M. promised so much money, then the repairing had been a condition precedent necessary to be averred. Per Holt, C. J. 12 Mod. 503. Pasch. 13 W. 3. in S. C. Condition that A. shall do, and for the

doing B. shall pay, is a condition precedent, but time fixed for payment will verify the condition. Per Holt, C. J. 1 Salk. 171. Pasch. 13 W. 3. B. R. Thorp v. Thorp. See this Dict. tit. Award.

If A. makes a lease for five years to B. upon condition that B. pays him 10l. within two years, that then he shall have a fee-simple in the lands, and make livery and seisin to B.; this passes the freehold immediately, and B. has a fee conditional: because if the freehold was not to vest in B. till the condition per-Thurtell v. formed, it would be difficult to determine in

inserted in such deeds as are perfected privately, which might prove greatly prejudicial to strangers. Lit. § 350: Co. Lit. 216, 217.

But in case of a lease for life, with such a condition, the freehold passes not before the condition performed, because the livery may presently work upon the freehold. But if a man grants an advowson, &c. (which lie in grant) for years, upon such condition, the grantee shall have no fee till the condition

performed. Co. Lit. 217.

If A. leases to B. for years, upon condition that if B. pays money to A. or his heirs, at a day, that B. shall have the fee, and before the day A. is attainted of treason and executed; now though the condition become impossible by the act and offence of A., yet B. shall not have a fee, because a precedent condition to increase an estate must be performed; and if it becomes impossible, no estate shall rise. Co. Lit. 210. Also in equity, with respect to conditions precedent and subsequent, the prevailing distinction seems to be, to relieve against the breach of non-performance, not so much whether the condition be precedent or subsequent, as whether a compensation can be made. 1 Vern. 79. 167. As if A. conveys lands to B., &c. and their heirs, upon trust, that if C., the son of A., within six months after the death of A., should secure to the trustees 500l. for the younger children of C., then after such security given, to convey to C. and his heirs, and until the time for giving such security, in trust for the eldest son of C., and in default of such security, to convey to such eldest son and his heirs, if C. dies before any such security given, yet this condition, though precedent, being only in nature of a penalty, the intent of the trust shall be regarded, which was to secure 500l. for the younger children. 1 Chan. Ca. 89.

If a feme covert, having power by will to devise lands, devises them to her executors, to pay 500l. out of them to her son; provided, that if the father gives not a sufficient release of certain goods to her executors, that then the devise of the 500l. should be void, and go to the executors; and after her death a release as tendered to the father, and he refuses; yet upon making the release after, the money shall be paid to the son; it was said to be the standing rule of the court, that a forfeiture should not bind, where a thing may be done .after, or a compensation made for it; as where the condition is to pay money, &c., and though it is generally binding, where there is a devise over, yet here, it being to go to the executors, it is no more than the law implies. 2 Vent.

252.

See more concerning Conditions under tit. Bond. See also 2 Com. Dig. tit. Condition: and 1 Inst. 201. 203. 206. 237. in the notes. And see Bac. Ab. tit. Condition, and tit. Obligation. (7th ed.)

CONDUITS, for water in London shall be

whom the freehold lay; for conditions may be aldermen may inquire into defaults therein, &c. Stat. 35 H. 8. c. 10. See farther, tit. London.

CONE and KEY. A woman at the age of fourteen or fifteen years might take the charge of her house, and receive cone and key: cone or colne in the Sax. signifying computus; so that she was then held to be of competent years, when she was able to keep the accounts and keys of the house. Bract. lib. 2. cap. 37. And there is something to the same purpose in Glanv. lib. 7. cap. 9.

CONEY BURROWS. Places where conies or rabbits breed and haunt, &c. Commoners cannot lawfully dig up coney-burrows in the common. 2 Wils. 51. See tit. Common. CONIES. By stat. 7 and 8 G. 4. c. 29. §

30. persons unlawfully, in the night-time, taking or killing any coney, in any warren or ground lawfully used for breeding or keeping them, are guilty of a misdemeanor; and committing such offence in the day-time, or setting or using any engine for taking conies, are

punished summarily before one magistrate. CONFEDERACY, confederatio.] Is when two or more combine together to do any damage or injury to another, or to do any unlawful act. And false confederacy between divers persons shall be punished, though nothing be put in execution; but this confederacy, punishable by law before it is executed, ought to have these incidents: first, it must be declared by some matter of prosecution, as by making of bonds or promises the one to the other; secondly, it should be malicious, as for unjust revenge; thirdly, it ought to be false against an innocent person; and lastly, it is to be out of court voluntarily. Terms de la Ley. Where a writ of conspiracy doth not lie, the conspiracy is punishable; and an inquiry shall be made of conspirators and confederators, who bind themselves together, &c. See post, tit. Conspiracy.

CONFESSION, confessio.] Is where a prisoner is indicted of treason or felony, and brought to the bar to be arraigned; and his indictment being read to him, the court demands what he can say thereto; then he either confesses the offence, and indictment

to be true, or pleads not guilty, &c.

Confession may be made in two kinds, and to two several ends: the one is, that the criminal may confess the offence whereof he is indicted openly in the court, before the judge, and submit himself to the censure and judgment of the law; which confession is the most certain answer, and best satisfaction that may be given to the judge to condemn the offender, so that it proceeds freely of his own accord, without any threats or extremity used; for if the confession arise from any of these causes, it ought not to be recorded; as a woman indicted for the felonious taking of a thing from another, being thereof arraigned, confessed the felony, and said that she did it by command of her husband; the judges in made and repaired, and the lord mayor and pity would not record her confession, but caused her to plead not guilty to the felony; | bable circumstances, that such confession may whereupon the jury found that she did the fact by compulsion of her husband, against her will, for which cause she was discharged. 37 Assis. pl. 50. Persons, having nothing to do with the apprehension, prosecution, or examination of the prisoner, advised him to tell the truth, and consider his family; it was held that such advice was no ground for excluding a confession made an hour afterwards to the constable in prison. Rex v. Row, Russ. & Ry. Ca. 153. It seems that the confession of a prisoner is evidence against him, though there is no proof aliunde of the offence having been committed. Rex v. Falkner, Russ. & Ry. Ca. 481: Rex v. Fippet, ibid. 409.

The other kind of confession is, when the prisoner confesses the indictment to be true, and that he hath committed the offence whereof he is indicted, and then becomes an approver, or accuser of others, who are guilty of the same offence whereof he is indicted, or other offences with him; and then prays the judge to have a coroner assigned him, to whom he may make relation of those offences and the full circumstances thereof. See tit.

Accessory.

There was also a third sort of confession, formerly made by an offender in felony, not in court before the judge, but before the coroner in a church, or other privileged place, upon which the offender, by the ancient law of the land, was to abjure the realm. 3 Inst. 129. See tit. Abjuration.

Confession is likewise in civil cases, where the defendant confesses the plaintiff's action to be good: by which confession there may be a mitigation of a fine against the penalty of a statute; though not after verdict. Finch.

387: 2 Keb. 408.

There is also a confession indirectly implied, as well as directly expressed, in criminal cases; as if the defendant, in a case not capital, doth not directly own himself guilty of the crime, but by submitting to a fine owns his guilt: whereupon the judge may accept of his submission to the king's mercy. Lamb. lib. 4. c. 9. By this indirect confession, the defendant shall not be barred to plead not guilty to an action, &c. for the same fact: the entry of it is that the defendant puts himself on the king's mercy; and of the direct confession, that he acknowledges the indictment. And this last confession carries with it so strong a presumption of guilt, that being entered on record, on indictment of trespass, it estops the defendant to plead not guilty to an action brought afterwards against him for the same matter: but such entry of a confession of an indictment of a capital crime, it is said, will not estop a defendant to plead not guilty to an appeal, it being in case of life. And where a person upon his arraignment actually confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony, where it doth; the judges upon pro- | verb confirm

proceed from fear, weakness, or ignorance, may refuse such a confession, and suffer the party to plead not guilty. 2 Hawk. P. C. c. 31. § 2.

A confession may be received, and the plea of not guilty be withdrawn, though recorded. Kel. 11. The confession of the defendant, whether taken upon an examination before justices of peace, upon an offender's being bailed or committed for felony; or taken by the common law, upon an examination before a Secretary of State, or other magistrate, for treason or other crimes, is allowed to be given in evidence against the party confessing; but not against others. Also two witnesses of a confession of high treason, upon an examination before a justice of peace, were sufficient to convict the person so confessing, within the meaning of 1 Ed. 6. c. 12. and 5 & 6 Ed. 6. c. 11, which required two witnesses in high treason; unless the offender should willingly confess, &c. But the stat. 7 W. 3. c. 3. requires two witnesses, except the party shall willingly without violence confess, &c. in open court. 2 Hawk. P. C. c. 46. § 3.—See tit. Evi dence.

It has been held, that wherever a man's confessi on is made use of against him, it must all be taken together, and not by parcels. 2 Hawk. 12. C. 46. § 5. And no confession shall, before final judgment, deprive the defendant of the privilege of taking exceptions in arrest of judgn rent, to faults apparent in the record. Ibid. c. : 12. § 4. A demurrer amounts to a confession of the indictment as laid, so far, that if the indictment be good, judgment and execution shall go against the prisoner. Bro. 86: S. P. C. 150: H. P. C. 246. And in criminal ca: ses, not capital, if the defendant demur to an i indictment, &c., whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgi nent. 2 Hawk. c. 32. § 7.—See tit. Abatement. Where a prisoner confesses the fact, the court has nothing more to do than proceed to judgment against him. Confessus in judicio, pro judicato habetur. 11 Rep. 30: 4 Inst. 65.- See farther, 2 Hawk. P. C. c. 32.

and this Di ct. tit. Evidence.

CONFE. SSOR, Lat. confessor, confessionarius.] Hat 'h relation to private confession of sins, in or der to absolution: and the priest who seceiv ed the auricular confession, had the title of confessor, though improperly; for he is athe r the confessee, being the person to whom the confession is made. This reconfession of a penitent, was in ceiving the old English t to shreve or shrive; whence comes the vord beshrieved, or looking like a confessed. or shrieved person, on whom was imposed sor ne uneasy penance. The most of confessing was the day before solemn lime from thence is still called Shrove-Lent, which Tuesday. (Towel.—See tit. Papist.

CONFIRI MATION, confirmatio, from the are, firmum facere. A conveyance of an estate or right in esse, that one hath in or to lands, &c. to another that hath aut diminuens: Perficiens, as if feoffee upon the possession thereof, or some estate therein; condition make a feoffment, and the feoffor whereby a voidable estate is made sure and unavoidable; or a particular estate is increascd, or a possession made perfect. 1 Inst. 295. See Shep. Touch. 311. It is a strengthening of an estate formerly made, which is voidable, though not presently void: as for example, a bishop granteth his chancellorship by patent, for term of the patentee's life; this is no void grant, but voidable by the bishop's death, except it be strengthened by the confirmatoin of the dean and chapter.

Confirmation is also defined to be the approbation or assent to an estate already created; which as far as is in the confirmer's power, makes it good and valid: so that the confirmation doth not regularly create an estate, but yet such words may be mingled in the confirmation as may create and enlarge an estate; but that is by force of such words as are foreign to the business of confirmation, and by their own force and power, tend to create the estate. Gilb. Ten. 75.

A confirmation is of a nature nearly allied to a release; the words of making it are these, Have given, granted, ratified, approved, and

confirmed. Litt. § 515. 531.

The words dedi et concessi, are as strong as the word confirmavi, for they amount to a grant of the right of the person in possession; and if he has any right, I can never after impeach his estate. Gilb. Ten. 79. See farther what words shall enure as a confirmation in Vin. Abr. tit. Confirmation (X.)

Madox in p. 19. of the Dissert. annexed to the Formul. Angl. says, that most ancient confirmations made after the Conquest, often run like feoffments; and are distinguishable from them chiefly by some words importing

a former feoffment or grant.

In ancient times, when feoffees were frequently disseised of their lands upon some suggestions or other, charters of confirmation seem to have been in great request. For in the early times after the Conquest so many confirmations may be met with, successively made to the same persons, or their heirs or successors, of the same lands and possessions, that it looks as if they did not think themselves secure in their possessions against the king, or the great lords who were their feoffors, or in whose fees their lands lay, uhless they had repeated confirmations from them, their heirs or successors. And these confirmations very anciently seem to have been sometimes made, either by precept or writ from the king, or other lords, to put the feoffees, or their heirs or successors into seisin, after they had been disseised, or to keep them in their seisin undisturbed, or else by charter of express confirmation. Shep. Touc t. edit. 1791. p. 314. in n. And on this sulfject of confirmation in general, see Sheppard' & whole chapter.

Confirmation, aut est perficiens, crescens condition make a feoffment, and the feoffor confirm the estate of the second feoffee. Crescens, that doth always enlarge the estate of a tenant; as tenant for years, to hold for life, &c. Diminuens, as when the lord of whom the land is holden, confirms the estate of his tenant, to hold by a less rent. 9 Rep.

The lord may diminish the services of his tenant by confirmation; but not reserve new services, so long as the former state in the tenantcy continues; and therefore if he confirm to the tenant, to yield him a hawk, &c. yearly, it is void. Lit. § 539: 1 Co. Inst. 296. Leases for years may be confirmed for part of the term, or part of the land, &c. But it is otherwise of an estate of freehold, which being entire, cannot be confirmed for part of the estate. 5 Rep. 31. There may be a confirmation implied by law, as well as express by deed; where the law by construction makes a confirmation of a grant made to another purpose: and a confirmation may enlarge an estate, from an estate held at will to term of years, or a greater estate; from an estate for years to an estate for life; from an estate for life to an estate in tail, or in fee; and from an estate in tail to an estate in feesimple. 1 Inst. 305: 9 Rep. 142: Dyer, 263. But if the confirmation be made to lessee for life or years of his term or estate, and not of the land, this doth not increase the estate, though if the lessor confirm the land, to have and to hold the land to the lessee and his heirs, this will enlarge the estate, and so of the rest. Co. Lit. 299: Plowd. 40.

In every good confirmation there must be a precedent rightful or wrongful estate in him to whom made, or he must have the possession of the thing as a foundation for the confirmation to work upon; the confirmor must have such an estate and property in the land, that he may be thereby enabled to confirm the estate of the confirmee; the precedent estate must continue till the confirmation come, so that the estate to be increased comes into it; and it is required that both these estates be lawful. Co. Lit. 296: 1 Rep. 146: Dyer, 109: 5 Rep. 15. If one have common of pasture in another's land, and he confirms the estate of the tenant of the land, nothing passes of the common, but it remains as it was before: so if a man have a rent out of the land, and he doth confirm the estate which the tenant hath in the land, the rent remaineth. Lit. § 537.

Tenant for life makes a lease for years to a man, and after leases the land to another person for years; and he in reversion confirms the last lease, and after that the first lease, this is not good: the second lessee hath an interest before by the confirmation of him in reversion. But in a like case, confirmation of the first lease, after the second was confirmed, was held good; for the lease takes no but it is otherwise if for years. 2 Danv. Abr. interest by the confirmation, but only to make 141. If tenant for life grant a rent charge, it durable and effectual. Moor. c. 180: I Inst. &c. to one and his heirs, he in reversion is to 296: Plowd. 10.

If a disseisee confirm the land to the disseisor but for one hour, one week, a year, or for life, &c., it is a good confirmation of the estate for ever: and if he confirms the estate of the disseisor without any word of heirs, he hath a fee-simple; and if a disseisor make a gift in tail, and the disseisee doth confirm the estate of the donce, it shall enure to the whole estate; also if the disseisor enfeoffs A. and B. and the heirs of B., and the disseisee confirms the estate of B. for his life; this shall extend to his companion, and for the whole fee-simple. Co. Lit. 291, 297, 299.

But where the estate is divided, it is otherwise; as if there be an estate for life, the remainder over, there the confirmation may be of either of the estates; and if the lessee of a disseisor of a lease for twenty years make a lease for ten years, the disseisee may confirm to one of them, and not to the other. 1 Cro. 472: 5 Rep. 81. If a disseisor or any other make a lease for years to begin at a day to come, a confirmation to the lessee before the lease begins will not be good; for there is no

estate in him. Co. Lit. 296.

The tenant in tail of land hath a reversion in fee expectant; in this case, the confirmation of the estate-tail will not extend to the reversion. And if my disseisor make a lease for life, the remainder in fee, and I confirm the estate of the tenant for life; this shall not confirm the estate of him in remainder: but if I confirm the remainder estate, without any confirmation to tenant for life, it shall enure to him also. Co. Lit. 297, 298. If lands are given to two men, and the heirs of their two bodies begotten, and the donor confirms their estate in the lands, to have and to hold to them two and their heirs; this shall be construed a joint estate for their lives, and after they shall have several inheritances. Co. Lit. 299. Tenant in tail, or for life, of land, lets it for years, if after he makes a confirmation of the land to the lessee for years, to hold to him and his heirs for ever, the lessee hath only an estate for the life of the tenant in tail, &c., and therein his lease for years is extinct. Lit. § 606.

A freehold for life, and term for years, it is said, cannot stand together of the same land, in the same person. 1 Nels. Abr. 480. feme lessee for years marries, and the lessor confirms the estate of husband and wife, to hold for their lives, by such a confirmation the term will be drowned; and the husband and wife are joint-tenants for their lives. Co. Lit. 300. But if the feme were lessee for life, then by the confirmation to husband and wife for their lives, the husband holdeth only in right of his wife for her life; but shall take a remainder for his life. Ibid. 299. Confirmation to lessee for life, and a stranger to hold of parsons, &c., by patron and ordinary. 1 for their lives, is void, for there is no privity: Inst. 237. 300, 301. Bishops may grant

confirm it, otherwise it is good only for the life of tenant for life. Lit. 529. A tenant for life, and remainderman in fee, join in a lease; this shall be taken to be the lease of tenant for life, during his life, and confirmation of him in remainder: though after the death of tenant for life, it is the lease of him in remainder, and confirmation of tenant for life. 6 Rep. 15: 1 Nels. Abr. 481.

If lessee for years, without impeachment for waste, accepts a confirmation of his estate for life; by this he hath lost the privilege annexed to his estate for years. 8 Rep. 76. Acceptance of rent in some cases makes a confirmation of a lease: as if a man leases for life, reserving rent upon a condition of reentry; if after the condition is broken, by non-payment of the rent, the lessor distrains for the said rent, this act shall be a confirmation of the lease, so as he cannot enter. 2

What a person may defeat by his entry, he may make good by his confirmation. Co. Lit. But none can confirm, unless he hath a right at the time of the grant; he that hath but a right in reversion cannot enlarge the estate of a lessee. 2 Danv. 140, 141. And where a person hath but interesse termini, he hath no estate in him upon which a confirma-

tion may enure. Co. Lit. 290.

As confirmation is to bind the right of him who makes it, but not alter the nature of the estate of him to whom made, it shall not discharge a condition. Poph. 51. If A. enfeoffs B. upon condition, and after A. confirms the estate of B., yet the condition remains: though if B. had enfeoffed C. so that the estate of C. had been only subject to the condition in another deed, and after A. had confirmed the estate of C., this would have extinguished the condition, which was annexed to the estate of 1 Rep. 147. A confirmation will take away a condition annexed by law: and by confirmation, a condition after broken in a deed of fcoffment is extinguished. 1 Co. Rep. 146. Confirmations may make a defeasible estate good; but cannot work upon an estate that is void in law. Co. Lit. 295.

A confirmation of letters-putent, which are void as they are against law, is a void confirmation. 1 Lil. Abr. 295. If there be lord and tenant, and the tenant having issue, is attainted of felony, if the king pardons him, nant dies, his issue shall not inherit, but the lord shall have it against his own confirmation: for that could not enable him to take by descent, who by the attainder of his father

was disabled. 9 Rep. 141.

Grants and leases of bishops not warranted by the stat. 32 H. 8. c. 28. must be confirmed by dean and chapter; and grants and leases leases of their church-lands for three lives, or otherwise if he do not disclaim them. It is twenty-one years, having the qualities required by 32 H. 8. c. 28. and concurrent leases for twenty-one years, with confirmation of dean and chapter. See 1 El. cc. 4. 19. If a prebend leases parcel of his prebendary, and the bishop, who is patron, confirms it, this shall not bind the succeeding bishop, without confirmation of dean and chapter, because the patronage is parcel of the possessions of the bishoprick; but it shall bind the present bishop, &c. 2 Danv. 139. If a parson grants a rent, the confirmation of the patron and bishop is sufficient without the dean and chapter, and shall be good against the succeeding bishop. Ibid. 140. The dean of Wells may pass his possessions, with the assent of the chapter, without any confirmation of the bishop. Ibid. 135. Leases of bishops are affirmed ex assensu et consensu decani et totius capituli. See farther tit. Leases.

To the grants of a sole corporation, as parson, prebendary, vicar, and the like, the patron must give his consent, because such sole corporation has not the absolute fee; but a corporation aggregate, as dean and chapter, master, fellows, and scholars of a college, &c., or any sole corporation that has the absolute fee, as a bishop with consent of the dean and chapter, may by the common law make any grant of their possessions without their founder or patron. 1 Inst. 300. b. See farther in what cases the confirmation of the patron and ordinary is necessary, and as to confirmation by dean and chapter of the grant of the bishop, Vin. Abr. tit. Confirmation (G.) (H.):

Bac. Abr. Leases. (G.)
A confirmation, as has been already said, is in nature of a release, and in some things is of greater force; and in this deed it is good to recite the estate of the tenant, as also of him that is to confirm it, and to mention the consideration; the words ratify and confirm are commonly made use of, but the words give, grant, demise, &c. by implication of law, may enure as a confirmation. 1 Inst. 295: West. Symb. 1. p. 457. And see Preston on Conveyancing, Vol. 2. 351: Watkins on Con-

veyancing, 221.
CONFISCATE, or CONFISCATED. From the Lat. confiscare, and that from fiscus, which signifies metonymically the emperor's treasure; and as the Romans say, such goods as are forfeited to the emperor's treasury for any offence are bona confiscata, so we say of those that are forfeited to our king's Exchequer; and the title to have these goods is given to the king by the law, when they are not claimed by some other: as if a man be indicted for stealing the goods of another person, when they are, in truth, his own proper goods; and when the goods are brought into court against him, and he is asked what he says to the said goods, if he disclaims them then he shall lose the goods, although that afterwards he be acquitted of the felony, and the

the same where goods are found in the possession of a felon, if he disavows them, and afterwards is attainted for other goods, and not for them; for there the goods which he disavows are confiscate to the king; but had he been attainted for the same goods, they should have been said to be forfeited, and not confiscate. So if an appeal of robbery be brought, and the plaintiff leaves out some of his goods, he shall not be allowed to enlarge his appeal; and forasmuch as there is none to have the goods so left out, the king shall have them as confiscate, according to the rule, Quod non capit Christus, capit fiscus. Staund. P. C. lib. 3. cap. 24.

Goods confiscated are generally such as are arrested and seized for the king's use, but confiscure and forisfacere are said to be synonima; and bona confiscata are bona foris-

facta. 3 Inst. 227. See tit. Forfeiture. CONFORMITY to the Church of England. See stat. 1 Eliz. c. 2. &c., and tits. Recusant, Nonconformist, Religion.

CONFRAIRIE, confraternitas.] A fraternity, brotherhood, or society; as the confraire de St. George, or les chevaliers de la bleu gartier, the honourable society of the knights

of the garter.
CONFRERES, confratres.] Brethren in a religious house; fellows of one and the same society. Stat. 32 H. 8. c. 24.

CONFUSION (property by). Where goods of two persons are so intermixed, that the several portions can no longer be distinguished, if the intermixture be by consent, it is supposed the proprietors have an interest in common, in proportion to their respective shares; but if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or cast gold in like manner into another's melting pot or crucible, our law does not allow any remedy in such case; but gives the entire property, without any account, to him whose original dominion (or property) is invaded, and endeavoured to be rendered uncertain, without his own consent, 2 Com. 405. Confusion, in the Roman and French law,

means the concurrence of two qualities in the same subject which mutually destroy each other, and takes place when the creditor becomes heir of his debtor; or vice versa, when the debtor becomes heir of his creditor; as to which see Pothier on Obligations or Contracts, vol. 1. p. 111. c. 5. translated by Evans.

CONGEABLE, from the Fr. congé, leave or permission.] Signifies in our law as much as lawful or lawfully done, or done with permission; as entry congeable, &c. Lit. Sect.

CONGE D'ACCORDER, Fr.] Leave to accord or agree, mentioned in the statute of fines, 8 Ed. 1. in these words:-When the original writ is delivered in the presence of the parties before justices, a pleader shall say king shall have them as confiscated; but it is this, Sir justice, congé d'accorder; and the

justice shall say to him, What saith Sir R.?

and name one of the parties, &c.

CONGE D'ESLIRE, Fr. i. e. leave to choose.] The king's license or permission sent to a dean and chapter to proceed to the election of a bishop, when any bishoprick becomes vacant. See tit. Bishop.

CONINGERIA, a coney-borough, or war-

ren of conies. Inquis anno 47 H. 3.

CONJUGAL RIGHTS, or RITES. A suit for restitution of conjugal rights, is one of the species of matrimonial causes; and is brought when either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other.

3 Comm. 94. See tit. Baron and Feme.

CONJURATIO, an oath; and conjuratus, the same with conjurator, viz. one who is bound by the same oath. Conjurare is where several affirm a thing by oath. Mon. Angl.

tom. 1. p. 207.

CONJURATION, conjuratio.] Signifies a plot or compact made by persons combining by oath to do any public harm; but was more especially used for the having (as was supposed) personal conference with the devil, or some evil spirit, to know any secret, or effect any purpose. The difference between conjuration and witchcraft was said to be, that a person using the one endeavoured, by prayers and invocations, to compel the devil to say or do what he commanded him: the other dealt rather by friendly and voluntary conference or agreement with the devil or familiar, to have his desires served, in lieu of blood or other gift offered. Both differed from enchantment or sorcery; because the latter were supposed to be personal conferences with the devil, and the former were but medicines and ceremonial form of words usually called charms, without apparition. Cowel.

Hawkins, in his Pleas of the Crown, lib. 1. c. 3. says, that conjurors are those who, by force of certain magic words, endeavour to raise the devil, and oblige him to execute their commands. Witches are such who, by way of conference, bargain with an evil spirit to do what they desire of him; and sorcerers are those who, by the use of certain superstitious words, or by the means of images, &c., are said to produce strange effects, above the ordinary course of nature. All which were anciently punished in the same manner as hereticks, by the writ de hæretico comburendo, after a sentence in the ecclesiastical court; and they might be condemned to the pillory, &c., upon an indictment at common law. 3 Inst. 44: H. P. C. 38.

The stats. 33 H. 8. c. 8. and 1 Jac. 1. c. 12. against conjuration and witchcraft, are repealed by stat. 9 G. 2. c. 5. which enacts, that no prosecution shall be commenced on the same; but where persons pretend to exercise any kind of witchcraft or conjuration, &c. or

undertake to tell fortunes, or, from pretended skill in any crafty science, to discover where goods stolen or lost may be found; upon conviction, they shall be imprisoned a year, and stand in the pillory once in every quarter in some market-town, and may be ordered to give security for their good behaviour. And a subsequent stat. 3 G. 4. c. 83. § 4. punishes as rogues and vagabonds "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any one." See 4 Comm. 60.

CONQUEST, conquæstus.] The feodal terms for purchase. As to countries granted by conquest, see tit. Plantations; and also tit. King.

CONSANGUINEO, a writ mentioned in Reg. Orig. de avo, proavo et consanguineo, &c. f. 226. See Cosinage.

CONSANGUINEUS FRATER, a brother

by the father's side. 2 Comm. 232.

CONSANGUINITY, consanguinitas.] Is a kindred by blood or birth, as affinity is a kindred by marriage; and it is considerable in the descent of lands, who shall take it as next of blood, &c., and also in administrations, which shall be granted to the next of See tits. Descent, Executor.

CONSCIENCE, COURTS OF. These are courts for recovery of small debts, constituted by act of parliament, in London and Westminister, &c. and other trading and populous districts. See tits. Courts, Arrests,

Process, &c.

CONSECRATION. See tits. Bishops, Church.

CONSENT. In all cases when any thing executory is created by deed, it may, by consent of all persons that were parties to the creation of it by their deed, be defeated and annulled, and therefore it was said that warranties, recognizances, rents, charges, annuities, covenants, leases for years, uses at common law, &c., may, by a defeasance made with the mutual consent of all that were parties to the creation of them by deed, be annulled, discharged, and defeated. 1 Rep. 113: Albany's Case.

The consent of the heir makes good a void devise. Chan. Cases, Trin. 23. Car. 2. Lord Conbury v. Middleton: 1 C. C. 208. Consent of remainder-man for life, though but verbal, is binding, and decreed to confirm building leases accordingly. 2 Chan. Cases, 28: Pasch. 32 Car. 2 Sidney v. the Earl of Leicester. Consent to a trial of a title to land in another county than where the land lies, will not help, it being an error, though such consent be of record: agreed per cur. 2 Show. 98. pl. 97: Pasch. 32 Car. 2. B. R. Lord Clare v. Reach.

A burgess of a corporation consenting to be turned out from his burgess's place, and the common council of the corporation removing him accordingly, does not amount to a resignation; and a peremptory mandamus was granted to restore him. Holt. 450. Mayor of Gloucester's Case.

CONSEQUENTIAL LOSSES or DAM.

AGES. It is a fundamental principle in law if it does; but if a sudden storm riseth, and reason, that he who does the first wrong shall answer for all consequential damages. 12 Mod. 396. Roswell v. Prior. But this admits of limitation. The damage must be the natural and lawful consequence of the defendant's act; not an unlawful act by a third party, for which that party is liable. 8 East, Though a man does a lawful thing, yet it any damage do thereby betall another, he shall answer if he could have avoided it; and this holds in all civil cases. As if a man lops a tree, and the boughs fall upon another ipso invito, yet an action lies. So if a man shoots at butts, and hurts another unawares. So if I have land through which a river runs to your mill, and I lop the sallows growing on the river side, which accidentally stop the water, so as your mill is hindered. So if I am building my own house, and a piece of timber falls on my neighbour's house, and breaks part of it. So if a man assaults me, and I lift up my staff to defend myself, and strike another in lifting it up; but it is otherwise in criminal cases, for there actus non fecit reum nisi mens sit rea. Ruym. 422, 423. See tit. Chance Med-Trespass will lie for originally throwing a squib, which, after having been thrown about in self-defence by other persons, at last put out an eye of plaintiff. Scott v. Shepherd, 2 W. Black. 892. Blackstone, J. thought case the only remedy.

If I have a pond, I cannot so let it out that it shall drown my neighbour's land. Arg. Het. 119. cites 6 Ed. 4. 6. If a stranger drive my cattle upon your land, whereby they are distrained by you, I shall recover against the stranger for this distress by you. Lane, 67. cites 9 Ed. 4. 4. A smith pricks the horse of a servant, being on his journey to pay money for his master to save the penalty of a bond; both the master and servant may have their several action on the case, for the several wrongs they have thereby sustained. Per Coke, C. J., 2 Bulst. 344. The being delayed four hours by an obstruction in a highway, and the being thereby prevented from performing the same journey as many times in a day as if the obstruction had not occurred, is a sufficient injury to entitle the plaintiff to sue the obstructor. 2 Bing. 263:

4 Maul. & S. 101. Where one is party to a fraud, all which follows by reason of that fraud shall be said as done by him. Arg. Cro. J. 469. An action lies for threatening workmen to main and persecute them, whereby the master loses the selling of his goods, the men not daring to go on with their work. Cro. J. 567. Garrick v. Taylor. A. breaks the fence of B., by which cattle get into C.'s ground, C. shall have the case against A., but not trespass. Per Roll. Sty. 131. Cowper v. St. John. If A. beats my horse, by which he runs on B., A is the trespasser, and not B. 2 Salk. 631.

He that makes a fire in his field must see that it does no harm, and answer the damage breakers of it, or bind them in recognizances

which he cannot stop, it is a matter of evidence, and he must show it. 1 Salk. 13. pl. 4. Turbervil v. Stamp. If a man keeps a beast of a savage nature, as a lion, &c., it is at his peril to keep him up, and he is answerable for all the consequences of his getting loose. Per Raymond, C. J. Gilb. 187. The King v. Huggins. See tit. Action; and see Bac. Ab., tit. Action on the Case. (7th ed.) And as to the distinctions between the action of trespass and the action for consequential damages, especially in cases of injuries from carriages and vessels, see Bac. Ab. tit. Tres. pass. (B.) (7th ed.) The general rule is, that if the injury is produced by immediate force on the plaintiff, whether wilful or otherwise, the remedy is trespass; but if the damage is only mediate or consequential upon some illegal act, the remedy is by action on the case.

CONSERVATOR, Lat.] A protector, preserver, or maintainer; or a standing arbitrator, chosen and appointed as a guarantee to compose and adjust differences that should arise between two parties, &c. Antiq. p. 513.

Conservator of the Peace, conservator vel custos pacis.] Is he that hath an especial charge to see the king's peace kept; and of these conservators Lambard saith, that before the reign of Ed. III., who first created justices of the peace, there were divers persons that by the common law had interest in keeping the peace; some whereof had that charge by tenure, as holding lands of the king by the service, &c.; and others as incideat to their offices which they bore, and so included in the same that they were never-theless called by the name of their office only; also some had it simply, as of itself, and were therefore named custodes pacis, wardens or conservators of the peace. chamberlain of Chester is a conservator of the peace in that county by virtue of his office. 4 Inst. 212. Sheriffs of counties at common law are conservators of the peace; and constables by the common law were conservators, but some say they were only subordinate to the conservators of the peace, as they are now to the justice.

The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the king's peace. The Lord Chancellor or Keeper, the Lord Treasurer, the Lord High Steward of England, the Lord Mareschal, and Lord High Constable of England (when any such offices are in being), and all the justices of the Court of King's Bench (by virtue of their offices), and the Master of the Rolls (by prescription), are general conservators of the peace throughout the whole kingdom, and may commit all

to keep it: the other judges are only so in | particular; and farther relating thereto, see their own courts. The coroner is also a conservator of the peace within his own county, as is also the sheriff; and both of them may take a recognizance or security for the peace. Constables, tithingmen, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them till they find sureties for their keeping it. 1 Comm. 350. See tits. Justices of Peace, Commitment.

CONSERVATOR OF THE TRUCE AND SAFE-Conducts, conservator nauciarum et salvorum regis conductuum.] Was an officer appointed by the king's letters patent, whose charge was to inquire of all offences done against the king's truce, and the safe-conducts upon the main sea, out of the liberties of the cinque ports, as the admirals customably were wont to do, and such other things as are declared in stat. 2 H. 5. st. 1. c. 6. Two men learned in the law were joined to conservators of the truce as associates; and masters of ships sworn not to attempt any thing against the truce, &c. And letters of request and of marque were to be granted when truce was broken at sea to make restitution. Stat. 4 H. 5. c. 7. See tit. Truce.

There was anciently a conservator of the privileges of the Hospitallers and Templars. Westm. 2. c. 43. And the corporation of the great level of the fens consists of a governor. six bailiffs, twenty conservators, and commonalty. Stat. 15 Car. 2. c. 17.

CONSIDERATIO CURIÆ, is often mentioned in law pleadings, and where matters are determined by the court. Ideo consideratum est per curiam, i. e. therefore it is considered and adjudged by the court; consideratio curiæ is the judgment of the court.

CONSIDERATION, consideratio.] The material cause, quid or pro quo, of any contract, without which it will not be effectual or This consideration is either expressed: as when a man bargains to give so much for a thing bought; or to sell his land for 100l., or grants it in exchange for other lands; or where I promise, that if one will marry my daughter, or build me a house, &c., I will give him a certain sum of money; or one agrees for a certain sum to do a thing. Or it is implied, when the law itself enforces a consideration; as where a person comes to an inn, and, there staying, eats and drinks, and takes lodging for himself and horse, the law presumes he intends to pay for both, though there be no express contract for it; and therefore if he discharge not the house, the host may stay his horse; and so if a tailor makes a garment for another, and there is no express agreement what he shall have for it, he may keep the clothes till he is paid, or sue the party for the same. 5 Rep. 29; Plowd. 308: Dyer, 30. 337.

Considerations may be considered either as relating to contracts generally or to deeds in 16. § 131. And as to the cases in which a

tits. Assumpsit, Deed.

As to contracts, a consideration may be defined to be the reason which moves the contracting party to enter into the contracts. This consideration must be a thing lawful in itself, or else the contract is void. A good consideration is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another. 3 Rep. 83: 2 Inst. 271: 1 Rep. 176. This consideration may sometimes, however, be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. See 13 Eliz. c. 5: 3 Barn & Adol. 362. And natural affection, though a good consideration to raise a use, is not a sufficient consideration for a binding promise. Cro. Eliz. 755. But a contract for any valuable consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and if it be of a sufficiently adequate value, is never set aside in equity; for the person contracted with has then given an equivalent in recompence, and is therefore as much an owner or a creditor as any other person. 2 Comm. 444: Noy's Max. 87: Hob. 230. See tits. Fraud, Fraudulent Conveyance.

These valuable considerations are divided by the civilians into four species :- Do ut des,facio ut facias,-facio ut des,-do ut facias; the bare mention of which is here suffi-

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a nudum pactum, or bare agreement to do or pay any thing on one side without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. Dr. & St. d. 2. c. 24. As if one man promises to give another 100l.; here there is nothing contracted for or given on one side, and therefore there is nothing binding on the other. And however a man may or may not be bound to perform it in honour or conscience, which the municipal laws do not take upon them to decide, certainly those laws will not compel the execution of what he had no visible inducement to engage for, and therefore our law has adopted the maxim of the civil law ex nudo pacto non oritur actio. But any degree of reciprocity will prevent the pact from being nude; nay, even if the promise be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer nudum pactum. But this promise must now be in writing. See 9 G. 4. c. 14. So a bankrupt is liable on a new promise to pay debts barred by his certificate, for it is founded on good consideration; but the promise must be in writing. 6 G. 4. c. moral obligation is sufficient to support an assumpsit, see 3 Bos. & Pull. 249: 5 Taun. 36: 1 Barn. & Adol. 104: 2 Barn. & Adol. And as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases where such promise is authentically proved by written documents. 2 Comm. 445, 6. Blackstone instances voluntary bonds or notes; as to which latter, see Fonblanque's observations in

Treat. Eq. 334. n.

Deeds also must be founded upon good and sufficient considerations, not upon an usurious contract. Stat. 13 Eliz. c. 8. Nor upon fraud or collusion, either to deceive purchasers bona fide, or just and lawful creditors. Stats. 13 Eliz. c. 5: 27 Eliz. c. 4. Any of which bad considerations will vacate the deed, and subject such persons as put the same in ure to forfeitures, and often to imprisonments. A deed also, or other grant made without any consideration, is, as it were, of no effect; for it is construed to enure, or to be effectual, only to the use of the grantor himself. Perk. § 533. The consideration of deeds, also, like that of contracts, may be either a good or valuable one. Deeds made upon good consideration only are considered as merely voluntary, and are frequently set aside in favour of creditors, and bona fide purchasers. 2 Comm. 296. See 3 Barn. & Adol. 362. See farther tit. Deeds.

A consideration ought to be matter of profit and benefit to him to whom it is done, by reason of the charge or trouble of him who doth it. Cro. Car. 8. If a person hath disbursed several sums for another, without his request, and afterwards such other says, that in consideration he hath paid the said sums for him, he promises pay them: this is no consideration, because it was executed before. But it will be otherwise if the sums were paid at the request of the other. Moor. 220. Cro. Eliz. 282. A mere voluntary courtesy will not be a good consideration of a promise; but the value and proportion of the consideration is not material to maintain an action; for a shilling or a penny is as much binding as 100l.; though in these cases the jury will give damages proportionably to the loss. Hob.

5: 10 Rep. 76.

A consideration that is void in part, is void in the whole; and if two considerations be alleged, and one of them is found false by the jury, the action fails. Hob. 126: Cro. Eliz. 848. But if there be a double consideration, for the grounding of a promise, for the breach whereof an action is brought; though one of the considerations be not good, yet if the other be good, and the promise broken, the action will lie upon that breach: for one consideration is enough to support the promise. 1 Lill. 297. A consideration must be lawful to ground an assumpsit. 2 Lev. 161. It must not be contrary to any statute. 5 Barn. cause, &c.

& A. 241: 11 East, 300: 1 Maule & S. 593: 10 Barn. & C. 93. Nor contrary to public policy. 8 Term R. 92: 2 Barn. & C. 669. Nor fraudulent. 2 Term R. 763: 4 East, 372. Nor immoral. 1 Bos. & Pull. 340: 1 Ry. & Moo. 251. Where considerations are valuable, and consist of two or more parts, there the performance of every part ought to be shown. Cro. Eliz. 579. In case a deed of feoffment be made of lands, or a fine and recovery be passed, and no consideration is expressed in the deed, &c. for the doing thereof, it shall be intended by the law, that it was made in trust, for the use of the feoffor or conusor; for it shall be presumed he would not part with his land without a consideration; and yet the deed shall be construed to operate something, and that which is most reasonable. 1 Lill. Abr. 299. And see tit. Assumpsit, Bac. Ab. (Ed. by Gwillim

CONSIGN, is a word used by merchants, where goods are assigned, delivered over, or transmitted from beyond sea or elsewhere to

a factor, &c.

Consignor, and Consignee, signify, among merchants, the shipper of merchandize, and the person to whom they are addressed. Where the consignor of goods abroad advised the consignee by letter, that he had chartered a certain ship on his account, and inclosed him an invoice of the goods laden on board, which were therein expressed to be for account and risk of the consignee; and also a bill of lading in the usual form, expressing the delivery to be made to order, &c., he paying freight for the said goods, according to charter-party, and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo; held, that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods in transitû, in case of the insolvency And the consignor's agent of the other. having obtained possession of the cargo under another bill of lading; and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months, in the manner before stipulated: held, that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully. Walley v. Montgomery, E. 43 G. 3 East, 585. See farther tits. Merchant, Factor, Transitu.

CONSILIUM, dies consilii.] A time allowed for one accused to make his defence, and answer the charge of the accuser. It is now used for a speedy day appointed to argue a demurrer: which the court grants after the demurrer joined, on reading the record of the

consimilities. This and the writ in casu proviso lay not at common law, but are given by stat. Gloc. 6 Ed. 1. c. 7. and Westm. 2. 13 Ed. 1. c. 24. for the reversioner after alienation; but during the life of the tenant in dower, or other tenant for life. See F. N. B. 205. 3 Comm. 183. n.

CONSISTORY, consistorium.] Signifies as much as prætorium, or tribunal; it is commonly used for a council-house of ecclesiastical persons, or place of justice in the spiritual court; a session or assembly of prelates. And every archbishop and bishop of every diocese hath a consistory court, held before his chancellor or commissary, in his cathedral church, or other convenient place of his diocese for ecclesiastical causes. 4 Inst. 338. bishop's chancellor is the judge of this court, supposed to be skilled in the civil and canon law; and in places of the diocese far remote from the bishop's consistory, the bishop appoints a commissary, (commissarius foraneus,) to judge in all causes within a certain district, and a register to enter his decrees, &c. 2 Rol. Abr. 286: Seld. Hist. Tithes, 413, 414. From the sentence of this consistory court an appeal lies by virtue of stat. 24 H. 8. c. 12. to the archbishop of each province respectively.

CONSOLIDATION, consolidatio.] Is used for the uniting of two benefices into one. Stat. 37 H. 8. c. 21. Which union is to be by the assent of the ordinary, patron, and incumbent, &cc. and to be of small churches lying near together. Vide tits. Church Union. This word is taken from the civil law, where it signifies properly an uniting of the possession, occupancy, or profit of lands, &c, with the property. See also Extinguishment Insurance. Where the court by rule consolidates several actions depending on the same question, so that all shall be decided by the event of one, this is called a consolidation rule, as to which see Tidd's Prac. (9th ed.) It is frequently done in actions against underwriters on the same policy.

CONSPIRACY, conspiratio.] This word was formerly used almost exclusively for an agreement of two or more persons falsely to indict one, or to procure him to be indicted of felony; and such person may still have his writ of conspiracy after his acquittal. Now, it is no less commonly used for the unlawful combination of journeymen to raise their wages, or to refuse working, except on certain stipulated conditions.

By the common law there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal. I Hawk. P. C. c. 72. § 2. See farther stat. 5 Eliz. c. 4. particularly §§ 18, 19, 20. and this Dict. tits. Labourers, Servants.

Writ of conspiracy lies for him that is indicted of a trespass and acquitted, though it was not felony; also upon an indictment for a riot. 2 Mod. 306: 5 Mod. 405. Where a

may prejudice his fame or reputation; and though it doth not import slander, if it endangers his liberty; or if the indictment be injurious to his property, &c. writ of conspiracy lieth. 3 Salk. 97. But though a conspiracy to charge falsely be indictable, yet the party ought to show himself to be innocent; and the writ of conspiracy lies not without an acquittal. Mod. Cas. 137. 185, 186. Not only writ of conspiracy, which is a civil action at the suit of the party, but also action on the case in the nature of a writ of conspiracy, doth lie for a false and malicious accusation of any crime, whether capital or not capital, even of high treason; and this though the bill of indictment is found ignoramus, or it does not go so far as an indictment. And the same damages may be recovered in such action as in a writ of conspiracy, where the party is lawfully acquitted by verdict. 1 Rol. Abr. 111, 112: 9 Rep. 56. See Gilb. Ca. 185: 10 Mod. 148. 214: Salk. 15. An action on the case is preferable, as being more in use, and the proceedings casier, and not attended with such niceties as the writ of conspiracy. See tits. Malicious Prosecution, Action.

If one falsely and maliciously procure another to be arrested and brought before a justice of peace to be examined concerning a felony, &c., on purpose to vex and disgrace him, and put him to charge and trouble, although he is not indicted for the same, yet he may have an action on the case; in which he need not aver that he was lawfully acquitted, as he ought to do in a writ of conspiracy; but he must aver that the accusation was false et maliciosè, which words are necessary in the declaration; and it must appear that there was no ground for it, and that the prosecution is at an end. And as an action on the case may be prosecuted against one person, where the writ of conspiracy or indictment doth not lie but against two, this action is most commonly brought. 1 Danv. Abr. 208. 213: 2 Inst. 562. 638. See tit. Malicious Prosecution.

Conspirators may be indicted at the suit of the king, and at the common law one may prefer an indictment against conspirators, who only conspire together, and nothing is executed; though the conspiracy ought to be de-clared by some act, or promise to stand by one another, &c. But a bare conspiracy will not maintain a writ of conspiracy at the suit of the party, because he is not damaged by it, though it is a ground for an indictment. 9 Rep. 56: 2 Rol. Abr. 77. If the defendants can show any foundation or probable cause of suspicion, they shall be discharged; and if a man hath good cause of suspicion that a person is guilty of felony, and causes him to be indicted, in prosecution of justice, action of conspiracy will not lie; but it is otherwise if the prosecutor imposes the crime of felony where no felony was committed. 1 Rol. Abr. '115: 4 Rep. 438.

and though, as before said, nothing is done in spiracy at the suit of the king. 1 Hale, Hist. prosecution of it, it is a complete and consummate offence of itself; and whether the conspiracy be to charge a temporal or ecclesiastical offence on an innocent person it is the same thing. Ld. Raym. 1167: 1 Salk. 174: Stra. 193.

A conspiracy consists in unlawfully conspiring to injure a person by a false charge.

3 Burr. Rep. 1320.

Several persons may lawfully meet together and consult to prosecute a guilty person; otherwise, if it be to charge one that is innocent, right or wrong; for that is indictable. 1 Salk. 174.

By the common law there can be no doubt but that all confederacies whatever, wrongfully to prejudice a third person, are highly criminal; 1 Hawk. P. C. c. 72. § 2; and a bare conspiracy to do a lawful act to an unlawful end is a crime. 8 Mod. 320.

Combining to hiss at a theatre, though each might have done so separately. Anon. B. R. 18 G. 3. 2 Campb. 369. So officers in the East India Company's service combining together to throw up their commissions.

Burr. 2472.

Conspiring to indict for the purpose of extorting money, is a misdemeanor, whether the charge be true or false. 4 B. & C. 329: 6 D. & R. 345.

It is an indictable offence to conspire to charge a person with being the father of a

bastard child. 1 Salk. 174.

If a man and woman marry, the man assuming the name of another, and the woman marrying him by such false name, knowing it to be false, with a design thereby to do a future injury to a person whose name was assumed, it is a conspiracy. Leach's Crown Law Cases, 44.

An indictment will not lie for conspiracy to commit a civil trespass by several persons agreeing to go, and by going, into a preserve for game, the property of another, in order to snare hares, though alleged to be done by the defendants armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. 13 E. R. 228.

After conviction of a conspiracy all the defendants must be present in court when a motion is made on their behalf in arrest of Burr. Rep. 929: 1 Bl. Rep. 209. judgment.

And so also upon a motion for a new trial. 11 E. R. 309: 3 Maul. & Sel. Rep. 2.

A person convicted of conspiracy cannot be a witness; Leach, 442; but if pardoned he may. 1 Hale, Hist. 306: 2 Hale, Hist. 275: 2 Hawk. P. C. (6th ed.) 558. 610: 1 Leach, 456. However, Sir William Scott held that a conviction for a conspiracy to defraud would not render an affidavit of the convict inadmissible. Case of Ville de Varsovie, 1817. And so also a conspiracy to raise the funds by false rumours. 3 Stark. 21. Lord Hale P. C. e. 72. § 9. There has been no instance

The conspiracy is the gist of the offence, | confines the disqualification to cases of con-278. One convicted of conspiracy is compctent to make an affidavit of debt to hold to 4 D. & R. 144.

In conspiracies there is no occasion to prove the actual fact of conspiring, but it may be collected from all the collateral circumstances

of the case. 1 Bl. Rep. 392.

Where an indictment for conspiracy was laid in Middlesex, where acts done by some of the conspirators were proved, acts done by others of the conspirators in other counties were given against them. 4 E. R. 171. But the venue must be laid where the conspiracy was, not where the result of such conspiracy was put in execution. 1 Salk. 174. If one overt act be proved where the venue is laid, others may be proved in other counties. Arch. C. L. 812.

The quarter sessions have jurisdiction over conspiracies. Burr. Rep. 1320: 1 Bl. Rep. 368.

An action lies not against a justice of peace, who sends out his warrant upon a false accusation; but it lies if he makes it out without any accusation. 1 Leon. 187. Conspiracies ought to be out of court; for if a prosecution be ordered in a court of justice, and witnesses appear against a party, &c., there shall be no punishment; and if persons acted only as jurors in a criminal matter, or redges in open court, there is no ground for prosecution. S. P. C. 173: 12 Rep. 24. If all the defendants but one are acquitted on indictment for conspiracy, that one must be acquitted also; because one person alone cannot be indicted for this crime; and husband and wife, being but one person, may not be indicted alone for a conspiracy. 2 Rol. Abr. The acquittal of one person is the acquittal of another upon indictment of conspiracy. 3 Mod. 220. (i. e. where only two are indicted, and it is not laid or proved that they conspired with others, unknown). Though where one is found guilty, according to the opinion of the Lord Chief Justice Hale, if the other doth not come in upon process, or if he dies pending the suit, judgment shall be had against the other. 1 Vent. 234. See Stra. 193. Writ of conspiracy was brought against two persons, and one found not guilty; the other shall not have judgment; but in action on the case it had been good. Cro. Eliz. 701. And action on the case in the nature of a conspiracy may be brought against one only. 1 Hawk. P. C. c. 72. § 8. If the parties are found guilty of the conspiracy upon an indictment of felony, at the king's suit, the judgment is, that they shall lose their frank law (which disables them to be put upon jury, to be sworn as witnesses, or to appear in person in any of the king's courts), and their lands, goods, and chattels be seized as forfeited, and their bodies committed to prison; which is called a villainous judgment.

of the villainous judgment since the reign of ries, or fees, to maintain their malicious enter-Edward III. The usual mode of punishment at present is, by pillory, fine, imprisonment, and surety for good behaviour. Burr. 996. 1027: Stra. 196. The quarter sessions have jurisdiction over this offence. Finch, 80: 8 Mod. 321. And on motion in arrest of judgment, the defendant must be personally present in court. Stra. 1227: Burr. 931.

The matter of the conspiracy ought to touch a man's life where the villainous judgment is imposed. 1 Hawk. P. C. c. 72. For conspiring to charge a person with poisoning another, &c., one of the parties was fined 1,000l., and some others had judgment of the pillory, and to be burnt in the cheek with the letters F. and C., to signify false conspirators. Moor, 816. As fine and imprisonment is the usual punishment at this day on the indictment for conspiracy, so on writ of conspiracy, &c. the party shall be fined, and render damages. See farther, 1 Hawk. P. C. c. 72 at large.

The term conspiracy is of late years most frequently applied to unlawful combinations of workmen, generally to the prejudice of themselves as well as of all engaged in the trade to which such combinations relate. were many ancient and modern statutes on this subject, all of which are repealed by stat. 6 G. 4. c. 129. which extends to the whole of the United Kingdom. By this act the offences of forcing, or endeavouring to force, workmen by violence, threats, intimidation, &c. to leave their service, or to quit their work, or return it unfinished, or to prevent their hiring themselves, and for using vio-lence, &c. towards another, for compelling them to belong to clubs, or to pay fines for not obeying orders as to wages, or for forcing any master to alter mode of work, or limiting number of apprentices, &c., are made punishable by three months' imprisonment, with or without hard labour, § 3; not to affect meetings for settling of rates of wages, or hours of work, of the persons meeting, § 4; nor meetings of masters as to rates of wages, wages, &c. of their workmen, § 5; summary conviction before two justices (within four months), § 7; no justice, being a master, shall act under this act, § 13; punishment of witnesses summoned, and refusing to appear or be examined, three mouths' imprisonment, § 8: offenders compellable to give evidence for the crown, and shall be indemnified, § 6; forms of convictions and commitments, § 10 and Sch.; convictions shall be transmitted to quarter sessions, and filed, § 11; appeal to quarter sessions by parties grieved, § 12.

Conspirators, conspiratores.] By stat. 33 Ed. 1. st. 2. are defined to be those that do bind themselves by oath, covenant, or other alliance, that every of them shall aid the other falsely and maliciously to indict persons; or falsely to move or maintain pleas, &c. And such as retain men in the country, with live- constable of the Tower, the constable of Lon-

prises, which extends as well to the takers as the givers; and stewards and bailiffs of great lords, who by their office or power undertake to bear and maintain quarrels, pleas, or debates, that concern other parties than such as relate to the estate of their lords or themselves. 2 Inst. 384. 562. And against conspirators, false informers, and imbracers of inquest, the king hath provided a writ in the Chancery; and the justices of either bench and justices of assize shall on every plaint award inquest thereupon. Stat. 28 Ed. 1. st. 2. c. 10. From the description of conspirators in several of our old law books, conspiracy is taken generally, and confounded with maintenance and champerty. See those tits. Besides these, there are conspirators in treason, by plotting against the govenrment, &c. See tit. Treason. CONSPIRATIONE. The writ that lay against

conspirators. Reg. Orig. 134: F. N. B. 114.

CONSTABLE.—The origin of the word CONSTABLE, erroncously sought for in the Saxon language, is undoubtedly to be found in the comes stabuli of the Eastern empire, who was at first, as his title imports, no more than superintendant of the imperial stables, or in other words, the emperor's master of the horse; but having, in process of time, obtained the command of the army, his name (corrupted into constabulus and constabularius, see Spelman) began to signify a commander; and with this signification appears to have been introduced into England at the Norman Conquest; or perhaps sooner.

THE CONSTABLE OF ENGLAND, OF Lord High Constable, was anciently an officer of the highest dignity and importance in the realm. He was the leader of the king's armies, and had the cognizance of all contracts and other matters touching arms or war. 13 R. 2. st. 1. c. 2; and see Madox's History of the Exchequer, p. 27. He sate as judge with the earl marshal, having precedence of him in the court of chivalry; and he is by some of our books also called marshal. See tit. Mar-

shal.

This office, which appears to have been granted by William the Conqueror to Walter Earl of Gloucester, or according to others, to William Fitzosborne, or Roger de Mortimer, became hereditary in two different families, as annexed to the earldom of Hereford; and in that right, after a lapse of near two centuries, was revived by judgment of law, in the person of Edward Stafford, Duke of Bucking. ham; who being attainted of high treason, an. 13 H. 8. this office became forfeited to the crown. Since this period there has been no lord high constable, except pro hac vice at a coronation, or on other solemn occasions.

CONSTABLES OF CASTLES were keepers or governors of the castles of the king, or of great barons, and who were frequently hereditary or by feudal tenure; such were the

don or Baypard's Castle, the constables of the Winton. Be this as it will, the discovery castles of Dover, Windsor, Chester, Flint, ought at least to teach those who are desirous &c., some of which offices, though not now hereditary, are remaining to this day. These are the constables intended in Magna Charta, c. 17. 20; and who, in the stat. of Westm. 1. (3) Ed. 1.) c. 15. are called constables of fees, and there considered as keepers of prisons; a constituent part, indeed, of all ancient castles. See 2 Inst. 31. The stat. of 5 H. 4. c. 10. reciting the oppressions of these constables, and enacting that none be imprisoned but in the common gaol, seems to have put an end to a race of tyrants, who by their misconduct

A Constable of the Exchequer is mentioned in the Dialogus Scaccarii, l. 1. c. 5: in the stat. de Districtione Scaccarii, 51 H. 3. st. 5: in Fleta, l. 2. c. 31: and in Madox's History

of that court, p. 174.

The Constable of the Stuple is also mentioned in some old statutes. See 27 Ed. 3. c. 8: 15 R. 2. c. 9: 23 H. 8. c. 6.

THE CONSTABLE OF THE HUNDRED, or the High, Chief, or Head Constable (as he is othcrwise called,) is next to be spoken of. By the stat. of Winton or Winchester, 13 Ed. 1. (c. 6.) it is ordered that in every hundred or franchise there shall be chosen two constables to make the view of armour, and to present the defaults of armour, and of the suits of

towns and of highways, &c.

Lambard (on Constables, p. 3.), Coke (4 Inst. 267.), and Hale (2 P. C. 96.), all agree in declaring that constables of the hundred were first introduced by this statute. (And see Cro. Eliz. 375.) And though it has been asserted that they were officers and conservators of the peace at common law, and that the stat. of Winton only enlarged their authority, yet no evidence has hitherto been produced to that purpose.—See Salk. 175. 381: 11 Mod. 215: 2 Ld. Raym. 1193. 5. The first mention made of the High Constable in any statute subsequent to that of Winton is in stat. 3 Ed. 4. c. 1.

Nothing, however, can be more certain than that the constable of the hundred, or High Constable, whether he be allowed an officer at the common law, or not, was instituted long before the stat. of Winton. This curious fact is ascertained by a writ or mandate of 36 H. 8. preserved in the Adversaria to Watts's edition of Matthew Paris, and from which c. 4. and 6. of the stat. of Winton are evidently taken; though it has hitherto escaped the notice of every writer or speaker upon the subject. By this writ it is provided, "that in every hundred there should be constituted a CHIEF CONSTABLE, at whose mandate all those of his hundred sworn to arms, should assemble and be observant to him, for the doing of those things which belong to the conservation of the king's peace." No mention of this officer, it is believed, can be any where found prior to the date of this instrument; which perhaps may no more determine the question as to his original creation than the stat. of

of explaining the antiquities of our law, to look into matters of record, and to trust very

THE CONSTABLE OF THE VILL (OF Petty Constable, as he is frequently called, to distinguish him from the officer last mentioned), is he who is generally understood by the term constable when mentioned without any pe-

This constable has been repeatedly acknowledged by the law, to be "one of the most ancient officers in the realm for the conservation of the peace." Poph. 13: 4 Inst. 265. It must be confessed, however, that no mention of him by this identical name is any where found to occur anterior to the writ or mandate of King Henry III. already mentioned; whereby it is also provided, that in every village or township, there should be constituted a constable or two, according to the number of the inhabitants. But it is pretty certain that Lord Coke's idea is right, and that this officer is actually owing to the institution of the frankpledge, usually attributed to King Alfred, and was in fact originally the senior or chief pledge of the tithing or decima. See the stats. 2 Ed. 3. c. 3: 20 H. 6. c. 14: 28 H. 8. c. 10.

Thus it appears that the ordinance of Hen. III., the from instituting the office, merely enlarged the number of officers, placing them in towns and villages, instead of franchises; since it might frequently happen, that a manor of great extent had only a single constable for several townships; a case exactly similar, indeed, sometimes occurring at this day, where a township, comprehending several hamlets, equally populous it may be with itself, has only one constable for the whole. [For a constablewick cannot be created at this day, unless by act of parliament. 1 Mod. 13.

We find the Constable beginning to be familiarly known by that name in the time of King Edward I.; but not previously. some articles of inquiry at the Eyre, perhaps, or Trailbaston, certainly in the time of Edward I., are items in which this officer is mentioned. Coll. Madox. Mus. Brit. iii. 285. He seems also to be meant in the two chapters of the Eyre, as given in Fleta. lib. 1. c.

He is named in the stat. of 2 Ed. 3. c. 3. for the first time; as also in those of 4 Ed. 3. c. 10: 5 Ed. 3. c. 14: 25 Ed. 3. st. 1. c. 6: and 36 Ed. 3. st. 1. c. 2: and in several statutes now repealed or obsolete, in the reigns of R. 2., H. 4., and H. 6., 1 H. 7. c. 7. &c.

It seems highly probable that, at the common law, and before the mandate of Henry III., the constable of the hundred and the constable of the manor, were officers of the same nature and authority, originating at the same time, and differing only as to the extent of their several districts; in short, that they bore to each other the same analogy as subsisted between the bailiff of the hundred and

the bailiff of the manor. It follows that the | c. 29. To enforce the laws against profane constable of the hundred neither possessed nor could have exercised any more authority within the precinct of the latter, than the constable of one manor possessed or could have exercised in another; the manor being to all intents and purposes exempt from, and exclu-

ded out of, the hundred.

Lord Bacon observes, that though the High Constable's authority hath the more ample circuit, "yet I do not find," says he, "that the petty constable is subordinate to the High Constable, or to be ordered or commanded by him." Those cases wherein it has been adjudged, that the being subject to a particular leet shall not excuse a man from serving the office of constable of the hundred, seem therefore to have been decided upon a wrong principle. See 3 Keb. 197. 230. 231: Freem. 348: 11 Mod. 215.

The powers and duties of this officer shall be considered under the following heads.

I. 1. His Quality; and 2. Qualifica-

II. 1. His Election; and 2. Who are excepted.

III. His Power and Authority.

IV. His Duty. [These two are in many instances co-extensive, and are therefore carefully to be compared to-

V. His Protection, Indemnity, and Allowances; and lastly,

VI. His Responsibility and Punishment.

But first it may be necessary to state a few particulars as to the High Constable, or constable of the hundred or similar division; who is as much the officer of the justice of the peace as the constable of the vill. Fort. 128. He is elected at the leet or turn of the hundred, or by justices of the peace. 1 Rol. Abr. 535: Bulst. 174: 3 Keb. 197. And by stat. 29 G. 2. c. 25. § 8, 9. in Westminster a high constable is to be elected annually by the dean or high steward or his deputy at a court leet. -As to his power-he may hold petty or statute sessions (for hiring servants) according to ancient usage. Stat. 5 Eliz. c. 4. But it is doubtful whether he can arrest for breach, or take surety of the peace. 1 Salk. 381: Cro. Eliz.375, 376. He is said to be an officer within the annual mutiny act, for billeting of soldiers; and liable to the penaltics thereby inflicted for malpractice in so doing; and he may occasionally make a deputy, whose acts in his 1 Blackst. principal's absence will be good. 350: 3 Burr. 1262: but see the act § 1.-Under stats. 39 Eliz. c. 20. and 13 G. 1. c. 23. he may determine complaints of clothiers, and see after abuses mentioned in those acts. His duty is-To present those who harbour strangers for whom they will not answer. 13 Ed. 1. c. 6. To collect the county rate, and pay it to the treasurer, or account, at the sessions, on pain of imprisonment, 12 G. 2.

swearing. 19 G. 2. c. 21. To give notice to the constables of the orders of the lieutenant or deputy lieutenant as to the militia. 26 G. 3. c. 107. This officer is removable by the justices of the peace, on good cause. Bulst. 174: 1 Salk. 150. He shall be discharged from serving the office of collector of the poor's rate during his office. 2 Jones, 46.

I. 1. His Quality.—The constable was ordained to repress felons and to keep the peace, of which he is a conservator by the common law. 10 Ed. 4. 18: Cromp. Just. 201: 4 Inst.

His office is therefore, first, original or primitive, as conservator of the peace; and secondly, ministerial and relative to justices of the peace, coroners, sheriffs, &c., whose precepts he is to execute. 1 Hale, P. C. 88.

He is, however, an officer only for his own precinct, and cannot execute a warrant directed to the constable of the vill, or to all constables, generally, of that particular jurisdiction: for he is a constable no where else: nor is he compellable to do it, though the warrant be directed to him by name; but he may, if he will, and so indeed may any other person. 1 Hale, P. C. 459: Comb. 446: Carth. 508: 1 Salk. 176: 3 Salk. 99: 2 Ld. Raym. 1300: 12 Mod. 316: Fost. 312. n.: 2 Black. Rep. 1135: 1 H. Black. 13. See stat. 24 G. 2. c. 55. under which a constable may execute a warrant in any other county, &c. if indorsed by a justice of such other county, &c., and earry the offender before a justice of such other county, &c.; and if the offender shall give bail, the constable is to deliver the recognizance, examination, or confession, of the offender, and all other proceedings relating thereto, to the clerk of assizes, or clerk of the peace of the county, &c., where the offence was committed, under the penalty of 10l. But if the offence shall not be bailable, or the offender shall not give bail, the constable shall carry the offender before a justice of the county where the offence was committed.

He is an officer of the court of quarter-sessions, over whom they have power. Comb.

2. Qualifications.—The common law requires, that every constable should be idoneus homo, i. e. apt and fit to execute the said office; and he is said in law to be idoneus, who has these three things, honesty, knowledge, and ability: honesty, to execute his office truly, without malice, affection, or partiality; knowledge, to know what he ought duly to do; and ability, as well in estate as body, that he may intend and execute his office when need is, diligently; and not for impotence or poverty neglect it. 8 Rep. 41. b. : And if one be elected constable who is not idoneus, he by the law may be discharged of his office, and another who is idoneus appointed in his place.

He must be an inhabitant of the place for

which he is chosen. 12 Mod. 256.

He ought not to be the keeper of a public house. 6 Mod. 42. And this is made an express disqualification in Westminster, by stat. 29 G. 3. c. 25.

II. 1. His Election.—The constable is chosen by the common law, at the leet, or, where there is no leet, at the tourn; sometimes by the suitors, and sometimes by the steward; and now in many towns and parishes by the parishioners; all according to ancient and particular usage. If he be present when chosen, he is to take the oath in court; if absent, he may be sworn before a (single) justice of the peace. But in the latter case he ought to have special notice of his election, and a time and place should be appointed for his taking the oath [well and truly to serve the office.] 4 Inst. 265: 2 Salk. 502: Comb. 416: 2 Jones, 212: Salk. 175: Ld. Roym. 70, 71: 2 Stra. 1119. 1149: 5 Mod. 130, 1: 2 Hawk. P. C. c. 10. § 46.

Corporations have no power at common law to elect a constable, and it can only be by prescription. 1 Ld. Raym. 94: 2 Salk. 52.

Constables of London (which city is divided into twenty-six wards, and every ward into precincts, in each whereof is a constable) are nominated by the inhabitants of each precinct on St. Thomas's day, and confirmed, or otherwise, at the court of wardmote; and after they are confirmed, they are sworn into their offices at a court of aldermen on the next Monday after Twelfth-day; their oath is long and particular, and goes to duties now seldom performed, but regulated by articles of the wardmote inquest, which directs the several matters to be observed by the constable; who is in the nature of a general superintendant of the morals of the inhabitants; and he ought to notice all new-comers, who, if of bad character, may be required to give security for their good behaviour, or be imprisoned; and see Carth. 129. 138. Every constable may execute warrants through the whole city.

In case a constable die, or quit the precinct, two justices may make and swear a new one, till the lord of the manor shall hold a court leet, or till the next quarter sessions, who may either approve of the constable so made, or appoint another. Also, if he continue above a year in office, the quarter sessions may discharge him, and put another in his place until the lord shall hold a court. But justices of the peace, either in or out of the quarter sessions, cannot in any other case discharge a constable chosen in the leet. Stat. 13 and 14 Car. 2. c. 12: Comb. 328: Stra. 1719. 1070. 1213: Bulst. 174: Sty. 362: Barn. 51.

1213: Bulst. 174: Sty. 362: Barn. 51.

A mandamus may be granted to the steward of the court-leet to swear a constable.

Comb. 51.

A person may be indicted for not taking | 5 Burr. 2790. who may rather be said to be upon him the office of constable. Stra. 920. See 5 Mod. 96. for the form of the indictment.

And the refusing to take the oath of office is prima facie evidence of a refusal to take upon | 13; but this seems doubtful.—11. Physicians.

He ought not to be the keeper of a public him the office. Rex v. Brain, 3 Barn. & Adol. use. 6 Mod. 42. And this is made an ex. 614.

In the lect or town where one is elected constable, and refuses to be sworn, he may, if present, be fined for the contempt; if absent, americal or subjected to a penalty for non-acceptance of the office according to the order. 5 Mod. 130.

Though the justices of the peace have not originally the making of the constable, it is matter of the peace within their general jurisdiction, and they may examine it in their sessions. 2 Jon. 212. See 1 Mod. 13. And on just cause remove them. 4 Inst. 267. And by warrant compel them to appear and be sworn. 5 Mod. 128: All. 78.

An information in the nature of a quo warranto is grantable against one to show by what authority he exercises the office of constable. 2 Stra. 1213.

By 1 and 2 W. 4. c. 41. two or more justices, on information on oath, that tumult, riot, or felony, has taken place, or may be apprehended, in any parish, &c., may nominate householders (not exempt) to be special constables, who shall take the oath required by the act; and notice of the nomination shall be forwarded to the secretary of state and lieutenant of the county. § 2. Secretary of state may, on representation of the justices, order persons exempt to be sworn in. § 4. The justices may make orders for rendering such special constables more efficient, and may remove them for misconduct. § 5. Such special constables to have all the powers and immunities of ordinary constables. § 6. On representation from two justices of adjoining county that an extraordinary circumstances render it expedient, the justices of the county wherein constables are acting may order them to act in the adjoining county. The act does not extend to Scotland or Ireland.

As to the appointment of constables in Ircland, see stat. 3 G. 4. c. 103: 5 G. 4. cc. 18. 23: and 9 G. 4. c. 63: 8 G. 4. c. 67.

2. Exemptions from serving the Office.—
1. Aged persons, incapaciated by weakness, should never be elected; and in Westminster those of sixty-three years old are expressly exempted by stat. 31 G. 2. c. 17. § 13.—2. Aldermen of London. Doug. 538. 1 Jon. 462: Cro. Car. 585 .- 3. Apothecaries practising in, or within seven miles of London, free of the Apothecaries' Company, or in the country having served seven years. Stat. 6 and 7 W. 3. c. 4.-4. Attorneys of the courts of K. B. and C. P. Noy. 112: Mar. 30: Cro. Car. 389: Doug. 538 .- 5. Barbers, see post, Surgeons. 6. Practising Barristers. 2 H. P. C. 103: 1 Mod. 22.—7. Dissenters, being teachers and preachers, but not others, by stat. 1 W. & M. c. 18. See post.—8. Foreigners naturalized, 5 Burr. 2790. who may rather be said to be incapacitated .- 9. Militia, sergeants, or private men serving in. 26 G. 3. c. 107. § 130.—10. Parliament, servants to members of; 1 Mod. president and fellows of the college in London, this particular district, even though a warrant by stat. 32 H. 8. c. 40. but no other physicians, nor they elsewhere. See 1 Mod. 22. and contra 1 Sid. 431: 2 Keb. 578: 2 H. P. C. 100 .-12. Surgeons free of the Surgeons' Company in London, examined, and approved, and exercising the science; by stats. 5 H. 8. c. 6: 32 H. 8. c. 42: 18 G. 2. c. 15: and by custom all surgeons. Com. Rep. 312. But not a mere member of the Barber's Company. Rex v. Chapple, 3 Camp. 91. A college barber at Oxford. Doug. 531 .- 13. Volunteers or members of yeomanry corps actually enrolled and effective. 57 G. 3. c. 44. § 3. (Exp.) But not masters of arts. 5 Vin. 429. Nor justices of peace in another county. Stra. 698. But see ante, Aldermen. Nor officers of the Guards. 1 Lev. 233: 1 Sid. 272. 355: 2 H. P. C. 100. Nor officers or watchmen at the Custom-house. 1 Sid. 272. Nor tenants in ancient demesne. 1 Vent. 344. Nor a younger brother of the Trinity House. 1 Term Rep. 679.

If, however, a gentleman of quality, or a physician, officer, &c. be chosen constable, where there are sufficient persons beside, and no special custom concerning it, it is said such persons may be relieved in B. R. 2 Hawk. P. C. 100. c. 10. § 41.

A constable may make a deputy, but a constable is answerable, and his deputy ought to be sworn, though it is not in all cases necessary. Sid. 355: and see 1 Burr. 129: 3 Burr. 1262: Stra. 942: Cromp. J. P. 201: Bacon, L. T. 187; Moore, 845: 3 Bulst. 78: 1 Ro. Rep. 274: 1 Rol. Abr. 591: 1 Term Rep. 682. But if the deputy is duly allowed and sworn, the principal is not answerable. Wood, b. 1. c. 7. Dissenters chosen to the office of constables, &c. scrupling to take the oaths, may execute the office by deputy, who shall comply with the law in this behalf. Stat. 1 W. & M. c. 18. Constables may appoint a deputy or person to execute a warrant, when by reason of sickness, &c. they cannot do it themselves. A woman made constable, by virtue of a custom, that the inhabitants of a town shall serve by turns, on account of their estates or houses, may procure another to serve for her, and the custom is good. Cro. Car. 389: 2 Term Rep. 395. See 2 Hawk. P. C. c. 10. § 37.

A person is not liable to serve the office of constable unless resident in the parish; and therefore a person occupying a house, and paying all parish rates for it, and carrying on the trade of a printer, frequenting the house on work days, and sometimes working there during the night, but not sleeping there, is not liable to serve the office in the parish where the house is situate. Rex v. Adlard, 4 Barn.

& C. 772.

III. His Power and Authority.-The constable hath as good authority in his place, as the chief justice of England hath in his. 1 Ro. Rep. 238.

is directed to A. constable of B.; to C. and to all other officers of the peace in the county of D. 1 H. Blackst. 15. n. But in 1 Ld. Raym. 736. it is said that a constable may execute a warrant out of his liberty (any where in the jurisdiction of the justices), though he is not compellable so to do; for under a magiatrate's warrant (for levying a poor's rate), directed to the constable of the parish of A:, they may seize goods in the parish of B. 1 Ld. Raym. 735. 545. His office may be served by deputy. 1 Term Rep. 679.

It may save much trouble to the inquirer to class the objects of his power and authority, as well as those of his duty, in alphabetical order; a method in some measure formerly pursued in Law Dictionaries, but not with

sufficient care and accuracy.

1. Affray.—If he see one making affray, or assaulting another, or breaking the peace, or hear or know one to menace, or threaten to kill, wound, maim, or beat another, the constable may take and set him in the stocks, or commit him to prison (as he may persons about to make an affray, and commanded to disperse) till the offender find surety to keep the peace or for his good behaviour. Cromp. J. P. 130, 1. 155.210: Dalt. 33: Lamb. 135. 141. But he may not set one who hath broken the peace in the stocks, if he can have him to the next gaol for the night. 22 Ed. 4. 35. Neither may be commit a party after an affray to compel him to find surety of the peace, as he cannot take any man's oath that he is in tear of his life. But he may upon complaint arrest the party, and bring him before a justice of peace (which indeed is always the safest way) to find surety. Cro. El. 375: Bro. Tit. Faux. Imp. 6: 2 Hale, P. C. 88. If men be making affray in a house, and the doors are shut, or persons making affray, run into a house, the constable may enter to see the peace kept. And if manslaughter, or bloodshed, is likely to ensue, and entrance upon demand is refused, he may break open the doors to keep the peace and prevent the danger. Cromp. J. P. 130. b.: 2 Hale, P. C. 95. 135. See post, 2.

Aid of the subject, requiring; see next division, Arrest.

Alehouses .- See 3. and post, IV.

2. Arrest of Felons, &c .- Where a felony is committed, though out of his precinct, the constable may, ex officio, without a warrant, arrest the felon (if found within his precinct), and imprison him till he can be conveyed to a justice of peace, or to the common gaol. 2 Hale, P. C. 90. 95. 120. If the felon in any case resists or flies, whether after arrest or before, and cannot be taken, the constable may kill him, and such killing is justifiable. 1 Hale, P. C. 481. 9: 2 Hale, P. C. 90. Where a felony has been actually committed, the constable (or any person), upon probable grounds of suspicion, may lawfully (and it is But a constable cannot act as such out of the constable's duty to) apprehend the sus-

Cromp. J. P. 153. b. 201. b.: 2 Hale, P. C. 9: 11 Mod. 248: Doug. 345: Ledwith v. Catchpole, Pasch. 23 G. 3. B. R.: Hawk. P. C. c. 11. § 15. n. Stat. 22 G. c. 58. empowers constables and watchmen to arrest persons suspected of conveying away stolen goods by night. Probable grounds are very many, e. g. common fame; hue and cry levied; goods found on a person, &c. Cromp. J. P. 87. 154: Ow. 121: 12 Rep. 92: 2 Hale, P. C. 81: 3 Bulst, 287. In case of a felony committed, or in danger to be committed (as if one beat or wound another dangerously), the constable either upon complaint, or hue and cry, may break open the doors to take the offender, if upon demand and notice he will not yield himself, or entrance be refused; or if the constable act under a justice's warrant for treason or felony. And he may imprison the offender till the injured party is out of danger. 2 Hale, P. C. 82. 90.4: Cromp. J. P. 141: Brownl. 211: 1 Bulst. 146. The constable may officially imprison for a time to prevent felony; as if he see two with weapons drawn ready to fight: or if a man in a fury be purposed to kill, maim, or beat another. He may also arrest and imprison one for a felonious intent, as if a man bring a helpless infant into a field, or elsewhere, and leave it to perish for want: and the constable see this himself. Moore, 284: Poph. 13. Though no felony has actually been committed, constable and his assistants are justified in arresting on a given charge of felony; Doug. 359, 360; and in this case constable may discharge the person suspected. Cro. El. 202. 752: Dalt. 272. Where there is a reasonable ground of suspicion the constable is justified in arresting, though it turns out that no felony has been committed. Beckwith v. Philby, 6 Barn. & C. 635. He may arrest persons coming before the king's justices with force and arms, or who bring force in affray of the peace, or go or ride armed in a warlike and unnecessary manner. Stat. 2 Ed. 3. c. 3. He may take aid of his neighbours to arrest another, or in execution of any part of his duty at common law, and under several statutes, and they are compelled to assist him; upon affray, or such like, he may raise the people of the realm to cause the peace to be observed. Cromp. J. P. 141. 201. b.: Comb. 309. He may carry one that he has arrested for felony to the common gaol, and the gaoler is bound to receive him. 1 Hale, P. C. 595. He is bound to carry him before a justice as soon as he reasonably can. Wright v. Court, 4 B. & C. 596.

As to what constable shall do with a prisoner when taken, if for an affray, see Affray above. In other offences he may convey his prisoners to the sheriff, or his jailor of the county; or to the jailor of the franchise in which they are taken, who are bound to receive them. Stat. 4 Ed. 3. c. 10. See stats. charged if they die ther 5 H. 4. c. 10: 23 H. 8. c. 2. But the best way this Dict. tit. Lunatics.

pected person, and carry him before a magis- in all cases is, to take him to a justice of peace, to bail or discharge him; till when it is the duty of the constable to keep and imprison an offender. 2 H. P. C. 95, 120. If a felon fly, constable ought to seize his goods, and keep them for the king's use, and send hue and cry after him. Stat. 27 Eliz. c. 13: Dalt. 289. 340: Cromp. J. P. 201. b.

Armed going .- Sec ante, 2. Assault. See ante, 1, 2.

3. Breaking open Doors.—See this division passim.—Other occasions not yet mentioned which justify so doing, are-A capias utlaga. tum, or capias pro fine .- On forcible entry and detainer found by inquisition, or view of justices.—On escape from a lawful arrest.—On warrant to search for stolen goods if found. 2 Hale, P. C. 151. 117. It is best always, and generally requisite, first to signify the cause of the constable's coming, and to demand that the door should be opened. 2 Hawk, P. C. c. 14: Fost. 136. 320.

4. Deserters .- Constables may apprehend persons suspected to be such, and take them before a justice, under the annual mutiny acts, and he is allowed 20s. for each.

5. Disorderly Houses and Persons.-If there be disorderly drinking or noise at an unseasonable time of night, especially in inns, taverns, or alc-houses, the constable or his watch demanding entrance, and being refused, the disorder; as is constantly done in London and Middlesex. 2 Hale, P. C. 95.—He or his watchmen (or indeed any men) may apprehend indecent nightwalkers, and commit them till morning. 2 Hale, P. C. 98. And he may arrest and commit lewd persons frequenting bawdy-houses, to make them find security for their good behaviour. Cromp. J. P. 153. b. See tit. Bawdy-houses, and stat. 5 Ed. 3. c. 14.

Felons.—Arrest, imprisonment, and flight of. See ante, 2.

Hue and Cry.-See ante, 2. ad finem; and

6. Husbandry.—He may grant testimonials under seal to servants in licensing them to change their masters. Stat. 5 Eliz. c. 4. And by the same statute, he is to cause all persons meet for labour to serve by the day, in mowing, reaping, &c.; or on refusal, set them in the

Imprisonment.—See this division passim.

7. Inn-keepers.—The constable on complaint may compel them to receive guests. Br. Act. sur le Case, 76; Cromp. J. P. 201. See stat. 1 Jac. 1. c. 9.

8. Insult, to himself; he may imprison any one insulting, assaulting, or making affray on him, or opposing him, though only verbally, in execution of his office. 1 Ro. Rep. 235: Cromp. J. P. 131: Clayt. 10.

9. Lunatics, or Madmen.—The constable may take and imprison; and he shall not be charged if they die there. Ow. 28: and sec

10. Peace, Surety of .- See ante, 1, 2. The tion of his office is murder. 2 Hale, P. C. constable may take surety by obligation in his own name, but not otherwise, and may certify it at the sessions. 10 Ed. 4. c. 18: 3 Lev. 208. See stat. 14 G. 3. c. 90. for regu-Br. Peace, pl. 2: Sureties, pl. 23: Cromp. J. lating the nightly watch and duty of consta-P. 131: 4 Inst. 265: Cro. El. 375, 6.

general warrant (before some justice), he may | Watchmen. carry his prisoner to what justice he will. 5 By 52 G. 3. c. 17. a temporary act (last Rep. 59. See stat. 24 G. 2. c. 55. as to incontinued by 58 G. 3. c. 52.) the constables dorsed warrants, by which offenders may be under the direction of justices of the peace

taken in any county; ante, I. 1.

and 4 W. & M. c. 10. nor appointed to be the officer to execute the warrants, yet the justices may command him to execute them. 1 office continue till his successor be sworn.

The constable is the proper officer to a justice of peace, and bound to execute his lawful ed, the constable is the officer to execute the warrant, and must obey it. 5 Mod. 130: 1 Salk. 381. Constable must at his peril take notice that his warrant is by one in the commission of the peace: 12 Mod. 347; and that the matter is within the justice's jurisdiction. 2 Hawk. P. C. c. 13. § 11 .- And if guilty of misdemeanour in executing a lawful warrant, he becomes a trespasser. 12 Mod. 344.—But a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction), will by stat. 24 G. 2. c. 44. at all events indemnify the officer who executes it ministerially. 4 Comm. 288.

12. Watch. Constable hath power ex officio to keep a watch for the purpose to raise or pursue hue and cry upon robberies committed by the statute of Winton, c. 1; to search for lodgers in suburbs of cities that are suspicious persons, which is to be done every week, or at least once in fifteen days, by the same statute, c. 4; for such as ride or go armed by the statute of 2 Ed. 3. c. 3: for night-walkers and persons suspicious, either by night or day, by the statute of 5 Ed. 3. c. 4. And it is in his power to hold such watches as often as he pleases, and the watchmen are his ministers and assistants, and are under the same protection with him, and may act as he doth, and regularly he ought to be in company with them in their walk and watch. 2 Hale, P.

A watchman hath a double protection of the law, viz. 1. As an assistant to the constable when he is present or in the watch. 2. Purely as a watchman set by order of law; and the law takes notice of his authority; constable may by warrant search for gunand the killing of a watchman in the execu- powder.

bles in Westminster, 10 G. 2. c. 22. for Lon-11. Warrants.-Where constable has a don, and other acts only of very local importwarrant, he is tied up thereby, to act only as ance, and which those who are to act under it directs. 11 Mod. 248.—If he arrests on a should diligently consult. See this Dict. tit.

are to assist in execution of that act, in places Though the constable is not named in 3 where disturbances prevail or are apprehended.

IV. His Duty.—The constable's duty and Salk. 381. And a constable need not return 12 Mod. 256. Though he may for just his warrant, but should keep it for his own cause be removed by the authority which justification. See stat. 24 G. 1. c. 44: 1 Salk. elected him. Bulst. 174: 2 Hawk. P. C. c. 381: 2 Ld. Raymd, 1196.

Affray.—See III. 1.

Ale-houses .- Constables are to enforce the warrants; and therefore where a statute au- penalties against the keepers of. See ante, III. thorizes a justice to convict a person of any and this Dict. tit. Ale-houses. And stats. I crime, and to levy the penalty, &c. without Jac. 1. c. 9: and 3 Car. 1. c. 4.—And by stat. saying to whom such warrant shall be direct- 26 G. 2. c. 31. constable is to give notice of the days appointed for licensing.

Armed-going .- See ante, III. 2. and this

Dict. tit. Arms.

Bawdy-houses .- Sec ante, III.

Bridges.—By stat. 22 H. 8. c. 5. constable and two most able inhabitants in the parish are to make an assessment for the repairs of bridges, to be allowed by justices. See 1 Hawk. P. C. c. 77. § 7.

Burglary.- If constable have notice that one is committed, it is his duty to pursue the felon immediately, though in the night.

Cro. El. 16.

Customs.—By 6 G. 4. c. 108. § 40. constables with officers of the Customs having a writ of assistance, may enter houses to search for uncustomed or prohibited goods.

Distress, for rent.—Constables are to assist in. See this Dict. tit. Distress. He is to make distresses under justice's warrants. Stat. 27 G. 2. c. 20; under which constable may take his own reasonable charges.

Drunkenness .- To assist the justices in punishing; under stat. 4 Jac. 1. c. 5.

Escape.—See post, VI.

Felons.—See ante, III. 2.—Felon's goods. Constable must keep goods found on the felon till trial, and then return them according to the directions of the court.

Fishing unlawfal.—Constable is to assist in enforcing acts against. These provisions are now consolidated in 7 and 8 G. 4. c. 29. § 34, 35: and 7 and 8 G. 4. c. 30. § 15.

Forcible entry.—Constable is to give assistance to justices of the peace, in removing, or shall be committed and fined. 5 Rep. 2.

Hawkers and Pedlars.—By stat. 8 and 9 W. 3. c. 25. constable is to assist in putting the laws in execution, against hawkers and pedlars, that travel without licenses, and by stat. 11 G. 2. c. 26. against hawkers of spirits.

Highways.—Constable is to be aiding and assisting in putting the acts in execution relating to; and to return lists of persons qualified for the office of surveyor, &c.; but he is not bound to present them if out of repair. 1 Vent. 336. Held contra, 3 Maule & S. 465; but now by 7 and 8 G. 4. c. 38. he is not bound. See this Dict. tit. Highway.

Horses.—Constable is to be assisting in driving off commons, forests, &c. horses and cattle, on pain of 40s. Stat. 32 H. 8. c. 13; but see stats. 2 Eliz. c. 8: and 21 Jac. 1. c. 28.—And in levying duties on horses under

stat. 25 G. 3. c. 49.

Hue and Cry.—See that tit. Husbandry.—See ante, III. Innkeepers.—See ante, III.

Juries.—Under 6 G. 4. c. 50. § 6. constables, on receipt of warrants from the clerk of the peace, are to issue precepts to churchwardens and overseers within their constablewicks, commanding them to make out the jury lists; and where there are several high constables for any hundred, wapentake, &c., each shall be liable for the performance of the duty through the whole hundred.

Lottery Offices illegal, constable is to endeavour to suppress. Stat. 27 G. 3. c. 1.

Malt.—See this Dict. tit. Malt.

Militia.—Constable's duty as to. See the statutes 52 G. 3. c. 38: 43 G. 3. c. 50.

Night Walkers .- See III.

Physicians, College of.—By stats. 14 and 15. H. 8. c. 5. and 32. H. 8. c. 40. in the city of London, constable is to be assisting to them in putting their laws in execution.

Plague.-See ante, III.

Poor's Rate.—Under stat. 43 Eliz. c. 2. § 12. the weekly rate for the relief of the poor is to be assessed, in case the parishioners disagree, by the churchwardens and constables, who are in either case to levy the rate; and by § 35. the churchwardens and constables of every parish are to collect the sums rated, and pay the same over to the high constable. And see stat. 12 G. 2. c. 29. and this Dict. Poor.

Postage.—Under stat. 9 Anne, c. 10. to levy money due for postage of letters under 5l.

§ 30.

Presentments.—Constable is at the quarter-sessions to make presentment of all things against the peace, and belonging to his office. Dalt. J. P. 474: Fitz. J. P. 6. And they are usually summoned by the sheriff to attend the quarter-sessions and assizes to make presentments; which seems justified by no express law, though perhaps by usage. But now by stat. 7 and 8 G. 4. c. 38. no constable shall be required to deliver any presentment respecting popish recusants, absence from church, rogues and vagabonds, inmates, retailers of brandy, forestallers, regrators, curs-

ing and swearing, servants out of service, felonies, unlicensed or disorderly houses, false weights and measures, highways, bridges, riots, routs, and unlawful assemblies.

Riot.—Constables are to suppress, and they may ex officio commit offenders, &c. See stat. 1 G. 1. c. 5: and this Dict. tit.

Riot.

Robbery .- See Hue and Cry.

Scavengers' rates in London shall be made by constables and churchwardens, under stat. 2 W. & M. st. 2.c. 8.

Scolds.—Under a presentment in the leet and the steward's warrant, constable and his assistant may put them in the cucking stool. Moor, 847.

Servants.—See III. Constables to assist in levying duty on, under stat. 25 G. 3.c. 43.

Soldiers.—Constables are to quarter soldiers in inns, ale-houses, victualling houses, &c. Not to receive any reward to excuse quartering them. To give in lists to the justices of the houses and persons obliged to quarter soldiers, and to provide carriages for troops on their march. See the annual statutes concerning soldiers, and ante III.

Statutes, or Acts of Parliament; constables are called upon to assist in the execution of these, on almost innumerable occasions.

Sunday. Constable is to enforce acts 1 Car. 1. c. 1. and 29 Car. 2. c. 7. against the profanation of. Where a parish clerk having refused to read a notice in church, and the party delivering it read it himself while the minister was going to the communion table, and no part of the service going on, and thereupon the defendant, a constable, took him from church, and detained him an hour till the service finished, and then let him go on promising to attend before a magistrate, it was held that though he was justified in removing him, yet the detention after the service was over was illegal, as there was no malicious disturbance of the church, amounting to an offence against the statute. 2 Barn. & C. 699. See this Dict. tit. Holidays.

Swearing.—By stat. 19 G. 2. c. 21. constable is to levy the penalty for profane swearing: which is 1s. for a servant, labourer, &c.; 2s. for others under the degree of a gentleman; and 5s. for a gentleman; and as the crime is repeated, the penalty is to be dou-

bled

Vagrants.—Constables to assist in enforcing the laws against. See this Dict. tit. Va-

grants.

Warrants of Justices.—It is part, and a great part of constable's duty to execute these, which are issued under an amazing variety of acts of Parliament; in all which cases constable's office is chiefly ministerial. See ante, III.

Watch.—See ante, III.

Weavers, Kidderminister.—Constables to assist, by stats. 22 and 23 Car. 2. c. 8.

Wreck.—Under stat. 12 Anne, st. 2. c. 18. constables may call together assistance to

save ships from wreck; and see this Dict. tit. | C. 96. But now under stats. 3 Jac. 1. c. 10. Wreck.

V. His Protection, Indemnity, and Allowances .- If a constable doth not his duty, he may be indicted and fined by the justices of peace; on the other hand he is protected by law in the execution of his duty.

It has been already mentioned that he shall

have aid of the county to pacify affrays.

By stat. 7 Jac. 1. c. 5. if any action is brought against a constable, for any thing done by virtue of his office, he, and also all others who in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give the special matter in evidence; and if he recovers he shall have double costs. But this must be certified on the record by the judge. 2 Vent. 45: Doug. 294.—And see stat. 19 G. 2. c. 21 against profane swearing, which gives treble costs.

By stat. 24 G. 2. c. 44. no action shall be brought against any constable, or other officer, or any person acting by his order, and in his aid, for any thing done in obedience to any warrant of a justice of peace, until demand of the perusal and copy of such warrant, and the same hath been refused or neglected by the space of six days; and in case after such demand, and compliance therewith, any action shall be brought against such constable, &c., without making the justice a defendant; then on producing and proving such warrant, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice: and if such action be brought jointly against such justice, and also against such constable, &c., then on proof of such warrant, the jury shall find for such constable, &c.; and if the verdict shall be given against the justice, the plaintiff shall recover his costs against him to be taxed so as to include costs plaintiff shall be liable to pay to such defendant, &c. No action shall be brought against any constable, &c. unless commenced within six calendar months after the act committed. This statute extends only to actions of tort. See Buller's N. P. 24.

Where defendants, (constables, &c.) in order to levy a poor-rate under magistrates' warrant, broke and entered the house; held that they might be sued in trespass without a previous demand of the perusal and copy of the warrant. 2 Maule & Selw. Rep. 259. Where a constable having a magistrate's

warrant of distress to levy a church-rate under stat. 53 G. 3. c. 127. broke the door of and entered plaintiff's dwelling-house; the Court of K. B. held that although he thereby exceeded his authority, yet no action could be sustained, after the three months limited by that act. Theobald v. Crichmore, Hil. 58 G. 3. Term

The charges of sending malefactors to jail were at common law to be borne by the vill, in which they were apprehended. 1 Hale, P.

Vol. 1. -52

and 27 G. 2. c. 3. where a malefactor has not sufficient property in the county where he is taken, on application by the constable or officer conveying him, a justice of peace may on oath examine into and ascertain the reasonable expences to be allowed; and by warrant without fee, order the treasurer of the county to pay the same, except in Middlesex, where such expences are to be paid by the overseers of the place where the offender was taken.

By 41 G. 3. (U. K.) c. 73. when special constables are appointed (in England) to execute warrants in cases of felony, two justices may order proper allowances for their expences, &c. whether allowed, or disallowed, by the sessions. In like manner, allowances may be made to high constables for extraordinary expences in the execution of their duty, in

cases of Riot, Felony, &c.

If in the execution of his office, and acting within his own district, after competent notice that he is constable, he or any that come to his assistance be killed, it is murder; although the party killing do not know his person. 1 Hale, P. C. 9. 459, 460, 1: 2 Ld. Raym. 1300. But see Leach's Cases in Crown Law, 211.

If two men are combating, and the constable come to part them and is hurt, he shall have action of trespass; and if he hurt them, they shall not have action against him. And so of those who aid him; every man who is assisting to the constable in the execution of his office having the same protection that the law gives to the constable. Crompt. J. P. 130: 2 Hale, P. C. 97.

If he be removed without just cause the Court of King's Bench will by rule of court order him to be restored to his place. Bulst.

A justice of peace's warrant is a sufficient justification of a constable in a matter within the jurisdiction of such justice. Stra. 711. See ante, III. 12.

By stat. 18 G. 3. c. 19. every constable is every three months, and within fourteen days after he goes out of office, to deliver to the overseers of the poor an account entered in a book, kept for the purpose, and signed by him, of all sums by him expended and received on account of the parish, &c. which overseers are within fourteen days to lay the same before the inhabitants, and, if approved, are to pay the money due out of the poor-rates; but, if disallowed, are to deliver the book back to the constable, who may produce it before a justice of peace, giving reasonable notice to the overseers; which justice is to examine the account, determine objections, settle the sum due, and enter it in, and sign the account: and the overseers are to pay such sum out of the poor's rate: but may appeal (giving notice) to the quarter sessions.

VI. His Responsibility and Punishment .-A constable arresting one possessed of money who dies, is chargeable with the money, and | so where he takes from a felon money of which he had robbed another, even though he should be afterwards robbed of it himself.

Neglecting a duty incumbent on him, either by common law, or by statute, he is for his default indietable. 1 Salk. 381: 2 Ro. Rep. 78.

If he will not return his warrant, or certify what he has done under it, he may be fined. 6 Mod. 83: 1 Salk. 381. But see 5 Mod. 96:

Gib. 192.

If he wilfully lets a felon escape out of the stocks, and go at large, it is felony. 1 Hale, P. C. 596. And it seems generally agreed, that all voluntary escapes in the officer amount to the same crime as the offender was guilty of, whether treason or felony. 2 Hawk. P. C. c. 19. § 22. et seq.

It is a misdemeanour in him to discharge an offender brought to the watch-house by a watchman in the night. 2 Burr. 867. But

see HI. 2.

He is liable to various pecuniary and sometimes personal punishments, on neglecting the duty imposed on him by several statutes, and particularly by stat. 58 G. 3. c. 55. two justices in session may fine any constable or parish officer not exceeding 40l., for any neglect of duty or disobedience of any warrant or order of any justice.

THE CONSTABLE'S OATH.

You shall swear, that you will well and truly serve our Sovereign Lord the King in the office of Constable for the township of C. within this manor [hundred or county], for the year now next ensuing, or until you shall be thereof discharged by due course of law: you shall see the King's peace kept, and keep all such watch and ward as are usually accustomed and ought to be kept: and you shall well and truly do and execute all other things belonging to the said office according to the best of your knowledge. So help you God.

FORM OF AN OBLIGATION TO BE TAKEN BY A CONSTABLE FOR KEEPING THE PEACE.

Know all men by these presents, That I, A. B. of C. in the county of D. labourer, am held and firmly bound unto E. F. yeoman, constable of the township [manor, &c.] of C. aforesaid, in the sum of forty pounds, to be paid to the said E. F. or his certain attorney, executors, administrators or assigns; for which payment, to be well and faithfully made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated this in the 30th year of the reign of our Sovereign Lord George the Third, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, and so forth, and in the year of our Lord 1790.

The condition of the above written obligation is such, that if the above bounden A. B. shall [personally appear at the next general quarter sessions of the peace, to be holden in and for the county of D. to do and receive what shall be there and then enjoined him by the court, and in the mean time shall] keep the peace [and be of good behaviour] toward the King and all his liege people, and especially toward G. R. of C. in the said county, yeoman, then the said obligation to be void, or else to remain in full force and virtue.

Signed, sealed, and delivered ? in the presence of

OATH OF THE APPRAISERS OF GOODS DISTRAIN-ED FOR RENT; TO BE ADMINISTERED BY THE CONSTABLE.

You shall swear that you will faithfully appraise and value the goods now taken in distress, and mentioned in the inventory to you shown, as between buyer and seller, according to the best of your skill and understanding. So help you God.

APPOINTMENT OF A DEPUTY.

I, A. B. Constable of C. in the county of D. do hereby make, substitute, and appoint E. F. of the same place, yeoman, my true and lawful deputy in the office aforesaid, as long as I shall hold the same; or thus, during the continuance of my will and pleasure, [or for any particular purpose] dated &c.

For a command or Proclamation for Ri-OTERS to disperse, see title Riot.

See more fully Bac. Ab. (7th ed.); Burn's

Justice, tit. Constable.

The name of a certifi-CONSTAT, Lat.] cate, which the clerk of the pipe, and auditors of the Exchequer, make at the request of any person who intends to plead or move in that court, for the discharge of any thing; and the effect of it is, the certifying what constat (appears) upon record, touching the matter in question. See stats. 3 and 4 Ed. 6. c. 4: 13 Eliz. c. 6. A constat is held to be superior to an ordinary certificate, because it contains nothing but what is evident on record. An exemplification under the great seal, of the inrolment of any letters patent is called a constat. Co. Lit. 225.

CONSTRUCTIVE TREASON. See title Treason.

CONSUETUDINARIUS. A ritual or book, containing the rites and forms of divine offices, or the customs of abbeys and monasteries: it is mentioned in Brampton.

CONSUETUDINIBUS ET SERVICIIS, is a writ of right close, which lies against the tenant that deforceth his lord of the rent or service due to him. Reg. Orig. 159: F. N. B. 151. When the writ is brought by the party in the right only, he shall accout of the

seisin of his ancestor, and the writ to be in solicitation of chastity, dilapidations and the debet; but when he counts of his own seisin, then the writ is in the debet et solet, &c. And if the party say in the writ ut in redditibus et arreragiis, these words prove that the demandant himself was seised of the services; and then if he count in such writ of his ancestors, and not of his own seisin, the writ shall abate: so that if he will bring a writ of customs and services of the seisin of his ancestors, he ought to leave these words ut in redditibus, &c. out of the writ. Where a person brings a writ of customs and services against any tenant, and by count demands homage, the writ ought to make special mention thereof; as ut in homagio, &c., or the writ shall abate. New Nat. Brev. 330: F. N. B. 151. If this writ be brought against a tenant for life, where the remainder is over in fee, there the tenant may pray in aid of him in the remainder, &c.

CONSUL, Lat.] In our law books signifies an earl. Bract. l. 1. c. 8. tells us, that as comes is derived from comitatu, so consul is derived from consulendo: and in the laws of Edward the Confessor mention is made of vicecomites and viceconsules. Blount. Consuls among the ancient Romans were chief officers, of which two were yearly chosen to govern the city of Rome. Those who now pass under the name of consuls residing in England sent from foreign nations, and in foreign ports sent from England, are merchants, or persons of eminence and knowledge, appointed to take care of the affairs and interests of merchants. See Lex. Mer-

A resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempted from arrest upon Viveash v. Becker. Term mesne process. Rep. 3 Maule & S. 284. See tit. Arrest.

CONSULTA ECCLESIA. A church full,

or provided for. Cowel.

CONSULTATION, consultatio.] A writ whereby a cause having been removed by prohibition from the Ecclesiastical Court, to the king's court, is returned thither again; for if the judges of the king's court, upon comparing the libel with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the Ecclesiastical Court, then upon this consultation or deliberation they decree it to be returned; whereupon the writ in this case obtained is called a consultation. Reg. Orig. 44. &c. Stat. of Writ of Consultations, 24 Ed. 1.

This writ is in nature of a procedendo: but properly a consultation ought not to be granted but in case where a man cannot recover at the common law, in the kiug's courts. New Nat. Br. 119. Causes of which the ecclesiastical or spiritual courts have jurisdiction are of administrations, admissions of

church repairs, celebration of divine service, divorces, fornication, heresy, incest, institution of clerks, marriage rites, oblations, obventions, ordinations, commutation of penance, pensions, procurations, schism, simony, tithes, probate of wills, &c.; and where a suit is in the Ecclesiastical Court, for any of these causes or the like, and not mixed with any temporal thing, if a suggestion is made for a prohibition, a consultation shall be awarded. 5 Rep. 9.

To move for a prohibition in another court, after motion in the Chancery, &c. on the same libel which is granted, is merely vexatious, for which a consultation shall be had. Cro. Eliz. 277. Where a consultation is granted upon the right of the thing in question, there a new prohibition shall never be granted on the same libel; but where granted upon any default of the prohibition, in form, &c., there a prohibition may be granted upon the same libel again. 1 Nels. Abr. 485. See

tit. Prohibition.

CONTEMPT, contemptus.] A disobedience to the rules, orders or process of a court, which hath power to punish such offence; and one may be imprisoned for a contempt done in court; but not for a contempt out of court, or a private abuse. Cro. Eliz. 689. If a defendant in addressing the jury is guilty of a contempt, the judge at Nisi Prius has authority to fine him. 2 Barn. & A. 329. But for contempt out of court, an attachment may be granted. And for contempt in speaking of the court when a rule was served on the defendant, the court issued an attachment without a rule to show cause. Salk. 84: and see 2 Barn. & Adol. 395. Attachment also lies against one for contempt to the court, to bring in the offender to answer on interrogatories, &c., and if he cannot acquit himself, he shall be fined. 1 Lil. 305. If a sheriff, being required to return a writ, directed to him, doth not return the writ, it is a contempt: and this word is used for a kind of misdemeanor, by doing what one is forbidden: or not doing what he is commanded. 12 Rep. 36. And as this is sometimes a greater, and sometimes a lesser offence, so it is punished with greater or less punishment, by fine, and sometimes by imprisonment. Dyer, 128. 177: 1 Bulst. 85.

Contempt committed in the face of any court may be punised by fine. At a court leet the steward told defendant he was a resiant, who replied he lied: whereupon the steward fined him 20l.; and adjudged good without a prescription so to do, and debt lies

for the fine. 3 Salk. 33.

If a jury be fined for contempt, they must be fined severally. *Ibid.* 1 Roll. Rcp. 32.

If a defendant in Chancery, on service of

a subpana, does not appear within the time limited by the rules of the court, and plead, demur, or answer, to the bill against him, he clerks, adultery, appeals in ecclesiastical causis then said to be in contempt; and the reses, apostacy, general bastardy, blasphemy, spective processes of contempt are in successions. sive order awarded against him. These are tum est astimatio et conditionis forma, qua attachment; attachment with proclamations; a commission of rebellion: and, finally, a se-

questration. 3 Comm. 443.

An attachment of contempt may issue against a bishop or other peer; but for not returning a fieri facias de bonis ecclesiasticis, it is proper to move against the chancellor, commissary, or official. Rex v. Bishop of St. Asaph, 1 Wils. 332.

It is a contempt to institute a suit fictitiously, though the demand is real, either to hurt any person or to get the opinion of the Coxe v. Phillips, Hardio. 237. 239. See farther tit. Attachment, and 4 Comm. 283.

Exhibiting in an assize town inflammatory publications respecting a crime about to be tried at the assizes, is not a contempt which a judge of assize can interfere to stop by committing the party exhibiting. Rex v. Gilham,

1 Moo. & Malk. 165.

Contempts against the king's prerogative are by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service, for defence of the realm, against a rebellion or invasion. 1 Hawk. P. C. c. 22.

Under this class may be ranked the neglecting to join the posse comitatus, or power of the county, being thereunto required by the sheriff or justices according to the stat. 2 H. 5. c. 8. (see tit. Riots;) which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to

Lamb. Eliz. 315.

Contempts against the prerogative may also be by preferring the interests of a foreign potentate to those of our own; or doing or receiving any thing that may create an undue influence in favour of such extrinsic power; as by taking a pension from any foreign prince without the consent of the king. 3 Inst. 114. Or by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council; or by letters from the king to a subject, commanding him to return from beyond the sea (for disobedience to which his lands shall be seized till he doth return, and himself afterwards punished); or by his writ of ne exat regno, or proclamation commanding the subject to stay at home.

Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment, at the discretion of the king's courts of justice. 4 Comm. 122. See also 1 Hawk. P. C. cc. 22, 23, 24. And this Dict. titles Oaths, King.

CONTENEMENT, contenementum.] said to signify a man's countenance or credit, which he hath together with, and by reason of, his freehold: in which sense it is used in stat. of 1 Ed. 3. and other statutes; and Spelman, in his Glossary, says, Contenemen-

quis in repub. subsistit. But contenement is more properly that which is necessary for the support and maintenance of men, agreeable to their several qualities or states of life. See Magna Charta, c. 14: and Glanvil. lib. 9. c. 8: and this Dict. tit. Distress.

CONTINGENT LEGACY. See tit. Le-

gucy.

CONTINGENT REMAINDER. Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious or uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect. 3 Rep. 20: 2 Comm. 169. And see 10 Rep. 85. See this Dict. tits. Estate, Limitation, Remainder; and also tit. Executory Devise.

CONTINGENT USE, is a use limited in a conveyance of land, which may or may not happen to vest, according to the contingency expressed in the limitation of such use. use in contingency is such which by possibility may happen in possession, reversion, or

remainder. 1 Rep. 121.

CONTINUAL CLAIM. See tit. Claim. CONTINUANCE, is the insuring of a cause in court by an entry upon the records there for that purpose. There is a continuance of the assize, &c. And continuance of a writ or action is from one term to another, in case where the sheriff hath not returned a former writ, issued out in the said action. Kitch. 262. Continuances and essoins are amendable upon the roll at any time before judgment: they are the acts of the court, and at common law they may amend their own acts before judgment, though in another term; but their judgments are only amendable in the same term wherein they are given. 3 Lev. 431. Upon an original, a term, or two or three terms, may be mesne between the testate and the return; and this shall be a good continuance, for the defendant is not at any prejudice by it, and the plaintiff may give a day to the defendant beyond the common day, if he will.

But a continuance by capias ought to be made from term to term, and there cannot be any mesne term, because the defendant ought not to stay so long in prison. 2 Danv. Abr. If a man recover upon demurrer, or by default, &c., and a writ of inquiry of damages is awarded, there ought to be continuances between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not complete till the second judgment, upon the return of the writ of inquiry of damages. Ibid. 153. If the plaintiff be nonsuit, by which the defendant is to recover costs; if the plaintiff will not enter his continuances, on purpose to save the costs, the defendant shall be suffered to enter them. Cro. Jac. 316, 317. The course of the Court of King's Bench is to enter no continuance upon the roll till after issue or demurrer, and then to enter the continuance of all upon the back before judgment; and if it is not entered, it is error. Trin. 16 Jac. B. R. Vide tits. Discontinuance, Process. And see Tidd's Prac. (9th edit.) but if day of payment be given, there the one may have an action for the money, and the other trover for the cloth. Dyer, 30. 293. Where a seller says to a buyer, he will sell his horse for so much, and the buyer says he

Continuances are now abolished. See

Pleading. I. 3.

CONTINUANDO. A word used in special declaration of trespass, when the plaintiff would recover damages for several trespasses in the same action; and, to avoid multiplicity of suits, a man may in one action of trespass recover damages for many trespasses, laying the first to be done with a continuando to the whole time, in which the rest of the trespasses were done; which is in this form, Continuando (by continuing the trespass aforesaid, &c. from the day aforesaid, &c.) until such a day, including the last trespass. Terms de la Ley. See 3 Comm. 212: and tit. Trespass. In such case he can only prove a series of trespasses within the time laid.

CONTRABAND GOODS. From contra, and the Italian bando, an edict or proclamation.] Are those which are prohibited by act of parliament, or the king's proclamation, to be imported into, or exported out of this into any other nation. See tits. Navigation Acts,

Customs.

CONTRACAUSATOR. A criminal, or one prosecuted for a crime: this word is men-

tioned in Leg. H. 1. cap. 61.

CONTRACT, contractus.] A covenant or agreement between two or more persons, with a lawful consideration or cause. West. Symb. part 1. As if a man sells his horse or other thing to another, for a sum of money, or covenants in consideration of 20l. to make him a lease of a farm, &c.; these are good contracts, because there is a quid pro quo, or one thing for another; but if a person make promise to me, that I shall have 20s., and that he will be debtor to me therefor, and after I demand the 20s. and he will not give it me, yet I shall never have any action to recover this 20s., because this promise was no contract, but a bare promise, or nudum pactum: though if any thing were given for the 20s., if it were but to the value of a penny, then it had been a good contract. See tit. Consideration.

Every contract doth imply in itself an assumpsit in law, to perform the same; for a contract would be to no purpose if there were no means to enforce the performance thereof.

1 Lill. Abr. 308. Where an action is brought upon a contract, and the plaintiff mistakes the sum agreed upon, he will fail in his action; but if he brings his action on the promise in law, which arises from the debt, there, although he mistakes the sum, he shall recover. Aleyn, 29. See tits. Action, Assumpsit.

There is a diversity where a day of payment is limited on a contract, and where not;

may have an action for the money, and the other trover for the cloth. Dyer, 30. 293. Where a seller says to a buyer, he will sell his horse for so much, and the buyer says he will give it; if he presently tell out the money, it is a contract; but if he do not, it is no contract. Noy's Max. 87: Hob. 41. property of any thing sold is in the buyer immediately by the contract; though regularly it must be delivered to the buyer before the seller can bring his action for the money. Noy, 88. If one contract to buy a horse or other thing of me, and no money is paid or earnest given, nor day set for payment thereof, nor the thing delivered; in these cases, no action will lie for the money, or the thing sold, but it may be sold to another. Plowd. 128. 309.

All contracts are to be certain, perfect, and complete: for an agreement to give so much for a thing as it shall be reasonably worth, is void for incertainty; so a promise to pay money in a short time, &c., or to give so much if he likes the thing when he sees it. Dyer, 91: 1 Bulst. 92. But if I contract with another to give him 10l. for such a thing, if I like it on seeing the same; this bargain is said to be perfect at my pleasure, though I may not take the thing before I have paid the money; if I do, the seller may have trespass against me; and if he sell it to another, I may bring an action on the case against him. Noy, 104. If a contract be to have for cattle sold 101., if the buyer do a certain thing, or else to have 201., it is a good contract, and certain enough. And if I agree with a person to give him so much for his horse as J. S. shall judge him worth, when he hath judged it the contract is complete, and an action will lie on it; and the buyer shall have a reasonable time to demand the judgment of J. S. But if he dies before the judgment is given, the contract is determined. Perk. § 112. 114: Shep. Abr. 294.

In contracts, the time is to be regarded in and from which the contract is made; the words shall be taken in the common and usual sense, as they are taken in that place where spoken; and the law doth not so much look upon the form of words as on the substance and mind of the parties therein. 5 Rep. 83: 1 Bulst. 175. A contract for goods may be made as well by word of mouth, as by deed in writing; and where it is in writing only, not sealed and delivered, it is all one as by word. But if the contract be by writing, sealed and delivered, and so turned into a deed, then it is of another nature; and in this case generally the action on the verbal contract is gone, and some other action lies for breach thereof. Plowd. 130. 309: Dyer,

0.

Contracts not to be performed in a year are to be in writing, signed by the party, &c., or no action may be brought on them; but if no day is set, or the time is uncertain, they may be good without it. Stat. 29. Car. 2. c. 3. And

by the same statute, no contract for the sale of goods for 10*l*. or upwards, shall be good, unless the buyer receive part of the goods sold, or give something in earnest to bind the contract: or some note thereof be made in writing, signed by the person charged with the contract, &c. See tits. Frauds, Agreement, III IV

If two persons come to a draper, and one says, "Let this man have so much cloth, and I will pay you;" there the sale is to the undertaker only, though the delivery is to another by his appointment; but if a contract be made with A. B., and the vendor scruples to let the goods go without money, and C. D. comes to him, and desires him to let A. B. have the goods, and undertakes that he shall pay him for them, that will be a promise within the stat. 29 Car. 2. c. 3. and ought to be in writing. Mod. Cas. 249.

A contract made and entered into upon good consideration, may for good considerations be dissolved. See Agreement and Sale. As to Usurious Contracts, see tit. Usury.

See the 9 G. 4. c. 14. § 7. as to executory

contracts, under Sale.

CONTRAFACTION, contrafactio.] A counterfeiting, Contrafactio sigilli regis, a counterfeiting the king's seal. Blount.

CONTRA FORMAM COLLATIONIS. A writ that lay where a man had given lands in perpetual alms to any lay houses of religion, as to an abbot and convent, or to the warden or master of any hospital and his convent, to find certain poor men with necessaries, and do divine service, &c. If they aliened the land, to the disherison of the house and church, then the donor or his heirs should bring this writ to recover the lands. It was had against the abbot or his successor, not against the alienee, though he were tenant of the land; and was founded upon the stat. of Westm. 2. c. 1. Reg. Orig. 238: F. N. B. 210.

Contra formam Feoffamenti. A writ that lay for the heir of a tenant, enfeoffed of certain lands or tenements, by charter of feoffment from a lord to make certain services and suits to his court, who was afterwards distrained for more services than were mentioned in the charter. Reg. Orig. 176: Old.

Nat. Br. 162.

CONTRA FORMAM STATUTI, contrary to the form of the statute in such case made and The usual conclusion of every provided. indictment, &c. laid on an offence created by Formerly considerable difficulty statute. arose as to whether an indictment should conclude against the form of the statute or statutes; but this is now obviated by the stat. 7 G. 4. c. 64. § 20. which enacts that no judgment on an indictment or information for felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed, for the insertion of the words, "against the form of the statute," instead of statutes, or vice versa.

CONTRAMANDATIO PLACITI. A res-

by the same statute, no contract for the sale piting or giving a defendant farther time to of goods for 10l. or upwards, shall be good, answer, or a countermand of what was formless the buyer receive part of the goods merly ordered. Leg. H. 1. c. 59.

CONTRAMANDATUM. A lawful excuse which the defendant in a suit by attorney allegeth for himself, to show that the plaintiff hath no cause of complaint. Blount.

CONTRAPOSITIO. A plea or answer.

Leg. Hen. 1. c. 34.

CONTRARIENTS. In the reign of King Edward II. Thomas Earl of Lancaster taking part with the barons against the king, it was not thought fit, in respect of their great power, to call them rebels or traitors, but contrarients; and hence we have a record of those times called Rolulum Contrarientium.

CONTRATENERE, to withhold. Si quis decimus contrateneat. Leg. Alfredi apud

Brompton, c. 9.

CONTRAVENTION, is the action founded on the breach of law-burrows. Scotch Dict.

CONTRIBUTION, contributio.] Is where every one pays his share, or contributes his part to any thing. One parcener shall have contribution against another; one heir have contribution against another heir, in equal degree; and one purchaser shall have contribution against another. Also conusors in a statute shall be equally charged, and not one of them solely extended. 3 Rep. 12, 13, &c. On a statute or recognisance there is a contribution and stay till the full age of the heir, &c.; and this doth extend to the lessee for life or years, of the conusor, who has part of the land liable, and the heir within age the residue; for the land of every one of them ought to be charged equally, because the whole is liable to the judgment; and this cannot be, if during the nonage the burthen shall fall upon one only. Jenk. Cent. 36. If lands are mortgaged, and then devised to one person for life, with remainder to another, both devises shall make contribution to payment of the mortgage-money. Chan. Cas. 224. 271. See tit. Mortgage.

Where goods are cast into the sea, for the safeguard of a ship, or other goods, &c. abroad in a tempest, there is a contribution among merchants, towards the loss of the

owners. See tit. Insurance.

CONTRIBUTIONE FACIENDA. A writ that lieth where there are tenants in common, that are bound to do one thing, and one is put to the whole burthen; as where they jointly hold a mill pro indiviso, and take the profits equally, and the mill falling into decay, one of them will not repair the mill: now the other shall have a writ to compel him to contribute to the reparations. And if there be three coparceners of land that owe suit to the lord's court, and the eldest performs the whole; then may he have this writ to compel the others to make their contribution. So where one suit is required for land, and that land being sold to divers persons, suit is demanded of them all, or some of them, by distress, as entirely as if all the land were still in one. Reg. Orig. 175: two hundred years since, and now applied to F. N. B. 162.

CONTROLLER, Fr. conterolleur, Lat. contrarotulator.] An overseer or officer relating to public accounts, &c. And we have divers officers of this name, as controller of the king's household, of the navy, of the customs, of the excise, of the Mint, &c.; and in our courts there is the controller of the hamper, of the pipe, and of the pell, &c. The office of controller of the household is to control the accounts of the green cloth, and he sits with the lord steward, and other officers in the counting-house, for daily taking the accounts of all expenses of the household. The controller of the navy controls the payment of wages, examines and audits accounts, and inquires into rates of stores for shipping, &c. Controllers of the customs and excise, their office is to control the accounts of those revenues; and the controller of the Mint controls the payment of wages, and accounts relating to the Controller of the hamper is an officer in the Chancery, attending the lord chancellor daily in term time, and upon seal days, whose office is to take all things sealed from the clerk of the hamper, inclosed in bags of leather, and to note the just number and effect of all things so received, and enter the same in a book, with all the duties appertaining to his majesty and other officers for the The controller of the pipe is an officer of the Exchequer, who writes out summonses twice every year to the sheriffs, to levy the farms and debts of the pipe; and keeps a controlment of the pipes, &c. Controller of the pell is also an officer of the Exchequer, of which sort there are two, who are the chamberlain's clerks, that do or should keep a controlment of the pell, of receipts and goings out; and this officer was originally such as took notes of other officers' accounts or receipts, to the intent to discover if they dealt amiss, and was ordained for the prince's better security. Fleta, lib. 1. cap. 18: stat. 12 Ed. 3. c. 3. This last seems to be the original use and design of all controllers.

CONVENIENT, conveniens.] Of the use of this word, Sir Edw. Coke, in his Institutes, says, Non solum quod licet sed quod est conveniens est considerandum, nihil quod est inconveniens est licitum. 1 Inst. 66. Mr. Hargrave well observes on the passage, that arguments from inconvenience deserve the greatest attention; and where the weight of other reasoning is nearly on an equipoise, ought to turn the scale. But if the rule of law is clear and explicit, it is in vain to insist

on inconveniences.

CONVENT, conventus.] Signifies the fraternity of an abbey, or priory, as societas doth the number of fellows in a college. Bract. lib. 2. c. 25. See tits. Monastery, Mortmain.

CONVENTICLE, conventiculum.] A private assembly or meeting for the exercise of religion, first used as a term of disgrace for the meetings of Wicliffe in this nation, above

the illegal meetings of the non-conformists. It is mentioned in the stats. 2 H. 4. c. 15; 1 H. 6. c. 3; and 16 Car. 2. c. 4; which stat. was made to prevent and suppress conventicles; and by stat. 22 Car. 2. c. 1. it is enacted, that if any persons of the age of sixteen years, subjects of this kingdom, shall be present at any conventicle where there are five or more assembled, they shall be fined 5s. for the first offence, and 10s. for the second; and persons preaching incur a penalty of 201. Also suffering a meeting to be held in a house, &c. is liable to 201. penalty. Justices of peace have power to enter such houses, and seize persons assembled, &c. And if they neglect their duty, they shall forfeit 100l. And if any constable, &c. know of such meetings, and do not inform a justice of the peace, or chief magistrate, he shall forfeit 5l. But the stat. 1 W. & M. st. 1. c. 18. ordains that protestant dissenters shall be exempted from penalties; though, if they meet in a house, with the doors locked, barred, or bolted, such dissenters shall have no benefit from that stat. By stat. 52 G. 3. 155. the act 22 Car. 2. c. 1. was finally repealed. By stat. 10 Anne, c. 2. officers of the government, &c. present at any conventicle, at which there shall be ten persons, if the royal family be not prayed for in express words, shall forfeit 40l. and be disabled. See tits. Dissenters, Nonconformist, Religion.

CONVENTIO, an agreement or covenant; as A. B. queritur, &c. de C. D. &c. pro eo quod non teneat conventionem, &c. There is a strange record of the court of the manor of Hatfield, in Com. Ebor. held anno. 11 Ed. 3. relative to a convention to sell the Devil, and on earnest given, and non-delivery, action brought; which on hearing was adjourned in

infernum.

CONVENTIONE. A writ for the breach of any covenant in writing, whether real or personal: a writ of covenant. Reg. Orig. 115: F. N. B. 145.

CONVENTION. A parliament assembled, but in which no act is passed, or bill signed. Dict.

The term convention is rather applied to the meeting of the Lords and Commons, without the assent of, or being called together by, the king, and which can only be justified ex necessitate rei.

Of this nature was the convention-parliament, which restored King Charles II., and which met above a month before his return: the Lords by their own authority, and the Commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament. And if this convention had not so met, it was morally impossible that the kingdom should have been settled in peace.

In a similar manner, at the time of the Revolution, A. D. 1688, the Lords and Commons by their own authority, and upon the summons of the Prince of Orange, (afterwards

William III.) met in a convention, and there- | and the increase of those converts, they bein disposed of the crown and kingdom. And it is declared by stat. 1 W. & M. st. 1. c. 1. that this convention was really the two houses of parliament, notwithstanding the want of writs or other defects of form.

If we may be allowed to suppose a possible case, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne; in this situation it seems reasonable to presume that the body of the nation, consisting of Lords and Commons, would have a right to meet and settle the government: otherwise there must be no government at all. But whenever the throne is full, no national meeting, nor any meeting pretending to be such, can be legal, but the parliament assembled by command of the king. See tit. Parliament, and 1 Comm. 151, 2.

The constitution of Great Britain having placed the representation of the nation, and the expression of the national will, in the parliament, no other meeting or convention even of every individual in the kingdom, would be a competent organ to express that will; and meetings of such a nature tending merely to sedition, and to delude the people into an imaginary assertion of rights, which they had before delegated to their representatives in parliament, could only tend to introduce anarchy and confusion, and to overturn every settled principle of government. An act of parliament was passed in Ireland, in the year 1793, to prevent any such meetings or conventions: and a few ignorant individuals, who in the same year had dared to assemble under that title in Scotland, were quickly dispersed, and their leaders convicted of seditious practices; for which they were sentenced to transportation. See farther tits. Parliament, Treason, Seditious Assemblies.

CONVENTUALS. Religious men united together in a convent or religious house.

CONVENTUAL CHURCH. A church that consists of regular clerks, professing some order of religion: or of dean and chapter, or other societies of spiritual men.

CONVERSION, is where a person finding or having the goods of another in his possession, converts them to his own use, without the consent of the owner, and for which the proprietor may maintain an action of trover and conversion against him.—And refusal to restore goods is, primâ facie, sufficient evidence of a conversion, though it does not amount to a conversion. 10 Rep. 56: 3 Comm. 152. See tit. Trover.

CONVERSOS. The Jews here in England were formerly called Conversos, because they were converted to the Christian religion. King Hen. III. built a house for them in London, and allowed them a competent provision or subsistence for their lives; and this house was called Domus Conversorum. But by reason of the vast expences of the wars,

came a burden to the crown; so that they were placed in abbeys and monasteries for their support and maintenance. Jews being afterwards banished, King Edward III. in the 51st year of his reign, gave this house which had been used for the converted Jews for the keeping of the rolls; and it is said to be the same which was till lately enjoyed by the master of the rolls. Blount. Harg.: Co. Lit. 291. b.

CONVEYANCE. A deed which passes or conveys land from one man to another. Conveyance by feoffment, and livery, was the general conveyance at common law; and if there was a tenant in possession, so that livery could not be made, then was the reversion granted, and the tenant always attorned; also upon the same reason a lease and release was held to be a good conveyance to pass an estate; but the lessee was to be in actual possession before the release. But the lease is now considered as operating so as to give the possession, which it does in point of law.

By the common law, when an estate did not pass by feoffment, the vendor made a lease for years, and the lessee actually entered; and the lessor granted the reversion to another, and the lessee attorned: afterwards, when an inheritance was to be granted, then likewise was a lease for years usually made, and the lessee entered (as before), and then the lessor released to him; but after the Statute of Uses, it became an opinion, that if a lease for years was made upon a valuable consideration, a release might operate upon it without an actual entry of the lessee; because the statute did execute the lease, and raised an use presently to the lessee: and Serjeant Moor was the first who practised this way. 2 Mod. 251,

The most common conveyances now in use are deeds of gift, bargain and sale, lease and release, fines and recoveries, settlements to

The following farther observations on conveyances at common law, and those which derive their effect from the Statute of Uses, are abridged from the long and learned note on 1 Inst. 271. b., to which the curious enquirer is referred for a more particular investigation of the subject. See also this Dict. tits. Deed, Estate, Lease and Release, Limitation, Trusts, Uses.

FEOFFMENTS and GRANTS were the two chief modes used in the common law for transferring property. The most comprehensive definition which can be given of a feoffment seems to be, a conveyance of corporeal hereditaments, by delivery of the possession, upon, or within view of, the hereditaments conveyed. This delivery was thus made, that the lord and the other tenants might be witnesses to it. No charter of feoffment was necessary; it only served as an authentication of the transaction; and when it was used, the lands were supposed to be transferred, not by the charter, but by the livery essential quality being that of transferring which it authenticated. Soon after the Conquest, or perhaps towards the end of the Saxon government, all estates were called fees: the original and proper import of the word feoffment is, the grant of a fee. It came afterwards to signify a grant with livery of seisin of a free inheritance to a man and his heirs: more respect being had to the perpetuity, than to the feudal tenure, of the estate granted. In early times, after the Conquest, char. ters of feoffment were various in point of form. In the time of Edward I. they began to be drawn up in a more uniform style. The more ancient of them generally run with the words dedi, concessi, or donavi. It was not till a later period that feoffavi came into use. The more ancient feoffments were also usually made in consideration of, or for the homage and service of the feoffee, and to hold of the feoffor and his heirs. But after the stat. quia emptores (18 Ed. 1. st. 1.) fcoffments were always made to hold to the chief lords of the fee, without the words pro homagio et servitio. See farther, 1 Inst. 6. a: 271. b.

The proper limitation of a feoffment is to a man and his heirs; but feoffments were often made of conditional fees (or of estates tail, as they are now called), and of life-estates; to which may be added, feoffments of estates given in frank-marriage and frankalmoigne. To make the feoffment complete, the feoffor used to give the feoffee seisin of the lands: this is what the feudists call investiture. It was often made by symbolical tradition, but it was always made upon or within view of the lands. When the king made a feoffment he issued his writ to the sheriff, or some other person to deliver seisin: other great men did the same; and this gave rise to powers of attorney. See Mad. Form. pref.

A GRANT in the original signification of the word is a conveyance or transfer of an incorporeal hereditament. As livery of seisin could not be had of these, the transfer of them was always made by writing, in order to produce that notoriety, which in the transfer of corporeal hereditaments was produced by delivery of the possession. But in other respects a feoffment and a grant did not materially differ. *

Such was the original distinction between a feoffment and a grant; but from this real difference in their subject matter only a difference was supposed to exist in their operation. A feoffment visibly operated on the possession; a grant could only operate on the right of the party conveying. Now as possession and freehold were synonymous terms, no person being considered to have the possession of the lands but he who had at least an estate of freehold in them, a conveyance which was considered as transferring the possession must necessarily be considered as transferring an things which did not lie in possession; they therefore could only transfer the right; that is, could only transfer that estate which the party had a right to convey. It is in this sense the expressions are to be understood, that a feoffment is a tortious and a grant a rightful conveyance. See tit. Disseisin.

This appears to have been the outline of conveyances at common law. The introduction of uses produced a great revolution in this respect. Uses at the common law were, in most respects, what trusts are now. When a feoffment was made to uses, the legal estate was in the feoffce. He filled the possession, did the feudal duties, and was in the eye of the law the tenant of the fee. The person to whose use he was seised, called the cestuy que use, had the beneficial property of the lands; had a right to the profits; and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee; if he withheld the profits from the cestuy que use, or refused to convey the estate as he directed, the feoffee was without remedy. To redress this grievance the writ of subpæna was devised, or rather adopted from the common law courts, by the Court of Chancery, to oblige the feoffee to attend in court and disclose the trust; and then the court compelled him to execute it.

Thus uses were established: they were not considered as issuing out of, or annexed to the land, as a rent or condition, or a right of common; but as a trust reposed in the feoffee, that he should dispose of the lands at the discretion of the cestuy que use, permit him to receive the rents, and in all other respects have the beneficial property of the lands. To all other persons, except the cestuy que use, the feoffee was as much the real owner of the fee as if he did not hold it to the use of another: his wife was entitled to dower; his infant heir was in wardship to the lord; and upon his attainder the estate was forfeited.

To remedy these inconveniences, the stat. 27 H. 8. c. 10. was passed: by which the possession was divested out of the persons seised to the use and transferred to the cestur que use. For by that statute it is enacted, "that when any person shall be seised of any lands to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise: in such case the persons having the use, confidence, or trust, should from thenceforth be deemed and adjudged in lawful seisin, estate, and possession of and in the lands, in the same quality, manner, and form as they had before in the use."-There seems to be little doubt but that the intention of the legislature in passing this act was utterly to annihilate the existence of uses considered as distinct from the possession. But they have been preserved under the appellation of trusts. The courts

hesitated much before they allowed them un. P. C. c. 10. A person convicted or attainted der this new name. And at length secret of one felony, may be prosecuted for another, modes of transferring the possession itself have been discovered, and have totally superseded that notorious and public mode of transferring property, which the common law required, and the statute intended to restore; and many modifications or limitations of real property have been allowed, which the common law did not admit. See tit. Lease and Release.

A son did give and grant lands to his mother, and her heirs; though this was a defective conveyance at common law, yet it was adjudged good by way of use, to support the intention of the donor, and therefore, by these words, an use did arise to the mother by way of covenant to stand seised. 2 Lev. 225. A feoffment without livery and seisin, will not enure as a grant; but where made in consideration of a marriage, &c., it has been adjudged, that it did enure as a covenant to stand seised to uses. 2 Lev. 213.

Tenant in fee, in consideration of marriage, covenanted, granted and agreed all that messuage to the use of himself for life, then to his wife for life, for her jointure, then to their first son in tail male, &c. Now by these words it appeared, that the husband intended some benefit for his wife, wherefore the court supplied other words to make the conveyance sensible. 1 Lutw. 782; 1 Inst. 271. b. n.

A conveyance cannot be fraudulent in part, and good as to the rest: for if it be fraudulent and void in part, it is void in all, and it cannot be divided. 1 Lil. Abr. 311. Sed vide 6 Taunt. 369: 1 Marsh, 210: 5 Taunt. 727: 4 Maule & S. 66. Fraudulent conveyances to deceive creditors, defraud purchasers, &c., are void, by stats. 13 Eliz. c. 5: 27 Eliz. c. 4.—See tit. Fraud.

CONVICT AND CONVICTION, convictus.] He that is found guilty of an offence by verdict of a jury. Staund. P. C. 186. Crompton saith, that conviction is either when a man is outlawed, or appeareth and confesseth, or is found guilty by the inquest: and when a statute excludes from clergy persons found guilty of felony, &c., it extends to those who are convicted by confession. Cromp. Just. 9. The law implies that there must be a conviction before pun-ishment, though it is not so mentioned in a statute: and where any statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such offence ought to be committed after a conviction for the first. 1 Hawk. P. C. c. 10. § 9. c. 41. § 3.

Judgment amounts to conviction; though it doth not follow that every one who is convict is adjudged. A conviction at the king's on a penal statute: because while in force it makes the party liable to the forseiture, and highly consonant to the general principles of

to bring accessaries to punishment, &c. Fitz. Coron. 379.

Persons convicted of felony by verdict, &c., are not to be admitted to bail, unless there be some special motive for granting it; as where a man is not the same person, &c., for bail ought to be before trial, when it stands indifferent whether the party be guilty, or not. 2 Hawk. P. C. c. 15. § 45. 80. See tit. Bail.-Conviction of felony, and other crimes, disables a man to be a juror, witness, &c. In our books conviction and attainder are often confounded. See tit. Attainder.

A magistrate is bound to give a defendant, convicted by him, a copy of such conviction, on being thereto required. Barn. Rep. 1720. As to the defendant's right to have a copy of a record of acquittal, see 1 Barn. & Adol.

Summary Proceedings are directed by several acts of parliament for the conviction of offenders, and the inflicting of certain penalties imposed by those acts. In these there is no intervention of jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge.

Of this summary nature are all trials for offences and frauds contrary to the laws of the excise, and other branches of the revenue: which are to be inquired into and determined by the commissioners of the respective departments, or by justices of peace in the country. And experience has shown that such convictions are absolutely necessary for the due collection of the public money; and are, in fact, a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent prosecutions by action or indictment.

Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament, for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others subjected to their jurisdiction. See tit. Justice of Peace, and the titles of the various offences throughout this Dict. These offences used formerly to be punished by the verdict of a jury in the court leets, and sheriff's tourn, the king's ancient courts of law; and which were formerly much revered and respected, but are now fallen very much into disuse and contempt.

The process of these summary convictions is extremely speedy. Though the courts of common law have thrown one check upon them, by making it necessary to summon the suit may be pleaded to a suit by an informer, party accused before he is condemned; which is now held an indispensable requisite, and is no one ought to be punished twice for the justice. See Stra. 261. 678: Salk. 181: 2 Ld. same offence: but conviction may not be Raym. 1405. After this summons, the mapleaded to a new suit by the king. 1 Hawk. gistrate may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the pardon, to a convict, see 7 and 8 G. 4. c. 28. § offender in writing; upon which he usually, issues his warrant, either to apprehend the of- before justices of the peace, see stat. 3 G. 4. fender, in case corporal punishment is to be inflicted on him; or else to levy the penalty in-curred by distress and sale of his goods, according to the directions of the several statutes which create the offences, or inflict the punishment; and which usually chalk out the method by which offenders are to be convicted in such particular cases.

The magistrates ought to state in the conviction the whole of the evidence for and against the defendant. 8 T. R. 220. And not merely the legal effect of such evidence in the words of a statute, though the latter form is valid; but the magistrate subjects himself to an information if he endeavour to shelter himself from detection by misstating such legal result, when the evidence would not warrant it. 9 E. R. 358.

Where power of conviction is by statute given to a magistrate he is the sole judge of the weight of the evidence given before him. and the court of K. B. will not examine whether or not he has drawn a right conclusion from the evidence. 8 T. R. 588.

A defendant who has been summoned may, on wilful default of appearance, be convicted of the offence; for if it were otherwise, every eriminal might avoid conviction. Stra. 44. And if a defendant appear and answer to the information, it cures the defect of his not being summoned. Burr. Rep. 1786. Regularly before a magistrate proceeds to hear and determine a case there should be an information in writing exhibited against the defendant for the offence, and this must be supported by the evidence. 1 Ld. Raym. 509. though a conviction upon an information instanter is good, yet it ought then to be declared to be so made, and not grounded upon an information which is not proved. Ibid. And the evidence must not be of a fact subsequent to the information. Ibid.

The witnesses must be sworn and examined in the defendant's presence. It is not sufficient to read over the deposition of a witness in the defendant's presence. 1 T. R. 125.

A summary conviction for any offence created by statute must negative every exception contained in the clause creating the offence. 8 T. R. 542.

A conviction must contain an adjudication whether the punishment be or be not fixed by the statute. 7 T. R. 238.

When a penalty is to be sued for within a certain time after the offence committed, it must appear upon the face of the conviction that the prosecutor was within time. 7 E. R. 146.

In a conviction on the stat. 5 Anne, c. 14. for killing game, the evidence need not, but the conviction must, negative all the qualifications mentioned in the act, 22, 23 Car. 2. § 25: 1 T. R. 125: 1 E. R. 643: 5 Maule & S. 206. See tit. Game.

As to the effect of pardon, or conditional 13. As to facilitating summary proceedings

See farther this Dictonary, tit. Justices of Peace: Burn's Justice, tit. Conviction; and 4 Comm. c. 20. as to the policy of extending this summary mode of proceeding.

CONVIVIUM, signifies the same among the laity as procuratio doth with the clergy, viz. when the tenant by reason of his tenure is bound to provide meat and drink for his lord once or oftener in the year. Blount.

CONVOCATION, convocatio.] The assembly of the representatives of the clergy of the two provinces of Canterbury and York, heretofore convened, to consult of ecclesiastical matters in time of parliament. The two convocations were distinct and independent of each other; and when they used to tax the clergy, the different convocations sometimes granted different subsidies. In 22 Henry VIII. the convocation of Canterbury had granted the king 100,000l., in consideration of which an act of parliament was passed, granting a free pardon to the clergy for all spiritual offences: but with a proviso that it should not extend to the province of York, unless its convocation would grant a subsidy in proportion; or unless its clergy would bind themselves individually to contribute as bountifully. This statute is recited at large in Gib. Cod. 77.

All deans and archdeacons were members of the convocation of their province; each chapter sending one proctor or representative, and the parochial clergy in each diocese of Canterbury two proctors; but on account of the small number of dioceses in the province of York, each archdeaconry elected two proctors. In York the convocation consisted only of one house; but for Canterbury of two houses, of which the twenty-two bishops formed the upper house; and before the Reformation, abbots, priors, and other mitred prelates, sat with the bishops. The lower house of convocation in the province of Canterbury consisted of twenty-two deans, fiftythree archdeacons, twenty-four proctors for the chapters, and forty-four proctors for the parochial clergy. Total, 144.

By stat. 8 H. 6. c. 1. the clergy in their attendance on the convocation had the same privilege in freedom from arrest as the members of the House of Commons, in their at-

tendance on parliament.

The convocation is still summoned (as a matter of form) by the archbishop's writ, under the king's directions, along with every new parliament, to which assembly it bore analogy in its constituent parts and primary functions. In those assemblies subsidies were continually granted, payable by the clergy, and ecclesiastical canons were enacted. In a few instances under Henry VIII. and Elizabeth they were consulted as to momentous

questions affecting the national religion. In sation of all business, that the convocation, 1533 the supremacy of the former monarch after a few formalities, either adjourned itself, was approved, and in 1562 the articles of faith were confirmed by the convocation. Their power to enact fresh canons without the king's licence was restrained by 25 H. 8. c. 19; and is now farther greatly limited by several later acts of parliament, such as the act of uniformity, the act confirming the Thirty-nine Articles of religion, the acts relating to non-residence, and other church matters; and still more perhaps by the doctrine gradually established in Westminster-hall, that new ecclesiastical canons are not binding on the laity. It seems therefore impossible that any authority of the convocation should be again exercised in any effectual manner, though on one point (the doctrinal disputes between Protestants and Papists) this might perhaps be desirable. During a long period the convocation (with the exception of 1603, when they established some regulations, and of 1640, an unfortunate precedent, when they attempted some more) had little business but to grant subsidies, which, however, from the time of Henry VIII., were always confirmed by act of parliament—an intimation, no doubt, that the legislature did not wholly acquiesce in their power, even of binding the clergy in a matter of property. This practice of ecclesiastical taxation was silently discontinued in 1664. See stat. 16 and 17 Car. 2. c. 1. by which the clergy were first charged in common with the laity, and discharged from the subsidies before granted in convocation; but with an express saving (§ 36, of the act) of their right to tax themselves in convocation should they think fit: but that has never been done since, the clergy having constantly been charged with the laity in all public aids. After that period the clergy assumed, and have been permitted to enjoy, the privilege of voting in the election of members of the House of Commons; and this right appears to be acknowledged by stats. 10 Anne, c. 23: 18 G. 2. c. 18. See Burnet's Reformation, Oxford edition, vol. 4. 508.

It has been observed also, that by this change in the mode of taxation, the clergy have obtained the solid advantage of being called upon to pay no heavier taxes than their fellow subjects, a benefit which was usually denied them when their own convocations, which were much under the influence of the divines expecting presents from the court, exercised the privilege of voting clerical supplies. See Kennett's Hist. Eng. vol. 3. p. 255. Upon the whole, therefore, clergymen have little or no reason to complain of their exclusion from the popular branch of the legislature. Their interests and that of religion are sufficiently protected by the prelates who still occupy that place in the great national council which has belonged to them even from the infancy of the English constitution. Soanes's Hist. Reformation, vol. 3. c. 3.

It was the natural consequence of this ces-

or was prorogued by a royal writ; nor had it. ever (with the few exceptions above noticed) sat for more than a few days for the purpose of voting its supply. But about the time of the Revolution the party most adverse to the then new order of things propagated a doctrine that the convocation ought to be advised with upon all questions affecting the church, and ought even to watch over its interests, as the parliament did over those of the kingdom. The Commons had so far encouraged this party, as to refer to the convocation the great question of a reform in the Liturgy for the sake of comprehension. It was not suffered to sit much during the rest of the reign of William III., to the great discontent of many of its members: one of the most celebrated of these, Atterbury (afterwards bishop of Rochester), published a book entitled, The Rights and Privileges of an English Convocation; but however specious the arguments for these rights and privileges may appear, and even were the perfect analogy of a convocation to a parliament fully admitted, there could be no doubt that the king might prorogue it at his pleasure, and that if neither money were required to be granted, nor laws to be enacted, a session would be very short. The church had by prescription a right to be summoned in convocation; but no prescription could be set up for its longer continuance than the crown thought expedient. In the year 1701, the lower house of convocation claimed a right of adjourning to a different day from that fixed by the upper, with other unprecedented claims, which were checked by a prorogation. Under the succeeding reign the convocation was in more activity for some years than at any former period, but they soon excited a flame which consumed themselves by an attack on Hoadley, bishop of Bangor, who had preached a sermon abounding with principles in favour of religious liberty, of which he had been long a celebrated asserter. The lower house of convocation, through the report of a committee, denounced the tenets of this discourse, as also those of a work not long before published by the bishop, as dangerous to the established church. A long (and for a time celebrated) war of pens took place, known by the name of the Bangorian Controversy. But as the principles of Hoadley and his adherents appeared in the main little else than those of Protestantism and toleration, the sentence of the laity was soon pronounced in their favour. The convocation was prorogued in 1717, and had never again sat for any business. Tindal, 539. [Butler, in his Rem. p. 95. cites 1720 as the era of this prorogation.]

The extinction of this Anglican great council has been deplored by some, and there are not wanting specious arguments for the expediency of such a synod. It might be urged, that the church, considered only as an integral member of the commonwealth, and the greatest corporation within it, might justly, writ that lay where a man could not get the claim that right of managing its own affairs which belongs to every other association. Answers to these and other suggestions might be, that the representation of the church in the House of Lords is sufficient for the protection of its interests, and that the clergy have an influence which no other corporation enjoys over the bulk of the nation, and, finally, that as the laws now stand the ratification of parliament must at all events be indispensable for any material change. See Hallam's Hist. of Eng. from Henry VII. to George II. c. 16.

CONVOY. See Insurance, I. 3.

CONUSANCE OF PLEAS. A privilege that a city or town hath to hold pleas. See Cognisance.

CONUSANT, Fr. connaissant.] Knowing or understanding: as if the son be conusant, and agreed to the feoffment, &c. Co. Lit.

COOPERTIO. The head or branches of a tree cut down; though coopertio arborum is rather the bark of timber trees felled, and the chumps and broken wood. Cowel.

COOPERTURA. A thicket or covert of

wood. Chart. de Foresta, cap. 12.

COPARCENERS, participes.] Otherwise called parceners, are such as have equal portion in the inheritance of an ancestor, and by law are the issue female, which, in default of heirs male, come in equality to the lands of their ancestors. Bract. lib. 2. cap. 30. They are to make partition of the lands; which ought to be made by coparceners of full age, &c. And if the estate of a coparcener be in part evicted, the partition shalf be avoided in the whole. Lit. 243: 1 Inst. 173: 1 Rep. 87. The crown of England is not subject to coparcenary; and there is no coparcenary in dignities, &c. Co. Lit. 27. Stat. 25 H. c. 22. See tits. Descent, Parceners.

COPARTNERSHIP. See tits. Partners

and Partnership.

COPE. A custom or tribute due to the king, or lord of the soil, out of the lead mines in some parts of Derbyshire; of which Manlove saith :--

Egress and regress to the king's highway, The miners have: and lot and cope they pay; The thirteenth dish of ore within their mine, To the lord for lot, they pay at measuring time;

Six-pence a load for cope the lord demands, And that is paid to the berghmaster's hands,

See also Sir John Pettus's Fodinæ Regales, where he treats on this subject. This word, by Domesday Book, as Mr. Hagar hath interpreted it, signifies a hill: and cope is taken for the supreme cover, as the cope of heaven. Also it is used for the roof and covering of a house; the upper garment of a priest, &c.

COPIA LIBELLI DELIBERANDA. A

copy of a libel at the hand of a judge ecclesiastical, to have the same delivered to him. Reg. Orig. 51.

COPPA. A cop or cock of grass, hay, or corn, divided into titheable portions; as the tenth cock, &c. This word in strictness denotes the gathering or laying up the corn in copes, or heaps, as the method is for barley or oats, &c. not bound up, that it may be the more fairly and justly tithed; and in Kent they still retain the word, a cop, or cap of hay, straw, &c. Thorn in Chron.

COPPER-PLATE ENGRAVINGS.—See

title Literary Property, &c.

COPY, copia.] In a legal sense the transcript of an original writing; as the copy of a patent, of a charter, deed, &c. A clause out of a patent, taken from the chapel of the Rolls, cannot be given in evidence; but there must be a true copy of the whole charter examined: it is the same of a record. And if upon a trial some part of an office copy is given in evidence to prove a deed, which deed is to prove the party's title to the land in question that gives it in evidence; if that part of the office copy given in evidence be not so much of it as doth any ways concern the land in question, the court will not admit of it: for the court will have a copy of the whole given, or no part of it shall be admitted. 1 Lil. Abr. 312, 313. Where a deed is inrolled, certifying an attested copy is proof of the inrolment; and such copy may be given in evidence. 3 Lev. 387. A common deed cannot be proved by a copy or counterpart, when the original may be procured. 10 Rep. 92. And a copy of a will of lands, or the probate, is not sufficient; but the will must be shown as evidence. 2 Rol. Abr. 74. Copies of court rolls admitted as evidence. See at large title Evidence.

COPYHOLD, TENURA per copiam rotuli A tenure of lands in England, for which the tenant hath nothing to show but the copy of the rolls, made by the steward of the lord's court; on such tenant's being admitted to any parcel of land or tenement belonging to the manor. 4 Rep. 25. This tenure is very rare in Ircland. A tenure somewhat similar exists in Scotland, under the denomination of rental-right. Copyhold is called base-tenure, because held at the will of the lord, and Fitzherbert says, it was anciently tenure in villenage, and that copyhold is but a new name. See this Dict. title Tenures, III. 13. Some copyholds are held by the verge in ancient demesne: and though they are by copy, yet are they a kind of freehold; for if a tenant of such copyhold commit felony, the king hath the year, day, and waste, as in the case of freeholders: some other copyholds are such as the tenants hold by common tenure, called mere copyhold, whose land, upon felony committed, escheats to the lord of the manor. Kitch. 81. But copyhold land cannot be made at this day: for the pillars of a copyhold estate, are, That it hath been demised time

the tenements are parcel of, or within, the

manor. 1 Inst. 58: 4 Rep. 24.

A copyhold cannot be created by operation of law; and therefore where wastes are severed from the manor by a grant of the latter, with the exception of the former, though the copyholders continue to have a right of common in the wastes by immemorial usage; yet if afterwards a grant of the soil of those wastes be made to trustees for the use of the copyholders in free socage, the lands, when inclosed, will be freehold, and not copyhold. 2 Term Rep. 415. 705.

A copyhold tenant had originally in judgment of law but an estate at will; yet custom so established his estate, that by the custom of the manor it was descendible, and his heirs inherited it; and therefore the estate of the copyholder is not merely at the will of the lord, but at the will of the lord according to the custom of the manor; so that the custom of the manor is the life of copyhold estates; for without a custom, or if copyholders break their custom, they are subject to the will of the lord; and as a copyhold is created by custom, so it is guided by custom. 4 Rep. 21. A copyholder, so long as he doth his services, and doth not break the custom of the manor, cannot be ejected by the lord: if he be, he shall have trespass against him: but if a copyholder refuses to perform his services, it is a breach of the custom, and forfeiture of his estate.

It appears that estates held by copy of court roll, but not at the will of the lord, have been deemed freehold by Lord Coke (see 1 Inst. 59. b) and others; and in order to distinguish them from the ordinary kind, hath been denominated customary freeholds. In consequence of the prevalence of this notion, a considerable number of such tenants claimed a right of voting as freeholders at the election of knights of the shire. This gave occasion to a short treatise on this subject, in which the origin of lands held in this peculiar way is traced; and it is proved that though these tenures in some respects resemble freeholds, they are in truth nothing more than a superior kind of copyhold. Soon after the publication of this treatise, the stat. 31 G. 2. c. 14. was passed, declaring that no person holding by copy of court-roll should be entitled to vote at the elections of knights of the shire. But now by 2 Will. 4. c. 45. § 19. copyholds of the annual value of 10l. give a vote for knights of the shire.

Lands held of a manor, which by the custom are conveyed by deed of bargain and sale, and also by surrender and admittance, are customary freeholds, and not copyholds.

If the lord of the manor purchase customary freeholds held of the manor, which are conveyed to him and his heirs by the ordinary assurances required by the custom, for the transfer of the customary freeholds, they will descend to his heirs, and not go with the manor to the remainder-man. The seignory is sus-

out of mind by copy of court-roll; and that | pended during the life of the tenant for life, but revives on his decease. Bingham v. Woodgate, 1 Russ. & M. 33.

The freehold of an estate parcel of a manor, and demiscable only by leave of the lord, passing by surrender and admittance, to hold to the tenant and his heirs of the lord by the accustomed rent, &c., is in the lord, and not in the tenant, though not holden at the will of the lord. 7 E. R. 298.

One may hold the prima tonsura, or fore-crop of land, as copyhold, and another may have the soil, and every other beneficial enjoyment of it, as freehold. 7 E. R. 200.

In some manors where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled Copyholds of Inheritance: in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only. For the custom of the manor has in both cases so far superseded the will of the lord, that provided the pervices be performed, or stipulated for by fealty, he cannot in the first instance refuse to admit the heir of his tenant upon his death; nor in the second can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will. 2 Com. 97. 147. And see tit. Ancient Demesne.

If the lord refuse to admit he shall he compelled in Chancery. 2 Cro. 368. And if the lord refuse to admit a surrenderce, on account of a disagreement about the fine to be paid, the court of B. R. will grant a mandamus to compel the lord to admit without examining the right to the fine. 2 Term Rep. 484. But that the court will not grant a mandamus to admit a copyholder by descent: because without admittance he has a complete title against all the world but the lord. 2 Term Rep. 198.

One who has a primâ facie title to a copyhold is entitled to inspect the court rolls and take copies of them, so far as relates to the copyhold claimed; though no cause be depending for it at the time 10 E. R. 235.

Copyholds descend according to the rules and maxims of the common law (unless in particular manors, where there are contrary customs, of great antiquity); 1 T. R. 474; but such customary inheritances shall not be assets, to charge the heir in action of debt, &c. 4. Rep. 22: Kitch. Though a lease for one year of copyhold lands, which is warranted by the common law, shall be assets in the hands of an executor. 1 Vent. 163. Copyholders hold their estates free from charges of dower. being created by custom, which is paramount to title of dower. 4 Rep. 24. Copyhold inheritances have no collateral qualities which do not concern the descent; as to make them assets; or whereof a wife may be endowed; a husband be tenant by the curtesy, &c. But by particular custom there may be dower and tenancy by the curtesy, &c. Cro. Eliz.361. There may be an estate-tail in copyhold lands by custom, with the co-operation of the stat. W. 2. And as a copyhold may be entailed by maintaining, it shall be construed favourably: custom, so by custom the tail may be cut off Comp. Cop. § 33: Cro. El. 879. An unrea-

by surrender. 1 Inst. 60.

Where by special custom a descent of copyhold may be contrary to the rules of common law, such custom shall be interpreted strictly; thus, where there is a custom within a manor, that lands shall descend to the eldest sister, where there is neither a son nor a daughter: this shall not extend to an eldest niece: but in default of such a son, daughter, and sister, the lands must descend according to the rules of the common law. See 12 E. R. 62.

Evidence of reputation of the custom of a manor, that, in default of sons, the eldest daughter, and in default also of daughters the eldest sister, and in case of the death of all the descendants of the eldest daughter or sister, the descendants of the other daughters or sisters respectively of the person last seised, should take, is proper to be left to the jury of the existence of such a custom, as applied to a great nephew (the grandson of an elder sister) of the person last seised: although the instances in which it was proved to have been put in use extended no farther than those of eldest daughter and eldest sister, and the son of an eldest sister, Doe, d. Foster v. Sisson, 12 E. R. 62. The existence of such custom in adjacent manors seems to be no evidence of the custom in the particular manor. Ib.

Copyhold descending by custom to all the children equally of the tenant last seised, one of the parceners may maintain ejectment on his single demise for his own share. Roe, d. Raper v. Lansdale, 19 East's Rep. 39.

A copyhold may be barred by a recovery by special custom; and a surrender may bar the issue by custom. A fine and recovery at common law will not destroy a copyhold estate; because common law assurances do not work upon the assurance of the copyhold; though copyhold lands are within the stat. 4 H. 7. c. 24. of fines and proclamations, and five years' nonclaim, and shall be barred. 1 Rol. Abr. 536. See title Fines.

A plaint may be made in the court of the manor, in the nature of a real action, and a recovery shall be had in that plaint against tenant in tail, and such a recovery shall be a discontinuance in the estate-tail. 1 Brownl. 121. And the suffering a recovery by a copyholder tenant for life in the lord's court is no forfeiture, unless there is a particular custom for it. 1 Nels. Abr. 507. Copyholders may entail copyhold lands, and bar the entails and remainders, by committing a forfeiture, as making lease without licence, &c.; and then the lord is to make three proclamations, and seise the copyhold, after which the lands are granted to the copyholder, and his heirs, &c. This is the manner in some places, but it must be warranted by custom. 2 Danv. Abr. 191: Sid. 314.

Customs ought to be time out of memory, to be reasonable, &c. And a custom in deprivation or bar of a copyhold estate, shall be taken strictly; but when for making and maintaining, it shall be construed favourably: Comp. Cop. § 33: Cro. El. 879. An unreasonable custom, as for a lord to exact exorbitant fines; for a copyholder for life to cut down and fell timber-trees, &c. is void. A copyholder for life pleaded a custom, that every copyholder for life might, in the presence of two other copyholders, appoint who should have his copyhold after his death, and that the two copyholders might assess a fine, so as not to be less than had been usually paid; and it was adjudged a good custom. 4 Leon. 238. But a custom to compel a lord to make a grant, is said to be against law; though it may be good to admit a tenant. Moor, 788.

If there be a custom within a manor for a lord to grant parcels of the waste by copy of court-roll, the land granted by that mode is well described as copyhold, though the date of the grant be modern. 3 Bos. & Pul. 346.

The lord of the manor has no right to enter on a copyhold of inheritance, and cut timber for his own use, leaving sufficient for botes and estovers, unless there be a custom in the manor for his so doing. Whitechurch v.

Holworthy, 3 Maule & S. 340.

By the custom of some manors, where copyhold lands are granted to two or more persons for lives, the person first named in the copy may surrender all the lands. I Nels. Abr. 497. There are customs, ratione loci, different from other places: but though a custom may be applied to a particular place, yet it is against the nature of a custom of a manor to apply it to one particular tenant. I Nels. 504: 1 Lutw. 126.

A single instance of a surrender in fee, by tenant in special tail, of a copyhold estate, held evidence of a custom within the manor to bar entails by surrender, though the surrenderer had not been dead twenty years, and though one instance was proved of a recovery suffered by tenant in tail to bar the entail. 2

Maul. & Selw. Rep. 92.

A custom that all the customary tenants of a manor having gardens, parcel of their customary tenements respectively, have immemorially by themselves, their tenants, and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plats in the gardens parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common; and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenements. 7 East's Rep.

privation or bar of a copyhold estate, shall be taken strictly; but when for making and exhibited on oath by the tenants; setting forth

lord, services of the copyhold tenants, the tenures granted, whether for life, &c., concerning admittances, surrenders, and the rights of the copyholders, as to taking timber for repairs, fire-bote, &c. Common belonging to the tenants, payment of rent, suing in the court of the manor, taking heriots, &c. All which customs are to be observed. Comp.

Court, Keep. 21.

When an act of parliament altereth the service, customs, tenure, and interest of land, in prejudice of the lord or tenant, there the general words of such an act shall not extend to copyholds. 3 Rep. 7. Copyholds are not within the stat. 27 H. 8. c. 10. of jointures ; nor stat. 32 H. 8. c. 28. of leases, copyholds being in their nature demisable only by copy: they are not within the statute of uses, nor are copyholds extendible in execution; but copyholds are within the statute of limitation of actions, and the statutes against bankrupts. The lord shall have the custody of the lands of idiots, &c. And a copyholder is not within the act 12 Car. 2. c. 24. to dispose of the custody and guardianship of the heir; for if there be a custom for it, it belongs to the lord of the manor. 3 Lev. 395: 1 Nels. Abr. 492.

Copyholders shall neither implead nor be impleaded for their tenements by writ, but by plaint in the lord's court held within the manor: and if on such plaint erroneous judgment be given, no writ of false judgment lies, but petition to the lord in nature of a writ of false judgment, wherein errors are to be assigned, and remedy given according to law. Co. Lit.

Where a man holds copyhold lands in trust to surrender to another, &c., if he refuses to surrender to the other accordingly, he may be compelled by bill exhibited in the lord's court, who, as chancellor, has power to do right. Leon. 2. A copyholder may have a formedon in descender in the lord's court. Lessee of a copyholder for life for one year shall maintain an ejectment. 4 Rep. 26: Moor, 679. It is every day's practice to bring ejectments to recover the possession of copyholds; for defendant by the rule, obliging himself to confess lease, entry, and ouster, the title only can come in question on the trial; but the lessor of plaintiff, before he brings his ejectment, should be admitted. See tit. Ejectment.

A manor is lost when there are no customary tenants or copyholders; and if a copyhold comes into the hands of the lord in fee, and the lord leases it for one year, or half a year, or for any certain time, it can never be granted by copy after; but if the lord alters the manor, &c., his alience may re-grant land by copy. If the lord keeps the copyhold for a long time in his hand, it is no impediment but that he may after grant it again by copy. 2 Danv. Abr. 176, 177. A copyholder in fee accepts of a lease, grant, or confirmation of the same land from the lord; this determines cutor may make grants of copyhold estates, his copyhold estate. 2 Cro. 16: Cro. Jac.

the bounds of the manor, the royalties of the | 253. If a copyholder bargains and sells his copyhold to a lessee for years, &c. of the manor, his copyhold is extinguished. 2 Danv. 205. A copyholder may grant his estate to his lord, by bargain and sale, release, &c., for between lord and tenant the conveyance need not be according to custom. 1 Nels. 504. A copyholder in other cases cannot alien by deed; though he that hath a right only to a copyhold may release it by deed. And if a copyholder surrenders upon condition, he may afterwards release the condition by deed. Danv. 205: Cro. Jac. 36. Also one joint copyholder may release to another, which will be good without any admittance, &c. Ibid.

A copyholder cannot convey or transfer his copyhold estate to another, otherwise than by surrender; which is the yielding up of the land by the tenant to the lord, according to the custom of the manor, to the use of him that is to have the estate; or it is in order to a new grant, and farther estate on the same.

As to copyhold grants, which are made either in fee or for three lives, &c., the lord of the manor that hath a lawful estate therein, whether he be tenant for life or years, tenant by statute merchant, &c., or at will, is dominus pro tempore, and may grant lands, herbage of lands, a fair, mill, tithes, &c., and any thing that concerns lands, by copy of court-roll, according to custom; and such grants shall bind those in remainder: the rents and services reserved by them shall be annexed to the manor, and attend the owners thereof after their particular estates are ended. 4 Rep. 23: 11 Rep. 18. And if a lord of the manor for the time being, lessee for life, years, &c., take a surrender, and before admittance he dieth, or the years or interest determine, though the next lord comes in above the lease for life or years, or other particular interest, vet he shall be compelled to make admittance according to the surrender. Co. Lit. 59. But a lord at will of a copyhold manor cannot license a copyhold tenant to make a lease for years, though he may grant a copyhold for life according to the custom: if a lord for life gives license to a tenant to make a lease for years, this lease shall continue no longer than the life of the lord. 2 Danv. Abr. 202.

If he that is lord of the manor for the time being admits one to a copyhold, he dispenses with all precedent forfeitures, not only as to himself, but also as to him in reversion; for such grant and admittance amount to an entry for the forfeiture, and a new grant; but a lord by tort cannot by such admittance purge the forfeiture as to the rightful lord. 1 Lev. 26. Grants by copy of court-roll by infants, &c. will be binding; and if a guardian in socage grants a copyhold in reversion, according to the custom of the manor, this shall be a good grant. 2 Rol. Abr. 41. If baron and feme, seised of a manor in right of the feme, grant a copyhold, this shall bind the feme, notwithstanding her coverture. 4 Rep. 23. An exeaccording to the custom of the manor, where a devise is made that the executor shall grant | but cannot make a depuly to act in general. copies for payment of debts. 2 Danv. 178.

A manor may be held by copy of courtroll, and the lord of such manor may grant copies; and such customary manor may pass by surrender and admittance, &c. A customary manor may be holden of another manor, and such customary lord may grant copies and hold courts: but a copyholder, lord of such a manor, cannot hold a court baron to have forfeitures, and hold pleas in a writ of right, &c. 1 Nels. Abr. 524.

All grants of copyhold estates are to be according to the custom of the manor, and rents and services customary must be reserved; for what acts of the lord in granting copyholds are not confirmed by custom, but only strengthened by the power and interest of the lord, have no longer duration than the lord's estate continueth. Comp. Court Keeper, 421. If by the custom a copyhold may be granted for three lives, and the lord grants it to one for life, remainder to such a woman as he shall marry, and to the first son of his body; both these remainders are void; and a remainder limited upon a void estate in the creation will be likewise void. But if by custom it is demisable in fee, a surrender may be to the use of one for life, remainder in tail, remainder in fee. 5 Danv. Abr. 203: Cro. Eliz. 373. It is held, where by the custom of a manor the lord can grant a copyhold for three lives, he may grant it for an estate coming within the intent of the custom; as to A. B. and his assigns, to hold to him and his assigns for the lives of three others, and of the longer liver of them successively, &c. 2 Ld. Raym. 994. 1000.

The lord of a manor may himself grant a copyhold estate at any place out of the ma. nor; but the steward cannot grant a copyhold at a court held out of the manor. Rep. 26. Though the steward may take surrenders out of the manor, as well as the lord. 2 Danv. Abr. 181. A steward is in the place of the lord, and, without a command to the contrary, may grant lands by copy, &c. But if a lord command a steward that he shall not grant such a copy, if he grants it, it is void; and if the steward diminishes the ancient rents and services, the grant will be void. Cro. Eliz. 699.

Things of necessity done by a steward, who is but in reputed authority, are good if they come in by presentment of the jury; as the admittance of an heir upon presentment, &c. Though acts voluntary, as grants of copyhold, &c. are not good by such stewards. Cro. Eliz. 699. If an under-steward hold a court without any disturbance of the lord of the manor, though he hath no patent or deputation to hold it, yet it is good; because the tenants are not to examine what authority he hath, nor is he bound to give them an account of it. Moor, 110. A deputy steward may authorise another to do a particular act, 2 Salk, 95.

In admittances in court upon voluntary grants, the lord is proprietor; in admittances upon surrender, the lord is not proprietor of the lands, but only a necessary instrument of conveyance; and in admittance by descent the lord is a mere instrument, not being necessary to strengthen the heir's title, but only to give the lord his fine. 4 Rep. 21, 22. The heir of a copyholder may enter, and bring trespass, before admittance, being in by descent; and he may surrender before admittance; but he is not complete tenant to be sworn of the homage, or to maintain a plaint in the lord's court. And if the heir do not come in and be admitted, on the death of his ancestor, where the same is presented and proclamation made, he may forfeit his estate.

Cro. El. 90: 4 Kep. 22. 27.
On surrender of a copyhold, the surrenderer or person making the same, continues tenant till the admittance of the surrenderee; and the surrenderee may not enter upon the lands, or surrender before admittance, for he hath no estate till then; though it is otherwise of the heir by descent, who is in by course of law, and the custom casts the possession upon him. Comp. Court Keep. 436. And the heir may devise the copyhold before he has been admitted. 3 Barn. & Adol. 664. A surrender is not of any effect until admittance, and yet the surrenderee cannot be defrauded of the benefit of the surrender; for the surrenderer cannot pass away the land to another or make it subject to any other incumbrances; and if the lord refuse the surrenderee admittance, he is compellable in Chancery. Comp. Cop. § 39. A grantee hath no interest vested in him till he is admitted; but admittance of a copyholder for life is an admittance of him in remainder, for they are but one estate, and the remainderman may, after the death of tenant for life, surrender without admittance. 3 Lev. 308: Cro. El. 504.

The title to copyhold lands relates back to the time of the surrender, as against all persons except the lord; so that the surrenderee may recover in ejectment against the surrenderer on a demise laid between the times of surrender and admittance. 1 Term Rep. K. B. 600.

Every admittance upon a descent or surrender may be pleaded as a grant; and a person may allege the admittance of his ances. tor as a grant; and show the descent to him, and that he entered, &c. But he cannot plead that his father was seised in fee, &c., and that he died seised, and the land descended to him. 2 Danv. 208. Admittance on surrenders must in all respects agree with the surrender, the lord having only a customary power to admit secundum forman et effectum sursumredditionis. 4 Rep. 26. If any are admitted otherwise, they shall be seised acluntary surrender is general, without saying to whose use, a subsequent admittance may

explain it. 2 Danv. 187. 204.

In voluntary admittances, if the lord admits any one contrary to custom, it shall not bind his heir or successor. If a copyholder surrender to the use of another, and after the lord, having knowledge of it, accepts the rent of such other out of court, this is an admittance in law; and any act, implying the consent of the lord to the surrender, shall be adjudged a good admittance. 1 Nels. Abr. 493. If the steward accept a fine of a copyholder, it amounts to an admittance. 2 Danv. 189. But delivering a copy is no admittance.

An enclosure made from the waste twelve or thirteen years before, and seen by the steward of the same lord from time to time without objection made, may be presumed by the jury to have been made by the licence of the lord, and ejectment cannot be brought against the tenant without previous notice to

throw up the land. 11 E. R. 56.

Where a widow's estate is created by custom, that shall be an admittance in law; and her estate arising out of that of her husband's, his admittance is the admittance of her. Hut. 18. And she who hath a widow's estate by the custom of the manor, upon the death of her husband, need not pay a fine to the lord for the estate; for this is only a branch of the husband's. Hob. 181. When a custom is, that the wife of every copyholder for life shall have her free bench, after the death of the baron, the law casts the estate upon the wife, so that she shall have it before admittance, &c. 2 Danv. 184. But if a wife is entitled to her free bench by custom, and a copyholder in fee surrenders to the use of another, and then dies, it has been adjudged that the surrenderee should have the land, and not the wife, because the wife's title doth not commence till after the death of her husband; but the plaintiff's title begins with the surrender, and the admittance relates to that. Inst. 59: 1 Salk. 185.

The widow's title commences not by the marriage; if it did, then the husband could do nothing in his lifetime to prejudice it; but it is plain he may alien or extinguish his right, so as to bind the estate of the widow; the free bench grows out of the estate of the husband; and it is his dying seised which gives the widow a title; and as the husband has a defeasible estate, so the wife may have her free-bench defeated. 4 Mod. Rep. 452, 453.

Entries on the rolls of a manor of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held during his chaste viduity, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her for a forfeiture on proof of her incontinence, although there was no instance

cording to the surrender; yet where a vol- forfeiture having been enforced. 10 East's Rep. 520.

A copyholder may surrender in court by letter of attorney, and out of court by special custom. 9 Rep. 75, 76. A copyholder being in Ireland, the steward of a manor here made a commission to one to receive a surrender from him there; and it was held good. 2 Danv. 181.

The intent of surrenders is, that the lord may not be a stranger to his tenant, and the alteration of the estate. As a copyholder cannot transfer his estate to a stranger by any other conveyance than surrender, so if one would exchange a copyhold with another, both must surrender to each other's use, and the lord admit accordingly. Comp. Cop. s. 39.

With respect to the devising of copyholds, the law formerly was, that no such devise could be made without a surrender to the use of the party's will; and that the lands did not then pass by the will, but by the surrender, the will being considered only as declaratory of the uses of the surrender. Many evils were found to result in the cases of creditors, wives, and children, from this necessity of a surrender to a will, and the courts of equity were astute in finding reasons for supplying the surrender, with due precaution, in favour of the claims of the several parties. See 3 P. Wms. 98. in n.

All these questions are now set at rest by a statute passed for that purpose, 55 G. 3. c. 192. by which it is enacted, that in all cases where, by the custom of any manor in England for Ireland, though instances of copyhold are rare there,] any copyhold tenant of such manor may by will dispose of or charge land surrendered to the use of the will, every disposition or charge of any such copyhold, made by the will of any person who shall hereafter die, shall be as valid and effectual, although no surrender shall have been made to the use of the will, as if such surrender had been actually made. On admissions under testamentary dispositions, the steward is allowed to charge his fees, as in cases of a surrender to the use of the will. § 2. The act shall not render invalid any devise of copyhold which would be valid if the act had not been made. § 3. Since this act, a copyhold will pass under a general devise of real estate, though there be no surrender to the use of the will. 7 Bing. 275: 2 Sim. & Stu. 229: 6 Mad. 323.

In the case of copyholds devised to charitable uses, the want of surrender is made good, not by the discretion of the court, but by the strong and general words of stat. 43 Eliz. c. 4 Attorney-General v. Burdett, 2 Vern. 755: Duke's Char. Uses, 84: Attorney-General v. Andrews, 1 Vez. 225.

A cestui que trust may devise an interest in land, &c. without surrender; and if copyhold lands are in mortgage, the mortgagor can dispose of the equity of redempin fact stated on the rolls or known of such a tion by will, without any surrender made; because he hath at that time no estate in the | court, it is void. Co. Lit. 62: 2 Danv. 188. If land, whereof to make a surrender. Praced. Canc. 320. 322. One joint tenant may surrender his part in the lands to the use of his will, &c. And where there are two joint tenants of a copyhold in fee, if one of them make a surrender to the use of his will, and die, and the devisee is admitted, the surrender and admittance shall bind the survivor. 2 Cro. 100.

A surrender of copyhold lands to the use of a will only operates on the estate which the surrenderer had at the time of the surrender: and therefore if a copyholder, having an estate pour autre vie, surrender all his estate in possession, remainder or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will. the fee will not pass by it. 6 Term Rep. 63.

Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest, nor will such a surrender operate by estoppel against the parties or their heirs. 11 E. R. 185.

A surrender may not be to commence in futuro, as after the death of the surrenderer, &c. March, 177. A copyholder cannot surrender an estate absolutely to another, and leave a particular estate in himself, though he may surrender to uses, &c. A copyholder surrendered to the use of his wife and younger son, without mentioning what estate, and adjudged that they had an estate for life. Rep. 29. If a man having brought a copyhold to himself, his wife and daughter, and their heirs, afterwards surrender it to another, and his heirs, for securing a sum of money; after his death, the surrenderee shall not be entitled to the land, it being an advancement for the wife and daughter. 2 Vern. 120.

A feme covert may receive a copyhold estate, by surrender from her husband, because she comes not in immediately by him, but by the admittance of the lord, according to the surrender. 4 Rep. 29. b. A feme covert is to be secretly examined by the steward, on her surrendering her estate. Co. Lit. 59. An infant surrendered his copyhold, and afterwards entered at full age, and it was held lawful, though the surrenderee was admitted. Moor, 597.

By the general custom of copyhold estates, copyholders may surrender in court, and need not allege any particular custom to warrant it; but where they surrender out of court, into the hands of the lord by customary tenants, &c., custom must be pleaded. 9 Rep. 75: 1 Rol. Abr. 500. Surrenders out of court are to be presented at the next court: for it is not an effectual surrender till presented in court. Where a copyholder in fee surrenders out of court, and dies before it is presented, yet the surrender, being presented at the next court, will stand good, and cestui que use shall be admitted; so if cestui que use dies before it is presented, his heir shall be admitted. But the tenants by whose hands the surrender was made shall die, and this upon proof is presented in court, it is well enough. 4 Rep. 29.

Where, by the custom of a manor, surrenders are not required to be presented within a definite time, an incumbrancer whose family is not enrolled till after a subsequent incumbrancer, will not be postponed, though the subsequent incumbrancer had no notice of the prior charge, for the first incumbrancer has priority at law, and in this case equity will follow the law. Horlock v. Priestly, 2 Sim. 75.

Tenants refusing to make presentment are compellable in the lord's court. And by surrender of copyhold lands to the use of a mortgagee, the lands are bound in equity, though the surrender be not presented at the next court. 2 Salk. 449. When a copyholder surrenders upon condition, and this is presented absolutely, the presentment is void: but where a conditional surrender is presented, and the steward omits entering the condition, on proof thereof the condition shall not be avoided; but the rolls shall be amended. 4 Rep. 25. A copyledder may surrender to the use of another, reserving rent with a condition of re-entry for non-payment, and in default of payment may re-enter. Ibid. 21.

If a copyholder of inheritance takes a lease for years of his copyhold estate, it is a surrender in law of his copyhold. Where there is a tenant for life, and remander in fee, he in remainder may surrender his estate, if there be no custom to the contrary. 3 Leon. 329. If a surrender is made with remainders over, case lies, for him in remainder, against a copyholder for life, who commits waste, &c. Lev. 128. A surrenderee of a reversion of a copyhold is an assignee within the equity of the stat. 32 H. 8. c. 34. to bring action of debt or covenant against lessee, &c. 1 Salk. A copyholder in fee surrenders to the use of one for life, with remainder to another for life, remainder to another in fee; as the particular estates and remainders make but one estate, there is but one fine due to the lord. 2 Danv. 191.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures are, fealty, services (as well in rents as otherwise,) reliefs and escheats. The two latter belong only to copyholds of inheritance: the former to those for life also. But besides these, copyholds have also heriots, wardship, and fines. Heriots are incident to both species of copyhold, but wardship and fines to those of inheritance only. Wardship in copyhold estates partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian, who usually assigns some relation of the infant tenant to act in his stead; and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seisins, due on the death of if the surrender be not presented at the next each tenant: others are mere fines for the

alienation of the lands. In some manors only assess a compensation in lieu of heriot, to be one of these sorts can be demanded; in some paid by an in-coming copyholder, on surboth, and in others neither. They are sometimes arbitrary and at the will of the lord; sometimes fixed by custom: but even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be reasonable in their extent: otherwise they might amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents or alienations (unless in particular circumstances) of more than two years' improved value of the estate. 2 Ch. Rep. 134. See 2 Comm. 97. As to the mode of calculating the fine where the estate is in several lives, see Wilson v. Houre, 2 B. & Adol. 350. In settling the value of the fine, the tenant is not concluded by the amount of rent he may have received on the premises, but may show their value to be less. 7 Bing.

and may be due on every change of the estate by lord or tenant. The lord may have an action of debt for his fine, or may distrain

by custom. 4 Rep. 27: 13 Rep. 2.

A covenant made by a copy older with a stranger to assign and surrender his copyhold to him, which covenant is afterwards presented by the homagee, does not give the lord any right to a fine before admission. 2 T. R. 484. The lord may recover from a copyholder the fine assessed by him on admittance, not exceeding two years' value of the tenement, although there be no entry of the assessment of such fine on the court rolls, but only a demand of such a sum for a fine, after the value of the tenement had been found by the homagec. 6 E. R. 56.

Tenants in coparcenary of a copyhold estate are in law but one heir: and it seems that they are entitled to admittance upon the payment of one fine. 4 D. & R. 625: S. C. 3 B. & C. 173.

A copyholder in fee surrendered to the uses of his will, and devised successive estates to A. and B., remainder to his own right heirs. After the death of the copyholder, A. and B. disclaimed, released all their interest to the heir-at-law, and refused to be admitted. It was determined, that as the legal estate was in the testator, and descended to his heirat-law, he was entitled to be admitted in the character of heir as tenant in possession, though it was objected that the lord would then be deprived of the fines due in respect of the intermediate interests vesting in, and conveyed by, the devisees. R. v. Wilson, 10 B. & C. 80.

An heriot is a duty to the lord, rendered at the death of the tenant, or on a surrender and alienation of an estate, and is the best beast or goods, found in the possession of the tenant deceased, or otherwise, according to custom. And for heriots, reliefs, &c. the lord may distrain, or bring action of debt.—Plowd. 96.

render or alienation, is not good. 1 Bos. & Pul. 212. See tit. Heriot.

Where a copyhold tenement, holden by heriot custom, becomes the property of several, as tenants in common, the lord is entitled to a heriot from each of them; but if the several portions are re-united in one person, one heriot only is payable. 6 B. & C. 2.

Relief is a sum of money which every copyholder in fee, or freeholder of a manor, pays to the lord, on the death of his ancestor, and is generally a year's profits of his land.

See tits. Tenure, Relief.

Services signify any duty whatsoever accruing unto the lord from tenants; and are not only annual and accidental, but corporal, as homage, fealty, &c. Comp. Court Keep. 7,

8, 9, &cc.

Copyholds escheat, and are forfeited in Fines are paid to the lord on admittances; many cases; escheat of a copyhold estate is either where the lands fall into the hands of the lord for want of an heir to inherit them, or where the copyholder commits felony, &c. But before the lord can enter on an estate escheated, the homage jury ought to present it.—Forfeitures proceeding from treasons, felonies, alienation by deed, &c., a presentment of them must be also made in court, that the lord may have notice of them. A copyholder refusing to do suit of court, being sufficiently warned, is a forfeiture of his es-tate, unless he be prevented by sickness, in-undations of water, &c. If the lord demandeth his rent, and the copyholder being present, denies to pay it at the time required, this is a forfeiture; but if the tenant be not upon the ground when demanded, the lord must continue his demand upon the land, so that by continual denial in law, it may amount to a denial in fact: though it is said there must be a demand from the person of the copyholder, and a wilful denial, to make a forfeiture.

If a copyholder do not perform the services due to his lord; or if he sue a replevin against the lord, upon the lord's lawful distress for his rent or services, these are forfeitures. If the lord upon admittance of a copyholder, the fine by the custom of the manor being certain, demandeth his fine, and the copyholder denieth to pay it upon demand, this is a forfeiture.

Upon the descent of any copyhold of inheritance, the heir by the general custom is tied, upon three solemn proclamations made at each of three several courts, to come in and be admitted to his copyhold; or if he faileth therein, this failure worketh a forfeiture.

The proclamations need not enumerate the particular estate of which the tenant died seized. 3 T. R. 162. Nor is it necessary they should be proved by viva voce testimony. The entry in the court rolls is sufficient. Ibid. A person claiming to be admitted as heir need not tender himself to be admitted at the lord's court, if the steward It seems that a custom for the homage to upon application to him out of court has refused to admit him. 2 Maul. & Selw. Rep. | wife shall enjoy the estate. Cro. Car. 7. And

A lord of a manor cannot seize a copyhold estate as forfeited pro defectu tenentis without a custom: therefore when on the death of a copyholder of inheritance, the lord, after three proclamations for the heir to come in, seized the estate into his hands, and afterwards granted it in fee to another, the court considered it as an absolute seizure, and consequently irregular, there being no custom to warrant it, and being irregular as an absolute seizure it could not afterwards be set up by the lord as a seizure quousque. 3 T. R. 162.

A forfeiture of a copyhold estate can only be taken advantage of by him who is lord at the time of the forfeiture, except in those cases where the act of forfeiture destroys the

estate. 3 T. R. 162.

An idiot, lunatic, &c., though lately able to take copyholds, yet were unable to forfeit them: and in respect to others, forfeitures may be mitigated by custom, and the copyholder only amerced. Repealed by stat. 1 W. 4. c. 65. § 3-10. on default of infants and feme coverts appearing to be admitted tenants to copyhold lands, the lord or his steward may name a person to be guardian or attorney for them, and by such guardian, &c. admit them: and if the usual fine thereon be not paid in three months, being demanded in writing, the lord may enter on the copyhold, receive the rents, &c., till the fine is paid with all charges. And by this statute no infant or feme covert shall forfeit any copyhold lands for their neglect to come to court to be admitted, or refusal to pay any fine. See Infant, V. See also Wills, III. 2

This statute, which was founded on a former act, 9 G. 1. c. 29. also extends to the case of lunatics acting by their committee. § 11 of this act, in conformity with former laws, provides for the surrendering of copyhold lands by attorneys, for the purpose of suffering re-

coveries.

The general custom of copyholds allows a copyholder to make a lease for one year of his copyhold estate, and no more, without incurring a forfeiture: but a copyholder may make a lease for one year, and covenant with the lessee, that, after the end of that year, he shall have the same for another year, and so from year to year during the space of seven years, &c., and be no forfeiture. Cro. Jac. 300. For this does not amount to a lease, but is only a covenant, subjecting the covenanter to an action for damages. Though a copyholder may not make a lease to hold for one year, and so from year to year during his life, excepting one day yearly, &c., which will be a forfei-ture, being a mere invasion. But a licence to lease may be had. A woman who was a copyholder in fee married, her husband made a lease for years, not warranted by the custom, which was a forfeiture; the husband died; and

see 4 Rep. 21-25. &c.

Livery upon any conveyance of a copyhold estate amounts to a forfeiture. And yet if a copyholder for life surrender to another in fee, this is no forfeiture; for it passeth by the surrender to the lord, and not by livery.

If copyholder for life cut down timber-trees, it is a forfeiture of his copyhold: though such copyholder may take house-bote, hedge-bote, and plough-bote, upon his copyhold, of common right, as a thing incident to the grant; if he be not restrained by custom, to take them by the assignment of the lord or his bailiff. Where a copyholder for life fells timber-trees, the lord may take them, and the estate is for-feited; but if under-lessee for years of a copyholder cut down timber, this shall not be a forfeiture of the copyhold estate, but the lord is put to his action on the case against the lessee. 1 Bulst. 150: Style, 233. A copyhold granted to two for their lives successively, where the custom of the manor is, that they shall not fell trees; if the first copyholder for life cut down trees, &c., it is not only a forfeiture of his own estate for life, but of him in remainder. Moor, 49.

In other cases, a copyholder for life, committing waste, shall not forfeit the estate of him in remainder. Cro. Eliz. 880. If copyholder for life, where the remainder is over for life, commits a forfeiture by waste, &c., he in remainder shall not enter, but the lord. 2 Danv. 198. A copyholder committing waste voluntarily, or permissive, this is a forfeiture: voluntary, as if he pull down any house, though built by himself; lop trees, and fell them, plough up meadows, whereby the ground is made worse, &c. Permissive, if he suffer the roof of the house to let in rain, or the house to fall; or if he permit his meadow-ground to be surrounded with water, so that it becomes marshy, or his arable land to be thus surrounded, and become unprofitable, &c.; these and the like are forfeitures. See 2 Danv. Abr. 192, 193. 196, &c.: 1 Nels. Abr. 509, 510, &c. Although the property in the mines be in the lord, yet the copyholder has a sufficient possession to maintain trespass against one who breaks and enters the subsoil, though no trespass is committed on the surface. Lewis v. Branthwaite, 2 B. & Adol. 437.

If a feme copyholder for life takes husband, who commits waste and dies, the estate of the feme is forfeited; though not if a stranger commit the waste without the assent of the husband. 4 Rep. 37. Sed qu. the difference between the copyholder for life and copyholder in fee, in this respect; unless waste is distin-

guished from other forfeitures?

Most forfeitures are caused by acts contrary to the tenure: but a succeeding lord of a manor shall not have any advantage of a forfeiture by waste done by a copyholder in the time of his predecessor. 2. Sid. 8. But adjudged that the lord shall not take advanthe lord may seize copyhold land quousque in tage of this forfeiture after his death, but the virtue of a right which accrued to the precedthe lord may seize copyhold land quousque in

be admitted. 1 Barn. & Adol. 736. If a present lord doth any thing whereby he acknowledges the person to be his tenant after forfeiture, this acknowledgement is a confirmation of his estate. Coke's Cop. c. 1.

The lord may enter for waste committed by a copyholder for life, though there be an intermediate estate in remainder between the estate of copyholder for life and the lord's reversion. 2 Maul. & Selw. Rep. 68. The lord may have an injunction, and account of waste

in equity. 3 Meriv. 673.

The Court of Chancery will sometimes relieve against a forfeiture for waste, and compel the lord to re-admit, on receiving satisfaction for the injury he has sustained. Such relief is particularly given where the waste is committed through ignorance, or where the waste is merely permissive, and there has not been an obstinate perseverance in neglecting to repair after notice. 1 C. C. 95: Pre. Ch. 568. Another instance in which relief against forfeiture for waste is said to be proper, is where the lesee of a copyholder commits waste without his direction or privity. Toth. 237. But in this latter case it may be doubted whether the waste is a forfeiture. See Mo. 49.

Also, when the estate is forfeited for nonpayment of rent, a fine, or such things, where a value may be set on them, and compensation made the lord on any laches of time, the tenant may be relieved: for there the land is but in nature of a security for those sums.

Preced. Chan. 569. 572.

A copyhold of inheritance is not forfeited by a conviction for felony without attainder, unless there is a special custom in the manor. 3 B. & Ald. 510. A pardon restores a copyholder who has committed felony to his competency to hold lands; and unless the lord has seized the copyhold, the copyholder may recover it on his pardon from a person who has

ousted him. 5 Barn. & C. 584.

In case of making a least for years, without licence, and not warranted by custom, found to be forfeiture at law, equity has nothing to do with it, to give any remedy; it is like to a feoffment made, or fine levied by particular tenants, against which there can be no relief. Where copyhold lands are pur-Ibid. 574. chased in fee, in trust for an alien, the lands are not seizable by the king: nor is the trust forfeited to him; for if the lands were forfeited as purchased for such alien, then the lord of the manor would lose his fines and services, &c.: Hard. 436.

By stat. 10 G. 2. c. 26. copyhold estates of poor prisoners may be assigned to creditors, and the assignees admitted by the lord, on paying the usual fine due on a surrender, &c. and see stat. 1 G. 3. c. 17. § 14. as to Insol-

The admission of infants and feme coverts entitled by descent, or surrendered to the use of a will, is regulated by stat. 9 G. 1. c. 29. And the stat. 5 G. 3. c. 46. (explained by 6 G. and contradictory—the exportation at one

ing lord, on default of the heir coming in to | 3. c. 49.) compels the steward to receive the stamp duty on admission, &c., at the same time he receives the fees of court.

See farther Bac. Ab. tit. Copyhold. (7th ed.)

Watkins's Treatise on Copyholds.

COPY-RIGHT. The exclusive right of printing and publishing copies of any literary performance; extended also to music, engravings, &c. See tit. Literary Property.

COBAAGE, coraagium.] A kind of extraordinary imposition, growing upon some unusual occasion, and seems to be of certain measures of corn: for corus tritici is a measure of wheat. See Bract. lib. 2. c. 116: Numb.

6. Numb. 8. Blount.

CORACLE. A small boat used by fishermen on some parts of the river Severn, made of an oval form, of split sallow twigs interwoven, and on that part next the water covered with leather, in which one man, being seated in the middle, will row himself swiftly with one hand, while with the other he manages his net or fish-tackle; and, coming off the water, he will take the light vessel on his back, and carry it home. This boat is of the same nature as the Indian canoes: though not of the same form, or employed to the like use. But quere if not long out of use.

CORAM NON JUDICE, is when a cause is brought and determined in a court whereof the judges have not any jurisdiction: then it is said to be coram non judice, and void. 2

Cro. 351.

CORBEL STONES, are stones wherein images stand: the old English corbel was properly a niche in the wall of a church, or other structure, in which an image was placed for ornament or superstition: and the corbel stones were the smooth polished stones, laid for the front and outside of the corbels or The niches remain on the outside of very many churches and steeples in England, though the little statues and reliques are most of them broken down. Paroch. Antiq. 575.

CORD OF WOOD, is a quantity of wood eight feet long, four feet broad, and four feet

high, ordained by the statute.

CORDAGE, Fr.] Is a general appellation for all stuff to make ropes, and for all kind of ropes belonging to the rigging of a ship; it is mentioned in 15 Car. 2. c. 13. and see stat. 25 G. 3. c. 56. against frauds in the manufacture of cordage for shipping. See Sail Cloth.

CORDINER. See Cordwainer. CORETES. From the Brit. Cored, pools, ponds, &c .- Et cum suis piscibus et coretibus anguillarum et cum toto territorio suo. Du Fresne.

CORIUM FORISFACERE. Was where a person was condemned to be whipped; which was anciently the punishment of a servant. Corium perdere, the same: and corium redimere is to compound for a whipping.

CORN. The laws relating to the importa-tion and exportation of corn have been heretofore very uncertain, fluctuating, intricate, time not being permitted without the royal licence, and being at other times encouraged by bounties; the importation being from time to time permitted or restrained by various acts, imposing duties and regulations; repealed, altered, and re-enacted on the spur of the occasion.

The following acts are at present in force on this subject:—By stat. 11 G. 2. c. 22. if any person use violence on another person to hinder him from buying or carrying corn to any sea-port town, to be transported, &c., he shall be imprisoned by two justices for not more than exceeding three months, and be publicly whipped, &c.; and committing a second offence, or destroying granaries or corn in any boat or vessel, to be adjudged a felon, and transported for seven years. By this act the hundred was made liable to damages not exceeding 100L; but this part of the act is repealed by 7 and 8 G. 4. c. 27. See tit. Hundred.

To preserve the markets of corn uninterrupted, it is enacted by 36 G. 3. c. 9. that persons hindering the buying of corn, or seizing it in its progress from place to place, shall be punished by imprisonment in the house of correction, § 1. Persons convicted of such offence a second time, and persons destroying storehouses or carrying corn away therefrom unlawfully, are punishable by seven year's transportation, § 2.

The intercourse of corn between Great Britain and Ireland was regulated by various acts after the Union. At length by stat. 36 G. 3. c. 97. the free interchange of every species of grain (the product of either country, 47 G. 3. c. 7.) was permitted between the countries without respect to the prices, and

without any duties or bounties.

By stat. 54 G. 3. c. 69. to permit the exportation of corn, grain, meal, malt, and flour, from any part of the United Kingdom, without payment of duty or receiving of bounty, all duties and bounties on the exportation of corn are repealed; and it is enacted, that it shall be lawful for any person to export at all times from any port of the United Kingdom, any corn, &c., without the payment of any duty or customs thereon; and that no person shall be entitled to any bounty upon or in respect of the exportation of any corn, &c.

By stat. 9 G. 4. c. 60. corn, grain, meal, and flour, the growth and produce of any foreign country, or of any British possession out of Europe, is allowed to be imported into the United Kingdom for consumption, upon payment of certain duties, regulated from time to time, according to the average price of British corn made up and published in manner required by the act; to be collected as duties of customs under 6 G. 4. c. 111. (see tit. Customs), and monthly accounts of all corn imported and the duties paid are to be published by the commissioners of customs. The following tables show the amount of the duties on foreign wheat, &c.

			TABI	LE	1.—	-WE	IEAT.					
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		71	-	*			72				8	
		70	-	-	-	-	71 70	-	-	10	8	
		69	-	-	-	*	70	-	-	13	8	
	1	68		-	*	•	69	**		16 18	8	
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	de	creas	e in	a	ver	age	pri	ce -	of			
	Br	itish										
1. Duty on wheat imported from												
	Br	itish	poss	ses	sio	ns a	broa	d :-	_			
British possessions abroad:— When British wheat is at or												
	_ ab	ove (i7s.		-	-		-		()	6	
	2. Is	und	er 6	78.		**		-		5	0	
above 67s 0 6 2. Is under 67s 5 0 The barrel of wheaten flour of												
The barrel of wheaten flour of 196 lbs. to be in all cases												
charged as 38 1-2 gallons of												
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	TA	BLE	11.—	-R	YE,	PEA	S, AN	D B	EAI	vs.		
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Dermar 1	· Duty.
And so increasing to 6d in	
And so increasing 1s. 6d. in	And so increasing 1s. 6d. in
duty on foreign rye, &c. for	duty on foreign oats, for
every 1s. decrease in price of	every 1s. decrease in price of
British.	British.
1. Duty on rye, &c. imported	1. Duty on oats imported from
from British possessions	British possessions abroad:—
abroad:-When British rye,	When British oats are at or
&c. is at or above 41s 0s. 6d.	above 25s 0s. 6d.
2. Is under 41s 3 0	2. Are under 25s 2 0
2. Is under 418.	181 1-2 lbs of oatmeal to be in
TABLE III. BARLEY, MAIZE, BUCKWHEAT, AND	every case charged as a quar-
BIGG.	ter of oats.
When the average price of Bri-	By § 5. of the act 9 G. 4. c. 60. it is
tish barley is at or above 41s.	enacted, that it shall not be lawful to import
per qr 1s. 0d.	from foreign parts any malt for home con-
Is at 40s. and under 41s 1 10	sumption into any part of the United King-
39 40 3 4	dom; nor to import into Great Britain any
38 39 4 10	corn ground except wheat-meal, wheat-flour,
37 38 6 4	and oatmeal; nor to import into Ireland
36 37 7 10	for consumption any corn ground, on pain
35 36 9 4	of forfeiture of any article so illegally im-
1 (34 35 10 10	ported.
2 \ 33 34 12 4	By § 7. of the same act, if it be made to ap-
Is under 33 and not under 32 13 10	pear to the king in council that any foreign
32 31 15 4	state has subjected British vessels or goods to
31 30 16 10	higher duties or greater burthens than the
30 29 18 4	ships or goods of any other country, or has
29 28 19 10	granted bounties on goods the produce of
28 27 21 4	other nations (and not on the British), in
27 26 22 10	such cases the importation of corn-meal or
26 25 24 4	flour into the United Kingdom from such fo-
25 24 25 10	reign state may be prohibited.
24 23 27 4	The act contains a series of regulations for
	The act contains a series of regulations to
23 22 28 10	ascertaining the average price of British corn,
22 21 30 4	by means of weekly returns from the corn-
21 20 31 10	dealers in London, and about 150 other cities,
And so increasing 1s. 6d. in	towns, and places in England and Wales.
duty on foreign barley, for	(By § 34. returns may be required from other
every 1s. decrease in price of	places in Great Britain or Ireland by order in
British.	council, but so as not to affect the average.)
1. Duty on barley imported from	These returns are made in each place to local
British possessions abroad;	inspectors, and by them transmitted to a
-When British barley is at	comptroller of the returns in London, appoint-
or above 34s 0 6	ed by the crown.
2. Is under 34s 2 6	In London the inspectors are appointed by
2. Is under 0 20.	the Lord Mayor and Court of Aldermen. In
mayer to the control	Oxford and Cambridge by the Chancellor,
TABLE IV.—OATS.	As a size other governments towers by the marrors
Title Alexander C.D.:	&c. in other corporate towns by the mayors
When the average price of Bri-	and justices; and in other places by the local
tish oats is at or above 31s.	justices of the peace at quarter sessions.
per qr 1s. 0d.	The average from all the returns received
Is at 30s. and under 31s 1 9	by the comptroller in London is to be made
29 30 3 3	up weekly by him on the Thursday in each
28 29 4 9	week, from the returns received in the week
27 28 6 3	ending on the preceding Saturday: and, the
1 / 26 27 7 9	average of the five preceding weeks being
2(25 26 - 9)3	added to each such weekly average, the
Is under 25 and not under 24 10 9	whole is divided by six, so as to produce the
24 23 12 3	average price for the six weeks preceding, by
23 22 13 9	which the duty is governed for the week en-
	suing, and so from week to week; and these
	outing, and so nothing week to week, and these
21 20 16 9	averages are published in the London Gazette
20 19 18 3	on the Friday in every week.
19 18 19 9	The names of the places from which the
18 17 21 3	returns are to be made are stated in a manner

neither topographical or alphabetical, but as 1 it under the title of Cornagium .- Sir Edward if thrown together in a bag, in § 8. of the act from which the following alphabetical list has been prepared :-

Abergavenny Ely Plymouth Alnwick Exeter Portsmouth Andover Fakenham Pontypool Appleby Fareham Preston St. Austel Four-lane Ends READING Aylesbury Frome Aylesham Gainsborough Ringwood Barnard Castle Glanford Brige, Royston Barnstaple Gloucester Rumford Basingstoke Guildford Rye Beccles Hadleigh Shaston Bedford Harleston Belford Havant Berwick-on-Haverfordwest Sleaford Tweed Southampton Beverly Hertford Hexham Birmingham Blanford Stockton Bodmin Stowmarket Bolton Hull Stow-on-the Boston Wold Huntingdon Bridgewater Ipswich Sudbury Bridlington Kingsbridge Sunderland Bridport Kirkby in Taunton Bristol Kendal Tavistock Bungay Lancaster Tetbury Bury St. Ed-Launceston Tewkesbury monds Leeds Thetford Cambridge Leicester Totness Canterbury Lewes Cardiff Lincoln Ulverston Carlisle Carmarthen LONDON Wakefield Carnarvon Lowestoft Walsham Chard Louth (North) Chelmsford Lynn Walsingham Chepstow Maidstone Wareham Chester Malton (New) WARMINSTER Chichester Manchester Warrington Watton Circncester Middlewich Cockermouth Monmouth Wells Colchester Morpeth Whitby Coventry Nantwich Whitehaven Wigan Darlington Newark Dartford Newcastle-on-Winchester Denbigh Tyne Windsor Newport Derby Wisbeach Dereham (E.) Northampton Woodbridge Worcester Norwich Dorchester Nottingham Wrexham Durham OXFORD Yarmouth Egremont Penrith York.

CORNAGE, cornagium, from the Lat. cornu, a horn.] A kind of tenure in grand serjeanty; the service of which was to blow a horn when any invasion of the Scots was perceived: and by this tenure many persons held their lands Northward, about the wall commonly called the Picts' Wall. Cambd. Britan. 609. This old service of horn-blowing was afterwards paid in money, and the sheriffs accounted for

Coke in his first Institute, p. 107, says, cornage is also called in the old books Horngeld; but they seem to differ much. See Hornegeld. CORNARE. To blow in the horn.-Matt.

Paris, p. 181.

CORN-RENTS. By stat. 18 Eliz. § 6. on college leases, one third of the old rent shall be reserved in wheat or malt, &c., the invention of Lord Treasurer Burleigh, and Sir Thomas Smith, who observed the value of money to sink much, and the price of provisions to rise greatly, on our communications with the Indies: and therefore devised this method for upholding the revenues of the colleges. 2 Com. 322.

CORNWALL. A royal duchy, the revenues of which belong to the Prince of Wales. for the time being, abounding with mines, and having stannary courts, &c. It yields a great revenue, and is held by a particular tenure. Several acts have been from time to time passed for regulating the granting of leases, &c. See 21 Jac. 1. c. 29: 1 Car. 1. c. 2. See stat. 13 Car. 1. c. 4: 6 Anne, c. 52: 12 Anne, c. 25: 24 G. 2. c. 50: 10 G. 2. c. 29. § 9, 10, 11: 33 G. 2. c. 10: 33 G. 3. c. 78: 50 G. 3. c. 6: 3 G. 4. c. 78: 5 G. 4. c. 78. As to holding the assizes at Launceston, or elsewhere, see 1 G. 1. st. 2. c. 45. See tit. King.

CORODY, corodium.] Signifies a sum of money, or allowance of meat, drink, and clothing due to the king from an abbey, or other house of religion, whereof he was founder, towards the sustentation of such a one of his servants as he thought fit to bestow it upon. The difference between a corody and a pension seems to be, that a corody was allowed towards the maintenance of any of the king's servants in an abbey: a pension is given to one of the king's chaplains, for his better maintenance, till he may be provided of a benefice. And as to both these, see Fitz. Nat. Br. fol. 250. where are set down all the corodies and pensions that our abbeys when they were standing were obliged to pay to the

Corody is ancient in our laws: and it is mentioned in Staundf. Prærog. 44. And by the stat. of Westm. 2. c. 25. it is ordained that an assize shall lie for a corody. It is also apparent by stat. 34 and 35 H. 8. c. 26. that corodies belonged sometimes to bishops, and noblemen, from monasteries: and in the New Terms of Law, it is said that a corody may be due to a common person, by grant from one to another; or of common right to him that is a founder of a religious house, not holden in Frankalmoigne; for that tenure was a discharge of all corodies in itself: by this book it likewise appears, that a corody is either certain or uncertain, and may not be only for life or years, but in fee. Terms de la Ley. 2 Inst. 630. See the Monasticon Anglicanum for the form of a grant of corody.

CORODIO HABENDO. A writ to exact a corody

Vol. I.-55

of an abbey or religious house. Reg. Orig. | lands enough to be made a knight (which by

CORONA MALA, or MALA CORONA. The clergy who abused their character, were

formerly so called. Blount.

CORONARE FILIUM. To make one's son a priest. Anciently lords of manors, whose tenants held by villenage, did prohibit them coronare filibs, lest such lords should lose a villein by their entering into holy orders: for ordination changed their condition, and gave them liberty, to the prejudice of the lord, who could before claim them as his natives or born servants. Homo Coronatus was one who had received the first tonsure, as preparatory to superior orders; and the tonsure was in form of a corona, or crown of thorns. Cowel.

CORONER, CORONATOR, à Corona.] An ancient officer at the common law. is made of him in King Athelstan's charter

to Beverley, anno 905.

He is called Coroner, Coronator-because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned. 2 Inst. 31: 4 Inst. 271. And in this light the Lord Chief Justice of the King's Bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm. 4 Rep. 57. But there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer. F. N. B. 163. This office is of equal antiquity with that of sheriff, and was ordained together with him to keep the peace, when the earls gave up the wardship of the county. Mirror, c. 1. § 3.

I. His Election and Removal.

II. 1. His Power and Duty; 2. His Fees for the Execution of his Duty; 3. His Punishment for the Breach of it; and 4. His Removal.

I. His Election and Removal.—HE IS STILL CHOSEN by all the freeholders in the countycourt; as, by the policy of our ancient laws, the sheriff and conservators of the peace, and all other officers were who were concerned in matters that affected the liberty of the people; 2 Inst. 558; and as verderors of the forests still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law de coronatore eligendo, F. N. B. 163. in which it is expressly commanded the sheriff, " quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere." See post. And in order to effect this the more surely, it was enacted by stat. Westm. 1. 3 Ed. 1. c. 10. that none but lawful and discreet knights should be chosen; and there was an instance in the 5 Edward III. of a man being removed from this office because he was only a merchant. 2 Inst. 32. But it seems it is now sufficient if a man hath | be defrayed by the candidates.

the statutum de militibus, 1 Ed. II. were lands to the amount of 201. per annum;) whether he be really knighted or not. F. N. B. 163, 4. For the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour. 1bid. And if he hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer. Mirror, c. 1. § 3. 2 Inst. 175. Now, indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands; so that although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid stat. Westm. 1. expressly forbidden to take a reward, under pain of great forfeiture to the king; yet for many years past they have only desired to be chosen for the sake of their perquisites: being allowed fees for their attendance. See post, II. 2.

By stat. 28 Ed. 3. c. 6. it is enacted "That all coroners of the counties shall be chosen in the full counties of the most meet and lawful people that shall be found in the same counties, to execute the said office: saved always to the king and other lords, who ought to make such coroners their seignories and

franchises."

The oaths of allegiance, supremacy, and abjuration, are to be taken, and then the oaths of office: when the coroner is elected, and sworn into his office, he is to remember the qualification acts, and in due time, to take the sacrament and oaths of abjuration. Impey's

The coroner should also within six months after his election make and subscribe the declaration required by the stat. 9 G. 4. c. 17. § 2. 5. which may be done either in the Court of Chancery or King's Bench, or at the quar-

ter sessions of the county.

Some doubts and difficulties which existed as to the election of coroners (England and Wales), are obviated by stat. 58 G. 3. c. 95. by which it is enacted that the sheriff shall hold his county-court for the election of coroners, at the usual place of election, at the county-court next after receipt of the writ de coronatore eligendo, (or within fourteen days after, if the court falls within six days of the receipt of the writ, or upon the same day, giving ten days' notice. That if the election is not determined on view, a poll shall be taken, which shall be determined within ten days. That the voters (if required) shall swear that they are bona fide freeholders (but the amount of the freehold is not specified). That mortgagors or cestui que trusts shall vote (unless the mortgagee or trustee be in actual possession, who may then vote). That freeholds shall not be split by conveyance for creating votes: and that the expences of the poll shall

Where a sheriff having received the writ! for the election of a coroner more than six days before the next county court, did not at that court proceed to the election, but there gave notice that the election would take place at a court to be holden by adjournment fourteen days after, held (by the Lord Chancellor and the Justices of K. B. & C. P.) that the election at such adjourned court was void, as not being in conformity with the writ. 58 G. 3.2. Russ. 475.

The coroner is chosen for life: and his office does not determine by death of the king, 3 Salk. 100. but may be removed by either being made sheriff, or chosen verderor, which are offices incompatible with the other; or by the king's writ de coronatore exonerando, for a cause to be therein assigned: as that he is engaged in other business, is incapacitated by years, or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it. F. N. B. 163, 4. See post. And by stat. 25 G. 2. c. 29. extortion, neglect, or misbehaviour, are also made causes of removal. See post, II. 3.

There are special coroners, within divers liberties, as well as the ordinary officers in every county: as the Coroner of the Verge, which is a certain compass about the king's court; who is likewise called Coroner of the King's Household. Cromp. Juris. 102.

The king's coroner shall execute his office within the verge. Stat. 32. 8. c. 10. § 7. Some corporations and colleges are licensed by charter to appoint their coroners within their own precincts. 4 Inst. 271. For what arises on the high sea, we read of coroners appointed by the king or his admiral. 2 Hale's Hist. P. C. 53. See post, Coroner of the King's Household.

It is said coroners are of three kinds. 1. By virtue of an office. 2. By charter or com-

mission. 3. By election.

1. The Chief Justice of K. B.—2. The Lord Mayor of London is by charter 18 Edward IV. Coroner of London. See post .-The Bishop of Ely also hath power to make coroners, by a charter of Henry VII.: and there are coroners of particular lords of franchises and liberties, who by charter have power to create their own coroners, or to be coroners themselves, especially in the jurisdiction of the Admiralty, as well as that of the verge above referred to .- 3. The general coroners of counties.—See 1 Hale, 52: 4 Rep. 57:

The coroner of Portsmouth has jurisdiction on board a man of war lying in Portsmouth harbour, on view of the body of a man who had hanged himself on board such vessel; for though the Admiralty have a coroner of their own, he never takes inquisitions of felo de se. Stra. 1097: Andr. 231.

in the county where generally elected. Their authority is judicial and ministerial. cial where one comes to a violent death, and to take and enter appeals of murder, pronounce judgment upon outlawries, &c. And to inquire of lands and goods, and escapes of murderers, treasuretrove, wreck of the sea, deodands, &c. The ministerial power is where the coroners execute the king's writs, on exception to the sheriff, as by his being party to a suit, kin to either of the parties, on default of the sheriff, &c. 4 Inst. 271: 1 Plowd. 73. And the authority of coroners does not determine by the demise of the king. 2 Inst.

Where coroners are empowered to act as judges, as in taking an inquisition of death, or receiving an appeal of felony, &c., the act of one of them is of the same force as if they had all joined; but after one of them has proceeded to act, the act of another of them will be void: and where they are authorised to act only ministerially, in the execution of a process directed to them upon the incapacity of the sheriff, their acts are void, if they do not all join. 2 Hawk. P. C. c. 9. § 45: Hob. 70.

So that coroners as ministers must all join; but as judges, they may divide. But two coroners ought to be judges in redisseisin; and though one serves to pronounce an outlawry, the entry ought to be in the name of all of them: and so of all processes directed to the coroners. Staundf. 53: Jenk. Cent. 85.

If the sheriff is either plaintiff or defendant, or one of the cognisees, the writ must be directed to the coroner. Cro. Car. 300. the coroner is not the officer of B. R. but where the sheriff is improper; not where there is no sheriff; for if the sheriff die the coroner cannot execute a writ. In case of two coroners, if one is challenged, the other may execute the writ, &c., yet both make but one officer: it is the same with two sheriffs of a city, &c. 1 Salk. 144. A venire facias shall go to the coroner, where the sheriff is a party, or the defendant is a servant to the sheriff, &c. But it ought to be on a principal challenge to the favour. Moor, 470.

If there be two sheriffs, and the objection of interest applies to one only, the writ should be directed to the other and not to the coroner. 5 M. & S. 144: Jervis on Coroners, p.

On defaults of sheriffs, coroners are to impanel juries, and return issues on juries not appearing, &c. As the sheriff in his turn might inquire of all felonies by the common law, saving the death of a man; so the coroner can inquire of no felony but the death of a person, and that super visum corporis. 4 Inst. 271. But in Northumberland the coroner by custom may inquire of other felonies. 35 H. 6. 27. But without custom no coroner II. 1. His Power and Duty.—The office of coroners especially concerns the pleas of the crown; and they are conservators of the peace of

shall hold pleas of the crown: but by state Westm. 1. 3 Ed. 1. c. 10. it is enacted, that the coroners shall lawfully attach and present pleas of the crown; and that sheriffs shall have counter-rolls with the coroners, as well

or appeals as of inquests, &c.

Coroners, before the stat. Magna Charta, might not only receive accusations against offenders, but might try them: but since that statute, they cannot proceed so far: and appeals before them are removeable into B. R. &c. by certiorari, directed to the coroners and sheriffs, &c. Though process may be awarded by the sheriff and coroner, or the coroner only, in the county-court on appeals, till the exigent, &c. 2 Hawk. P. C. c. 9. § 41.

By the stat. de officio coronatoris, 4 Ed. 1. st. 2. the coroner is to go to the place where any person is slain or suddenly dead, and shall by his warrant to the bailiffs, constables, &c., summon a jury out of the four or five neighbouring towns, to make inquiry upon view of the body; and the coroner and jury are to inquire into the manner of killing, and all circumstances that occasioned the party's death; who were present, whether the dead person was known, where he lay the night before, &c. Examine the body if there be any signs of strangling about the neck, or of cords about the members, &c. Also all wounds ought to be viewed and inquiry made with what weapons, &c. And the coroner may send his warrant for witnesses, and take their examination in writing: and if any appear guilty of the murder, he shall inquire what goods and lands he hath: and then the dead body is to be buried. A coroner may likewise commit the person to prison who is by his inquisition found guilty of the murder; and the witnesses are to be bound by recognizance to appear at the next assizes, &c.

When the jury have brought in their verdict, the coroner is to inroll and return the inquisition, whether it be brought in murder, manslaughter, &c., to the justices of the next gaol-delivery of the county, or certify it into B. R., where the murderers shall be proceeded against 2 Rol. Abr. 32. Upon an inquisition taken before the coroner, he must put into writing the effect of the evidence given to the jury before him; and bind them to appear, &c., which is to be certified to the court with the inquisition: and for neglecting it the coroner shall be fined. 1 and 2

P. M. c. 13: 1 Lib. Abr. 317.

By stat. 7 G. 4. c. 64. § 4. every coroner upon inquisition taken before him for manslaughter, murder, or for being accessary to murder before the fact, shall put the evidence in writing, and bind the witnesses by recognizance to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine or great sessions, and certify and subscribe the evidence, recognizances, and inquisition, and deliver the same to the proper officer of the court before the opening of the court: and

shall hold pleas of the crown: but by stat. by § 5. coroners neglecting such duties may Western 1. 3 Ed. 1. c. 10. it is exacted that the fixed.

A coroner is not bound ex officio to take an inquisition, but must be sent for. 1 Salk. 377. The coroner has a discretion as to admitting or excluding persons from his court. If he acts corruptly or maliciously, he is liable to a criminal information; but as he is a judge of record an action does not lie against him for turning a person out of a room when he was about to make an inquisition. Garnett v. Ferrand, 6 Barn. & Cres. 611.

The words "suddenly dead," are not to be understood of a fever, apoplexy, &c., and ought not in such cases to intrude into private families; and death by a kick of a horse is not a case for an inquest: violent and unnatural deaths are what the law intends. See

11 East, 229.

The word Murdravit is not necessary in a coroner's inquisition of felo de se; though it is in an indictment for killing another person. 1 Salk. 377. It is not necessary that the inquisition be taken in the place where the body was viewed. 2 Hawk. P. C. c. 9. § 25. But a coroner has no authority to take an inquisition of death, without a view of the body; and if the inquest be taken by him without such view, it is void. 2 Lev. 140.

See 3 Barn. & Ald. 260.

The coroner may in convenient time take up a dead body that hath been buried, in order to view it; but if it be buried so long that he can discover nothing from the viewing it, or if there be danger of infection, the inquest ought not to be taken by the coroner, but by justices of peace, by the testimony of witnesses; for none can take it on view but the coroner. Bro. Coron. 167. 173. If the body is buried, the town shall be amerced: and it shall be, if the body is suffered to lie so long that it sinks. 2 Danv. Abr. 209. &c. Where the body hath lain for some time, that it cannot be judged how it came by its death, that must be recorded; that at the coming of the justices of assize, the town where, &c. may be amerced on sight of the coroner's

A coroner may find any nuisance by which the death of a man happens: and the township shall be amerced on such finding. I Nels. Abr. 536. If one is slain in the day, and the murderer escapes, the town where done shall be amerced, and the coroner is to inquire thereof on view of the body. Stat. 3 Hen. 7. c. 1. A coroner may take an indictment upon view of the body; as also an appeal, within a year after the death of one slain. Wood's Inst. 491. But a coroner super visum corporis, cannot make an inquisition of an accessory after the murder; though he may of accessories before the fact. Moor, 29.

Coroners ought to sit and inquire on the body of every prisoner that dies in prison. They have no jurisdiction within the verge of the king's courts; nor of offences, committed at sea, or between high and law water mark when the tide is in; though they have in arms and creeks of the sea. 3 Inst. 134. See ante, I. ad finem.

Where a coroner's inquest is quashed, he must take a new one super visum corporis.

And a coroner may attend and amend his inquisition in matters of form: but if he misbehaves himself, and a melius inquirendum is granted upon it, that inquisition must be taken by the sheriffs or commissioners, upon affidavits, and not super visum corporis; because none but a coroner can take inquisition super visum, &c., and he is not to be trusted again. 1 Salk. 190: 2 Danv. Abr. 210. See 3 Barn. & A.260. A coroner's inquest was quashed for omitting to state the place where the death happened, or where the body was buried, and for omitting the names of the jurors on the body, and because they had subscribed with the initials only of their christian names. Rex v. Evett, 6 Barn. & C. 247.

A coroner's inquisition being final, the coroner ought to hear council and evidence on both sides. 2 Sid. 90. 101. The coroner must admit evidence, as well against the king's interests, as for it; but it hath been held, that if a person be killed by another, and it is certainly known that he did it, the coroner's jury are to hear the evidence only for the king, and inquire whether the killing were by malice or without malice, &c. Per Hale, C. J. Where a coroner would not admit of evidence against the king, to prove a felo de se to be non compos mentis, his inquisition was set aside: and a new inquisition taken, whereby it was found that the party was non compos. 2 Hale's Hist. P. C. 60. If there be an inquisition of manslaughter or murder, and also an indictment by the grand jury against one, and he is arraigned, and found Not Guilty on the indictment; here it is necessary to quash the coroner's inquisition, or to arraign the party upon it, and acquit him on that also: for otherwise it stands as a record against him, whereon he may possibly be outlawed. 2 Hale, 65. And where a person found guilty by the coroner's inquest, pleads, and is acquitted by the petit jury; they must give in who it was that killed the man, which serves as an indictment against that other person; and if they cannot tell who, they may mention some fictitious name. Ibid.

The court of K. B. granted a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and it was not found that the party had any malicious motive in the publication. R. v. Fleet, 1 Barn. & A. 379.

It is a misdemeanor and indictable to bury a dead body, liable to the coroner's inquest, without sending for the coroner. 1 Salk. 377.

2. His Fees for the Execution of his Duty. By the stat. 3 Ed. 1. c. 10. coroners shall demand or take nothing for doing their office: and by the ancient law of England, none having any office concerning the administration of justice could take any fee for doing his office; and therefore this statute was only in affirmance of the common law. By stat. 3 H. 7. c. 1. upon an inquisition taken on view of the body, the coroner shall have 13s. 4d. fee of the goods of the murderer; and if he be gone, then out of the amercement of the town for the escape; though stat. I H. 8. c. 7. enacts, that where a person is slain by misadventure, the coroner is to take no fee, on pain of 40s. Justices of assize and of peace have power to inquire of and punish extortions of coroners, and also their defaults. Stat.

By the stat. 25 G. 2. c. 29. for every inquisition, not taken upon the view of a body dying in gaol, which shall be taken by any coroner in any township or place contributory to the rates directed by stat. 21 G. 2. c. 29. the sum of 20s., and for every mile which he shall travel from the place of his abode, the farther sum of 9d. shall be paid him out of the money arising by the said rates. And for every inquisition taken upon the view of a body dying in gaol, so much money not exceeding 20s. shall be paid him as the justices at the sessions shall think fit to allow, out of the money arising from the said rates. Provided that over and above the recompence by the statute appointed, the coroner who shall take an inquisition upon the view of a body slain or murdered, shall have the fee of 13s. 4d. payable by stat. 3 Hen. 7. c. 1. out of the goods of the slayer or murderer, or out of the amercements upon the township, if the slayer or murderer escape. Coroners taking farther fees guilty of extortion.

Provided that no coroner of the king's palaces, nor any coroner of the Admiralty, nor of the County Palatine of Durham, nor of the city of London and borough of Southwark, or of any of the franchises belonging to the said city, nor any coronor of any city, borough, town, liberty, or franchise, not contributary to the rates directed by stat. 12 G. 2. c. 29. or within which such rates have not been usually assessed, shall be entitled to any fee, recompence, or benefit given by this act.

Under this act a coroner is not entitled to any compensation for the miles travelled in returning from taking an inquisition. R. v. Oxfordshire Just. 2 Barn. &. A. 203. And if he holds two or more inquisitions at the same place he is only entitled to one sum of 9d. per mile for travelling expences. 5 Barn. & C. 430

The coroners of franchises that do not contribute to the county rate, are not entitled to the fees given by the stat. 25 G. 2. c. 29. nor to any fees to be paid by the county. 7 East's Rep. 52. A mandamus to the justices

in session, to allow an item of charge in the which the coroner of the county cannot intercoroner's account, refused, because the justices were of opinion that under the circumstances there was no ground to suppose that the deceased had died any other than a natural, though a sudden death, and therefore that the inquisition had not been duly taken: and the Court of K. B. saw no reason for interfering with that judgment. 11 East's Rep.

By stat. 1 G. 4. c. 28. to regulate the fees payable to coroners in Ireland on attending inquisitions, grand juries are authorised to present five guineas for each inquest held, provided the whole amount do not exceed forty guineas at each assize.

3. His punishment for the Breach of it .- If a coroner be remiss in coming to do his office, when he is sent for, &c., he shall be amerced by virtue of the above mentioned statute De coronatoribus. S. P. C. 51: Salk. 377: H.

P. C. 170.

If a coroner hath been guilty of any corrupt practice, bribery, &c. in taking the inquisition, a melius inquirendum may be awarded for taking a new one by special commissioners, &c. Coroners concealing felonies, &c. are to be fined, and suffer one year's imprisonment. 3 Ed. 1. c. 9. Also for mismanagement in the coroner, the filing of the inquisition may be stopped. 1 Mod. 82. coroner's inquisition is not traversable: if it be found before the coroner super visum corporis, that one was felo de se, the executors or administrators of the deceased, it is said, cannot traverse it. 3 Inst. 55. But it has been held that the inquest, being moved into B. R. by certiorari, may be there traversed by the executor or administrator of the deceased. 2 Hawk. P. C. c. 9. § 54. And it has been adjudged, that the inquisition of felo de se is traversable, though fugam fecit is not. 2 Leo. 152.

4. His Removal .- If a coroner be convicted of extortion, wilful neglect of duty, or misdemeanor in his office, the court before whom he shall be so convicted may adjudge that he shall be removed from his office. See stat. 25 G. 2. c. 29. And coroners may be removed by the writ de coronatore exonerando for any reasonable cause assigned in the writ, and new coroners be elected in their stead. writ is issued on petitition of the freeholders, and must state the grounds of objection to the coroner's continuance in his office, and should be verified by affidavit. The writ commands the sheriff to discharge the former coroner, on which the writ de coronatore eligendo issues. In practice both writs are issued together, but the writ de coronatore exonerando must be executed first. 1 Jac. & Walk. 454: Jervis on Coroners, 69.

For farther matter on this subject, see 2 Hawk. P. C. c. 9. throughout, and Jervis on

Coroners.

CORONER OF THE KING'S HOUSEHOLD, hath an exempt jurisdiction within the verge, 1. c. 18.

meddle with; as the coroner of the king's house may not intermeddle within the county out of the verge. 2 Hawk. P. C. c. 9. § 15. If an inquisition be found before the coroner of the county, and the coroner of the verge, where the homicide was committed in the county, and it is so entered and certified, it will be error. 4 Rep. 45. But if murder be committed within the verge, and the king removes, before any indictment taken by the coroner of the king's household; the coroner of the county and the coroner of the king's house shall inquire of the same. And according to Sir Edward Coke, the coroner of the county might inquire thereof at the common 2 Hawk. P. C. c. 9. § 15: 3 Inst. 550. If the same person be coroner of the county, and also of the king's house, an indictment of death taken before him as coroner, both of the king's house, and of the county, is good. 4 Rep. 46: 2 Inst. 134.

By the stat. 33 H. 8. c. 12. § 1. 3. it is ordained, that all inquisitions made upon the view of persons slain within any of the king's palaces or houses, or any other house or houses wherein his majesty shall happen to be abiding in his royal person, shall be taken by the coroner for the time being of the king's household, without any assistance of another coroner of any shire within this realm; by the oaths of twelve or more of the yeoman officers of the king's household, returned by the two clerks controllers, the clerks of the checks, and the clerks marshal, or one of them, of the said household, to whom the said coroner of the household shall direct his precept; and the said coroner shall certify under his seal, and the seals of such persons as shall be sworn before him, all such inquisitions before the master or lord steward of the household; who hath the appointment of such coroner, &c.

CORONER OF LONDON. By the charter of King Edward IV. the mayor and commonalty of London may grant the office of coroner to whom they please; and no other coroner but he that belongs to the city, shall have any power there. Also the lord mayor, &c. may choose two coronors in Southwark. When any one is killed, or comes to an untimely death in London, the coroner upon notice shall attend where the body is, and forthwith cause the beadles of the ward to summon a jury to make the necessary inquiry, how such person came by his death: and after inquisition taken he shall give a certificate to the church-warden, clerk, or sexton of the parish, to the intent the corpse may be buried. The coroner's fees here formerly amounted to 25s., now to above double that sum; unless the friends of the deceased are poor, and then he shall execute his office for nothing. Cit. Lib. 46,

What anciently belonged to coroners, you may read at large in Bracton, lib. 3. tract. 2. c. 5, 6, 7, and 8: Britton, c. 1: and Fleta, lib.

COLONATORE ELIGENDO. A writ which lies on the towns situated within his domaine, on the death or discharge of any coroner, directed to the sheriff out of the Chancery, to call together the freeholders of the county, for the choice of a new coroner; and to certify into the Chancery both the election and the name of the party elected, and also to give him his oath, &c. Reg. Orig. 177: F. N. B. 163. See tit. Coroner: and Jervis on Coro-

CORONATORE EXONERANDO. A writ for the discharge of a coroner, for negligence, or insufficiency in the discharge of his duty; and where coroners are so far engaged in any other public business, that they cannot attend the office, or if they are disabled by old age or disease to execute it, or have not sufficient lands, &c., they may be discharged by this writ. 2 Inst. 32: 2 Hawk. P. C. c. 9. § 12. But if any such writ be grounded on an untrue suggestion, the coroner may procure a commission from the Chancery to inquire thereof; and if the suggestion be disproved, the king may make a supersedeas to the sheriff, that he do not remove the coroner; or if he have removed him, that he suffer him to execute the office. Reg. Orig. 177, 178: F. N. B. 164. See tit. Coroner. As also the coroner's is an office of freehold, the Court of Chancery, with whom the power of granting this writ resides, will not suffer it to issue, unless on affidavit, that the defendant has been served with notice of the petition for it. 3 Atk. 184. And on an election of a new coroner by a majority of the freeholders, the power and authority of the old one is ipso facto extinguished. See tit. Coroner: and Jervis on Coroners.

CORONE, Fr.] All matters of the crown were heretofore reduced to this law head or title; they are the things that concern treason, felony, and divers other offences, by the common law, and by statute. Shep. Epit. 367.

CORPORAL OATH. And how it is administered. See tit. Oath.

CORPORATION, CORPORATIO.] A body politic or incorporate; so called as the persons composing it are made into a body, and of capacity to take and grant, &c. Or, it is an assembly and joining together of many into oue fellowship and brotherhood, whereof one is head and chief, and the rest are the body; and this head and body knit together make the corporation: also it is constituted of several members, like unto the natural body, and framed by fiction of law, to endure in perpetual succession.

With respect to corporations, or communities of old, the forming of cities into communities, corporations, or bodies politic, and granting them the privilege of municipal jurisdiction, contributed more than any other cause to introduce regular government, police, and arts, and to diffuse them over Europe. Louis the Gross, in France, to counterbalance

called charters of community, and formed the inhabitants into corporations, or bodies politic, to be governed by a council and magistrates of their own nomination. About the same period the great cities in Germany began to acquire like immunities; and the practice quickly spread over Europe, and was adopted in Spain, England, Scotland, and all the other feudal kingdoms. Robertson's Hist. Emp. C. V. 1 v. 32. 34. &c.

Of corporations some are sole, some aggregate: sole, when in one single person, as the king, a bishop, dean, &c. Aggregate, which is the most usual, consisting of many persons, as mayor and commonalty, dean and chapter, &c. Likewise corporations are spiritual or temporal; spiritual, of bishops, deans, archdeacons, parsons, vicars, &c. Temporal, of mayors, commonalty, bailiffs and burgesses, &c. Some corporations are of a mixed nature, composed of spiritual and temporal persons, such as heads of colleges and hospitals, &c. All corporations are said so be ecclesiastical, or lay.

Lay corporations are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an interregnum, or vacancy of the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London and other towns: and some for the better carrying on of divers special purposes, as churchwardens, for conservation of the goods of the parish; the College of Physicians, and company of Surgeons in London, for the improvement of the medical science; the Royal Society for the advancement of natural knowledge; and the Society of Antiquaries, for promoting the study of antiquities. And among these general corporate bodies, the Universities of Oxford and Cambridge must be ranked. 3 Burr. 1650.

The eleemosynary sort are, such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent: and all colleges, both in our Universities, and out of them. Such as at Westminster, Eton, Winchester, &c., which colleges are founded for two purposes. 1. For the promotion of piety and learning, by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with his potent vassals, conferred new privileges greater ease and assiduity. And all these

eleemosynary corporations are, strictly speak. I tion, it shall be intended that it did originally ing, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies. 1 Ld. Raym. 6. They are, in fact, lay corporations, because they are not subject to the jurisdiction of the ecclesiastical courts, or to the visitations of the ordinary or dioccsan in their spiritual characters. 1 Comm. 471.

I. How Corporations are created. II. Their Interest and Jurisdiction.

III. How far their Acts are binding.

IV. How they are visited.

V. How they are dissolved.

I. How Corporations are created.—Bodies Politic or incorporate may commence and be established three manner of ways, viz. by prescription, by letters patent, or by act of parliament; but most commonly begin by patent, or charter. 1 Inst. 250: 3 Inst. 202:

3 Rep. 73.

In making aggregate corporations, there must be, 1. Lawful authority. 2. Proper persons to be incorporated. 3. A name of incorporation. 4. A place, without which no corporation can be made. 5. Words sufficient in law to make a corporation. 10 Rep. 29. 123: 3 Rep. 73. The words incorpora, funda, &c., are not of necessity to be used in making corporations; but other words equivalent are sufficient; and of ancient time, the inhabitants of a town were incorporated, when the king granted to them to have Guildam Mercatoriam. 2 Danv. Abr. 214. He that gave the first possessions to the corporation is the The parishioners or townsmen of a parish or town, and tenants of a manor, are to some purposes a corporation. Co. Lit. 95.

If the king grants lands to the inhabitants of B., their heirs and successors, rendering a rent, for any thing touching these lands, this is a corporation, though not to other purposes: but if the king grants lands to the inhabitants of B., and they be not incorporated before, if no rent be reserved to the king, the grant is void. 2 Danv. 214. If the king grants to the men of Islington to be discharged of toll, this is a good corporation to this intent: but not to purchase, &c. And by special words the king may make a limited corporation, or a corporation for a special purpose. Ibid.

A corporation may be created by implication from the provisions of an act of parliament, though there are no express words creating it. Thus, where it appeared from the act that certain conservators of a river were to take lands by succession, and not by inheritance, they were held a corporation by implication. 10 Barn. & C. 349: 2 B. & Adol.

London is a corporation by prescription: but though a corporation may be by prescrip-

derive its authority by grant from the king; for the king is the head of the commonwealth, and all the commonwealth in respect of him, is but one corporation; and all other corporations are but limbs of the greater body. 1 Lil. Abr. 330. A mayor and commonalty, or corporation, cannot make another corporation or commonalty. 1 Sid. 290. The city of London cannot make a corporation, because that can only be created by the crown; but London, or any other corporation, may make a fraternity. 1 Salk. 193.

The parliament by its absolute and transcendant authority, may perform this, or any other act whatsoever: and actually did perform it to a great extent, by stat. 39 Eliz. c. 5., which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble: and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the crown; and the king may prevent it when he pleases. And, in the particular instance before mentioned, it was done, as Sir Edward Coke observes, 2 Inst. 722. to avoid the charges of incorporation and licences of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

Where the words of a charter are doubtful, they may be explained by contemporaneous

usage. 3 T. R. 271. 288. n.

The constitution of a corporation, as settled by act of parliament, cannot be varied by the acceptance of any charter inconsistent with 6 T. R. 268.

A charter cannot be partially accepted, whether a charter of creation, or one granted to an existing corporation. 4 Barn. & C. 781. A college is not bound to accept an accession to its foundation. 1 Jac. R. 391.

The king (it is said) may grant to a subject the power of erecting corporations. (Bro. Abr. tit. Prerog. 53: Viner, Prerog. 88. pl. 16; though the contrary was formerly held. Year Book, 2 H. 7. 13.); that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument; for though none but the king can make a corporation, yet qui facit per alium, facit per se. 10 Rep. 33. this manner the chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.

When a corporation is erected, a name must be given to it; and by that name alone it must sue and be sued, and do all legal acts, though a very minute variation therein is not material. 10 Rep. 122. A foreign corporation may sue in this country by its corpora-

tion name. and, though it is the will of the king that successors. erects the corporation, yet the name is the knot of its combination, without which it Gilb. Hist. C. P. 182. The name of incorporation, says Sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the king bap-

tizes the corporation. 10 Rep. 28.

A non-description of a corporation in a conveyance of part of their estates for the redemption of the land tax was held immaterial. 6 Taunt. 467: and see 7 Taunt. 546.

And it may change its name, as corporations frequently do in new charters, and will still retain its former rights and privileges.

No persons shall bear office in any corporation, &c., but such as have received the sacrament of the church, and taken the oaths. Stat. 13 Car. 2. st. 2. c. 1. But see the stat. 5 G. 1. c. 6. confirming officers and corporations. See tits. Bye-Laws, Oaths, Nonconformists.

What persons are capable of being elected members of a corporation. See Hardw. 23.

II. Their Interest and Jurisdiction .-When a corporation is duly created, all incidents, as to purchase and grant, sue and be sued; 2 B. & Adol. 840; &c. are tacitly annexed to it; and although no power to make laws, statutes, or ordinances, is given by a special clause to a corporation, it is included by law in the very act of incorporating. Co. Lit. 264. A new charter doth not merge or extinguish any of the ancient privileges of the old charter. And if an ancient corporation is incorporated by a new name, yet their new body shall enjoy all the privileges that the old corporation had. Raym. 439: 4 Rep. 37.

There are usually granted in charters to corporations, divers franchises; as felons' goods waifs, estrays, treasure-trove, deodands, courts, and cognizance of pleas, fairs, markets, assize of bread and beer, &c. 4 Rep. 65. Actions arising in corporations may be tried in the corporation courts; but if they try actions which arise not within their jurisdictions, and encroach upon the common law, they shall be punished for it. Lutw. 1571, 1572. Actions triable there must, in general, mean those actions wherein the corporation is not interested.

There may be a corporation without a head; but where there is a head, all acts ought to be by and to the head; nor can they sue without such head; and if he dies, no-

Ry. & Moo. Ca. 190. Such ble: so it is, if a fcoffment be made of land name is the very being of its constitution; to a dean and chapter, without mention of

In a case of sole corporation, as bishop, dean, parson, &c., no chattel, either in action could not perform its corporate functions. or possession, shall go in succession; but the executors or administrators of the bishop, parson, &c. shall have them; but it is otherwise of a corporation aggregate, as a dean and chapter, mayor and commonalty, and the like; for they in the judgment of law never But the case of the chamberlain of London differs from all these: his successor, in his own name, may have execution of a recognizance acknowledged to his predecessor for orphanage money; and the reason is, because the corporation of the chamberlain is by custom, which hath enabled the successor to take and have such recognizances, obligations, &c., that are made to his predecessor. Terms de la Ley.

Though a sole corporation cannot generally take in succession goods and chattels, &c., yet it may take a fee simple in succession, by the words successors. Co. Lit. 8, 9. 46. Aggregate corporations may take not only goods and chattels, but lands in fee-simple. without the word successors, for the reason before-mentioned. 4 Inst. 249. Succession in a body politic is an inheritance in a body private. If a lease for years be made to a bishop and his successors, it is said his executors shall have it in auter droit; for regularly no chattel can go in succession in case of a sole corporation, no more than if a lease be made to a man and his heirs, it can go to this heirs. Co. Lit. 46.

Grants of corporations are to be by deed, under their common seal, and are good without delivery, for the common seal gives perfection to corporation deeds. Dav. 44.

But though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate without a formal delivery, if done with that intent, yet it has no such effect if the order for affixing the seal be accompanied by a direction to their clerk, to retain the conveyance till accounts were adjusted with the purchaser. 9 East's Rep. 360.

An obligation sealed with the common seal of a corporation, if the mayor signs it, he is suable, if the corporation be dissolved: but if two of the members sign it, the particular persons are not bound by it. 2 Lev. 137: Raym. 152. A release of a mayor for any sum of money due to the corporation, made in his own name, is not good in law; the corporation must join and do it by their common scal. Terms de la Ley.

A corporation which hath a head, may make a personal command without writing; but a corporation aggregate without a head thing can be done in the vacancy. 10 Rep. 20. 32: Co. Lit. 264. If land be given to a mayor and commonalty for their lives, they have an estate by intendment not determination. Contact the state of th

Vol. I.-56

terest or title, 1 Ventr. 47, 48. Such a cor- that the act of detention done by their serparation may appoint a bailiff to take a distress, without deed or warrant. 1 Salk. 191. But cannot without deed command a bailiff to enter into lands for a condition broken; for such command without deed is void. Cro. 815.

Though a corporation cannot do an act in pais without their common seal, they may do an act upon record; and the reason is, because they are estopped by the record to say it is not their act. 1 Salk. 192. A promise to a corporation is good without deed. 2 Lev. 252. The head of a corporation aggregate may not be charged with the act of his predecessor if it be not by common seal, or for such things as come to the use of the whole body or society. 1 And. 23. 196. Assumpsit will lie against a trading corporation, whose power of drawing and accepting bills is recognized by statute. 5 Barn. & A. 204. And see 3 Barn. & A. 1. But it is not settled whether a company incorporated for purposes of manufactory, can contract otherwise than by their seal for service, work, and the supply of goods for carrying on their business. Dunston v. Imperial Gas Company, 3 B. & Adol. 125. A corporation may prove debts under a commission by their agent, under a general power of attorney. 1 Swanst. 10.

A corporation may do an act in that capacity to one of themselves in his natural capacity; and any member in his natural capacity may perform an act to the corporation in his politic capacity; and so they may sue one another in their distinct capacities. 1 Shep. Abr. 436. Trespass for an assault and battery, &c., will not lie against a corporation, but it must be brought against the persons that do the trespass by their proper names: though if the beasts of the corporation trespass on a man in his ground, action of trespass lies against them for this. Process of outlawry will not lie against a corporation, nor capias or exigent, but distress. 22 Ass. 67: 39 Ed. 3. 13: 21 Ed. 4. A suit by a corporation does not become defective on the death of one of its members. 3 Swanst. 138.

A corporation cannot sue, or appear in person, but by attorney: they cannot commit treason or felony, or be excommunicate, &c. They may not be executors, or administrators, be joint tenants, trustees, &c. Nor shall the members of a corporation be regularly witnesses for the corporation. 10 Rep. 32: 11 Rep. 98: Co. Lit. 134. But they may be disfranchised, and then be witnesses, though not surrender by consent. Yet in some cases the judges now admit their testimony without disfranchisement where the interest is remote. Attachment doth not lie against a corporation. Raym. 152.

Trover lies against a corporation; and if it be essential to the conversion of the property, that they should have authorized it under their seal, such authority will be presumed after verdict; but it does not seem necessary) or the mences of the commerce. Alone the

vants within the scope of their employment should be authorized under their seal. borough v. Bank of England, 16 East's Rep. 6.

A charter granting jurisdiction to borough magistrates over a district not within the borough does not exclude the county justices, without express words. 3 T. R. 279. A foreign corporation may sue in this country by their corporate name. 1 Ry. & Moo. Ca.

Corporations may have power not only to enfranchise freemen, but to disfranchise a member, and deprive him of his freedom, if he doth any act to the prejudice of the body, or contrary to his oath, &c. Though for conspiring to do any thing contrary to his duty, or for words of contempt against the chief officers, he may not be disfranchised, but he may be committed till he find sureties for his good behaviour. 11 Rep. 98: 5 Mod. 257. A corporation cannot disfranchise for breach of a bye law. 1 Lil. 331. And one wrongfully disfranchised may be restored, and have his remedy by mandamus, &c. in B. R. An alderman or freeman of a corporation cannot be removed from his freedom or place without good cause, and a custom to remove them ad libitum is void, because the party hath a freehold therein. Cro. Jac. 540.

A bye-law made by a corporation may begood in part, and bad in part, where the two parts are entire and distinct from each other. 8 Term Rep. 356.

A corporation created by letters patent, with a power of making bye-laws, cannot make any laws to incur a forfeiture. Nor can they if created by act of parliament, unless such a power is given. 1 Term Rep. 118.

A bye-law made by a company in a corporation to restrain the number of apprentices to be taken by any one of the members is void. 7 Term Rep. 543.

A bye-law made by a company carrying on trade in partnership, to prevent any one of the members carrying on a separate trade on his own account is good. 8 Term Rep. 352.

A power granted by charter to a company exercising a particular trade in a certain place to make bye-laws for the government of all persons exercising that trade in that place, enables it to make bye-laws binding as well on persons so exercising the trade, who are not members of the company, as on those who are. 1 H. Blackst. 370.

Where by the custom all persons having served an apprenticeship to a free burgess, carrying on trade, were entitled to be free burgesses, it was held that a clerk having

served under articles to an attorney was not within the custom. 7 Barn. & C. 630.

A person may be bound to the good behaviour for words spoken against mayors, &c., but he may not be indicted for it: and it justices of a corporation deny to do right, it is a forfaiture of their exemption from the inquire

Head officers of corporations are to redress abuses of merchant-strangers, &c., or the franchise shall be seized; stat. 9 Eliz. 3. § 1; and have authority in many cases by statute; for which see title Mayors.

No strangers shall sell by retail any woollen or linen cloth, or mercery wares, in corporate towns, except at fairs, on pain of forfeiture, But such persons may sell wares by wholesale, and cloth of their own making by retail. 1 and 2 P. & M. cap. 7. Bodies poli. tic and ecclesiastical may make leases for three lives, or twenty-one years, under the restrictions in the acts 1 Eliz. c. 19: 13 Eliz. c. 20 .- See title Leases. If land is given in fee to a dean and chapter, or to a mayor and commonalty, &c., and after such body politic or incorporate is dissolved, the donor shall have the land again, and not the lord by escheat. Co. Lit. 31.

The corporation of the city of London is to answer for all particular misdemeanors, which are committed in any of the courts of justice within the city; and for all other general misdemeanors committed within the city; so it is conceived of all other corporations. 1 Lil. Abr. 329. If a common officer of a town doth any thing for their common use, it is reasonable the corporate town should be an-

swerable for it. 1 Leon. 215.

The stat. 32 G. 3. c. 58. § 4. does not bind an officer of a corporation, having custody of the records, to permit any member of the corporation to inspect the order for the admission and swearing in of the freemen, &c. of the corporation; and therefore where the townclerk offered to permit an inspection of the entries made upon stamps, of the admission and swearing in of burgesses, but refused an inspection of the common council book, in which it was usual to enter the order for the admission and swearing in of the burgesses, the Court of K. B. held that he did not thereby incur a pen-Davies v. Humphreys, 3 Maule & S. alty.

By 2 and 3 W. 4. c. 69. no municipal corporation or any officer thereof, shall apply any money, stock, securities, &c. of the corporation in discharge or satisfaction of any expences incident to the election of any member of parliament, or of any candidate. § 3. All conveyances of any lands, &c. of the corporation for such purpose to be void. corporation officers and others applying money, &c. contrary to the act, shall be liable to make good the amount. § 7. Members of corporations concurring in any such application, &c. shall be guilty of a misdemeanor.

III. How far their Acts are binding .-- A corporation is properly an investing the people of the place with the local government thereof, and therefore their laws shall be binding to strangers; but a fraternity is some people of a place united together in respect of a mystery and business into a company, and their laws and ordinances cannot bind strangers, for they have not a local power. Salk. 193.

No masters and wardens, &c. of any mystery, or other corporation, shall make any byclaws or ordinances in diminution of the king's prerogative, or against the common profit of the people; except the same be approved by the Lord Chancellor, or chief justices, &c. on pain of 40l. And such bodies corporate shall not make any acts or ordinances for the restraining persons to sue in the king's courts for remedy, &c. under the like penalty. Stat. 19 H. 7. c. 7. Ordinances made by corporations, to be observed on pain of imprisonment, or of forfeiture of goods, &c. are contrary to Magna Charter. 2 Inst. 47. 54.

But penalties may be inflicted by bye-laws, which may be recovered by distress or action of debt: and a custom for the Lord Mayor and aldermen of London to commit a citizen for not accepting of the livery, &c. was held a good custom, being for the good government

of the city. 5 Mod. 320.

Corporations may not, by bond, or otherwise, restrain any apprentice, &c. from keeping a shop in the corporation, under the penalty of 40l. Stat. 28 H. 8. c. 5. See tit. Bye-laws.

In acts done by corporations, the consent of the major part shall be binding. Stat. 33 H.

This act clearly vacates all private statutes, both prior and subsequent to its date, which require the concurrence of more than a majority to give validity to any grant or election. Blackstone (1 Comm. 478.) is of opinion, that it has not affected the negative given by the statutes to the head of any society; but it seems that this opinion may be questioned; especially in cases where, in the first instance, he gives his vote with the members of the society. It is the usual language of college statutes to direct that many acts shall be done by guardianus et major pars sociorum, or magister, or propositus et major pars; and it has been determined by the Court of King's Bench (Cowp. 377.) and by the visitor of Clare Hall, Cambridge, and also by the visitors of Dublin College, that this expression does not confer upon the warden, master, or provost, any negative; but that his vote must be counted with the rest, and he is concluded by a majority of votes against him.

IV. How they are visited.—Corporations being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, cither sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all suffragan bishops: in ecclesiastical matters, the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation, the ordinary neither can,

nor ought to visit. 10 Rep. 31.

The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation; the one fundatio incipiens, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other fundatio perficiens, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital. 10 Rep. 33. But here the king has his prerogative; for, if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And in general the king being the sole founder of all civil corporations, and the endower, the perficient founder of all eleemosynary ones, the right of visitation of the former results, according the rule laid down, to the king; and of the latter to the patron or endower.

The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction; which is the Court of King's Bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. However, though the Court of King's Bench, upon a proper complaint and application, can prevent and punish injustice in civil corporations, as in every other part of their jurisdiction; it is not the language of the profession to call that part of their authority a visitatorial power. 1 Comm. 481. n.

As to eleemosynary corporations, by the dotation, the founder and his heirs are of common right the legal visitors; but if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the Universities; these were all of them considered by the popish clergy as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and, with regard to hospitals, it has long been held (Y. B. 8 Ed. 3. 28: Ass. 29.) that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This

and the bishops in their several dioceses are right of lay patrons was indeed abridged by stat. 2 H. 5. c. 1. which ordained that the or-dinary should visit all hospitals founded by subjects; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by stat. 14 Eliz. c. 5. which directs the bishop to visit such hospitals only, where no visitor is appointed by the founder thereof: and all hospitals founded by virtue of the stat. 89 Eliz. c. 5. are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit. 2 Inst. 575.

Colleges in the Universities (whatever the common law may now, or might formerly judge) were certainly considered by the popish clergy, under whose direction they were, as ecclesiastical, or at least as clerical corporations; and therefore the right of the visitation was claimed by the ordinary of the diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull, to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese in which Oxford was formerly comprised, has immemorially exercised visitatorial authority (that is, the Bishop of Lincoln, from whose diocese that of Oxford was taken); which can be ascribed to nothing else but his supposed title as ordinary to visit this, among other ecclesiastical foundations.

But, whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law. Ld. Raym. 8. And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of Philips v. Bury. Ld. Raym. 5: 4 Mod. 106. In this the main question was, whether the sentence of the Bishop of Exeter who, (as visitor) had deprived Doctor Bury, the rector of Exeter College, could be examined and redressed by the Court of King's Bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But Lord Chief Justice Holt was of a contrary opinion; and held that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party grieved ought to have redress: the founder having reposed in him so entire a the law doth annex a condition to every such confidence that he will administer justice im- grant, that if the corporation be dissolved, the partially, that his determinations are final, and examinable in no other court whatever. And, upon this a writ of error being brought into the House of Lords, they concurred in Sir John Holt's opinion, and reversed the judgment of the Court of King's Bench. To which leading case all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the Court of Kings Bench will interpose to prevent a defect of justice. Stra. 797. Also it is said (2 Lutw. 1556.) that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise where he mistakes in a thing within his power.

No particular form of words are necessary for the appointment of a visitor. Sit visitator, or visitationem commendamus, will create a general visitor, and confer all the authority incidental to the office; 1 Burr. 199; but this general power may be restrained and qualified, or the visitor may be directed by the statutes to do particular acts, in which instance he has no discretion as visitor; as where the statutes direct the visitor to appoint one of two persons, nominated by the fellows, to be the master of a college, the Court of King's Bench will examine the nomination of the fellows, and, if correct, will compel the visitor to appoint one of the two. 2 Term Rep. 290. New ingrafted fellowships, if no statutes are given by the founders of them, must follow the original foundation, are subject to the same discipline and judicature. Burr. 203. It is the duty of the visitor, in every instance, to effectuate the intention of the founder, as far as he can collect it from the statutes, and the nature of the institution; and in the exercise of this jurisdiction he is free from all control. Lord Mansfield has declared, that the visitatorial power, if properly exercised, without expence or delay, is useful and convenient to colleges; and it is now settled and established that the jurisdiction of a visitor is summary, and without appeal from it. 1 Burr. 200. See 1 Comm. 479. &c.

V. How they are dissolved.—A corporation may be dissolved, for it is created upon a trust; and if that be broken it is forfeited. 4 Mod. 58.

Corporations are dissolved by forfeiture of their charter, misuser, &c. upon the writ quo warranto brought: by surrender, or by act of parliament: and if they neglect to choose officers, or make false elections, &c. it is a forfeiture of the corporation. 4 Rep. 77.

Corporations may be dissolved in several ways, which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for '

grantor shall have the lands again, because the cause of the grant faileth. Co. Lit. 13. The grant is indeed only during the life of the corporation, which may endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of any other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities. 1 Lev. 237.

A corporation may be dissolved. 1. By act of parliament; which is boundless in its operations. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king, which is a kind of suicide.

4. By forfeiture of its charter, through negligence or abuse of its franchise; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and therefore the incorporation is void. And the regular course is to bring an information in nature of a writ of quo warranto, to inquire by what warrant the members now exercise their corporative power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state, in the reign of King Charles and King James the Second, particularly by seizing the charter of the City of London, gave great and just offence, though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by act of parliament, stat. 2 W. & M. c. 8. after the revolution. And by the same statute it is enacted, that the franchises of the City of London shall never more be forfeited for any cause whatsoever. And because by the common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter, or established by prescription, it is now provided by stat. 11 G. 1. c. 4. that no corporation shall be dissolved, for any default to choose a mayor, &c., but the electors are still to proceed to election; and if no election be made, the Court of King's Bench shall issue a mandamus requiring the electors to choose such mayor, &c. See Rex v. Mayor of Norwich, 1 B. & Adol. 316.

The proclamation of Jac. II. in the 4th year of his reign, for restoring corporations to their ancient charters, &c., operates (when accepted) as a grant of revival to such of the old corporations as had surrendered their corporate franchises to Car. II. (but which surrenders were not enrolled) who had granted new charters, and overturns such new charters. 3 T. R. 139.

When an integral part of a corporation is gone, and the corporation has no power to restore it, or to do any corporate act, the corporation is so far dissolved, that the crown may grant a new charter. 3 T. R. 199: and see 3 East, 213.

By stat. 2 Anne, c. 20. where persons intrude into the office of mayor, &c., of a corporation, a quo warranto shall be brought against the usurpers, who shall be ousted, and fined: and none are to execute an office in a corporation for more than a year. See farther on this subject Kyd's Treatise on the Law of Corporations;—and see also particularly this Diet. tits. Mortmain, Mandamus, Quo Warranto.

To prevent improper conduct in trading corporations in elections, and in disposing of the joint stock, it is by stat. 7 G. 3. c. 48. enacted, that no member of such corporations shall be admitted to vote in the general courts, until he shall have been six months in possession of the stock necessary to qualify him, unless it comes to him by bequest, marriage, succession, or settlement. And by the same statute, only one half yearly dividend is to be made by one general court, five months at least from the preceding declaration of a dividend; and questions for increasing the dividend are to be decided by ballot. See tit.

East India Company.

To facilitate the proceedings in cases of mandamus and quo warranto, and to prevent any undue advantage on either side, the stat. 12 G. 3. c. 21. provides that where any person shall be entitled to be admitted a freeman, &c. of any corporation, &c., and shall apply to the proper officer to be admitted, and shall give notice of his intention to move the Court of King's Bench for a mandamus, in case of refusal, the officer shall pay all the costs of the application. And the same statute enacts, that the proper officer shall, on the demand of two freemen, permit them and their agents to inspect the entries of admission of freemen, and to take copies and extracts, under penalty of 100l.

A bill has just been introduced into the House of Commons by Lord John Russell for the regulation of municipal corporations in England and Wales, which is intended to extend to 183 cities and towns, omitting only a few corporations of trifling importance. The following is a short outline of the provisions of the bill, some of which will, in all probability, undergo considerable alterations be-

fore they pass into a law.

The bill is entitled "A Bill to provide for the Regulation of Municipal Corporations in England and Wales." It recites, that divers bodies corporate at sundry times have been constituted within the cities, towns, and boroughs of England and Wales, to the intent that the same might for ever be and remain well and quietly governed; but that, partly by defects in the charters by which the said bodies corporate have been constituted, partly by neglect and abuse of the privileges by such charters granted and confirmed to the inhabitants of the said cities, towns, and horoughs,

and partly by change of circumstances since the said charters were granted, the bodies corporate, for the most part, have not of long time been and are not now useful and efficient instruments of local government; and first it enacts the repeal of all acts, charters, and customs inconsistent with the bill. The bill commences with the usual interpretation clause, defining the construction of certain terms. It then provides as follows:—

1. That after the first election of councillors, the body corporate shall take and bear the name of "the mayor and burgesses of" (city and borough), and be constituted a corporation.-2. That the boundaries of certain cities and boroughs, in certain sections of schedules (A.) and (B.) of the bill, shall be the boundaries settled by the Parliamentary Boundary Act, 2 and 3 W. 4. c. 64; and that the boundaries of certain other sections in the said schedule shall be settled by the King in council, determined by a commission-That the municipal constituency shall be occupiers of houses, warehouses, counting houses, or shops, rated for three years to the relief of the poor of the borough, and who have paid all rates due for six months before the revision, and who shall be entitled to be burgesses, excluding all who, within twelve months of registration, shall have received parochial relief, or other alms, or any person or charitable allowance from any fund entrusted to the charitable trustees of such borough thereinafter mentioned; and that all occupiers whose landlords are rated or rateable to the poor may claim to be rated, as in the English Reform Bill; and any person coming to inhabit after the rate for the current year is made, may claim to be put upon it.-4. The burgesses who cease to be occupiers within the borough, or neglect to pay their rates, shall be omitted from the burgess roll; but within two years, may be restored at the next revision of the burgess roll: and that after the passing of the act no person shall be elected, admitted, or enrolled a citizen, freeman, liveryman, or burgess, or by any name, a member of any body corporate, in respect of any right or title other than that of being a settled rate-payer within such borough, according to the meaning and provisions of the bill .- 5. That burgesses shall not have individual benefit from common lands and public stock, &c., who were not entitled thereunto before the passing of the act.-6. That all exclusive rights of trading shall be abolished. -7. That overseers make out alphabetical lists of persons entitled to vote by certain forms; that persons omitted in the lists may give notice of claim, and lists of claimants and persons objected to, to be published; power to the mayor to revise the lists, and, upon due proof, to insert and expunge names, with certain powers to rectify mistakes in the lists; publication of the lists provided for as in the Reform Bill, and all expenses of regis-

borough fund .-- 8. That a mayor and town | municipal purposes; all corporate property council be chosen in every borough; the mayor to be elected by the council; the councillors to be chosen by the burgesses on the 25th day of October next; one-third of the council to go out of office annually; any ex-councillor to be capable of re-election.—9. The larger class of towns (those with a population of 25,000) to be divided into wards: the mode of voting to be by ticket or voting paper, containing the christian names and surnames of the persons for whom each burgess votes, with their respective places of abode and description, signed by the burgess; all elections to be concluded in one day, and polling booths in the discretion of the mayor; no inquiry of the voter, except as to his identity, and whether he has voted before at the same election; the register to be final.-10. All existing mayors and aldermen, and councils, to go out of office, on election of new councils under the act.-11. Mayor to be annually elected by the council.-12. No qualification for mayor, council, or other municipal officers, other than that of burgess; fines for refusal of office; any public officer becoming bankrupt, or declared insolvent, to vacate office.—13. The mayor to be a justice of the peace for the borough and for the county, and to act as a returning officer at elections of members to serve in parliament during the term of his said mayoralty.—14. Power to the town council to appoint town clerk, treasurer, and other officers: to take security for due discharge of their official duties, and to determine salaries.—15. Treasurers to pay no money but by order in writing of a quorum of the town conneil, countersigned by town clerk, with summary powers against officers for not accounting.—16. Town councils of cities and towns which are counties, to name a sheriff; and in certain boroughs to appoint a coroner.—17. Town clerks and officers removed under the provisions of the act, to receive compensation, if they can agree, the same with the town councils: in case of non-agreement, the Lords of the Treasury to determine amount.—18. Town councils to nominate sub-committees.—19. All licenses of publicans and victuallers to be granted by town councils.—20. Town councils to appoint charitable trustees to administer all charity funds vested in municipal corporations; such trustees to appoint a secretary and treasurer. -21. Town councils to be trustees of all acts of which corporators are ex officio trustees.-22. A police committee to consist of mayor and councilmen; such committee to appoint constables for the borough; constables to be for the county as well as borough; powers of constables defined.—23. Borough magistrates to appoint annually a certain number of persons to act as special constables, in case of need to be called out on warrant of magistrates when they shall deem ordinary police insufficient.—24. Limited powers of rate for

and all fines to be received on account of borough fund.-25. Power of bye-laws vested in the town-council.-26. Burgesses annually to choose two auditors (not to be members of council, nor to be town clerk, treasurer, or charitable trustee,) and mayor to choose a third; the three, half-yearly, to examine and audit borough accounts; all accounts to be annually published.—27. Town councils of certain boroughs to nominate persons for a commission of justices of the peace, such commission to be confirmed by the crown; and any town councils petitioning for stipendiary magistrates, the crown to appoint such. -28. Recorders (barristers-at-law of five years' standing) to be appointed by the crown in certain boroughs, if town councils petition for quarter sessions: with powers to such recorders to act for more than one borough. Recorder not to be councillor or police magistrate; recorder to be sole judge; in his absence, the mayor, &c .- 29. All capital jurisdictions abolished, and criminal jurisdiction limited to that of quarter sessions.—30. County justices of the peace to have jurisdiction in all boroughs which have not a separate court of sessions of the peace under the act, with provisions as to county rates, and appointment of the expenses of prosecutions at the assizes and county quarter sessions.-31. Civil jurisdiction extended in some boroughs, and generally regulated .- 32. Burgesses to be jurors.-33. Fees regulated, and tables to be

CORPOREAL INHERITANCE. houses, lands, &c. See tit. Inheritance.

CORPSE, stealing of. If any one in taking up a dead body, steals the shroud, or other apparel, it will be felony. 3 Inst. 110: 12 Rep. 113: 1 Hal. P. C. 515. But stealing the corpse itself, only, is not felony, but it is punishable as a misdemeanour by indictment at common law. 2 Comm. 236: Russ. & Ry. 367.

CORPUS CHRISTI DAY. A feast instituted in the year 1264, in honour of the blessed sacrament; to which also a college in Oxford is dedicated. It is mentioned in the stat.

32 H. 8. c. 21.

CORPUS CUM CAUSA. A writ issuing out of the Chancery, to remove both the body and record, touching the cause of any man lying in execution upon a judgment for debt, into the King's Bench, &c., there to lie till he have satisfied the judgment. F. N. B. 251. See tit. Habeas Corpus.

CORRECTOR OF THE STAPLE, A clerk belonging to the staple to write and record the bargains of merchants there made.

See stat. 27 Ed. 3. cc. 22, 23.

CORREDIUM, CONREDIUM. The same

with corrodium. See Corody.
CORRUPTION OF BLOOD, corruptio sanguinis.] An infection growing to the state of a man, and to his issue; and is where

a person is attainted of treason or felony, by means whereof his blood is said to be corrupted, and neither his children, nor any of his blood can be heirs to him, or any other ancestor; also if he is of the nobility or a gentleman, he and all his posterity by the attainder are rendered base and ignoble; but by pardon of the king, the children born afterwards may inherit the land of their ancestor, purchased at the time of the pardon, or after; but so cannot they who were born before the pardon. Terms de la Ley.

If a man that hath land in right of his wife hath issue, and his blood is corrupt by attainder of felony, and the king pardons him; in this case, if the wife dies before him, he shall not be tenant by the courtesy, for the corruption of the blood of that issue; though it is otherwise, if he hath issue after the pardon; for then he should be tenant by the courtesy, although the issue which he had before the pardon be not inheritable. 13

H. 7. c. 17.

A son attainted of treason or felony in the life of his ancestor, obtains the king's pardon before the death of his ancestor, he shall not be heir to the said ancestor, but the land shall rather escheat to the lord of the fee by the corruption of blood. 36 Ass. Pl. 32 H. 8.

If the father of a person attainted die seised of an estate of inheritance, during his life no younger brother can be heir; for the elder brother, though attainted, is still a brother, and no other can be heir to his father, while he is alive; but if he die before the father, the younger brother shall be heir. 2 Hawk. P. C. c. 49. § 49. See farther Co. Lit. 8. 391:

Dyer, 482: 3 Inst. 211.

Corruption of blood from an attainder is so high that it cannot be absolutely salved but by act of parliament: for the king's pardon doth not restore the blood so as to make the person attainted capable either of inheriting others, or being inherited himself by any one born before the pardon. 1 Inst. 391, 392: 2 Hawk. - A statute which saves the corruption of blood, impliedly saves the descent of the land to the heir; and it prevents the corruption of blood so far: also it saves the wife's dower, &c. But nevertheless the land shall be forfeited for the life of the offender. 3 Inst. 47: 1 Hawk. P. C. c. 41. § 5. By stat. 54 G. 3. c. 145. it is enacted that no future attainder for felony, except in cases of high treason, petit treason, or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to prejudice of the right or title of any person, other than the right or title of the offender during his natural life only: and that it shall be lawful to every person to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender, should or might have appertained if no such attainder had been to enter into the same. See farther tits. Attainder, Forfeiture, Escheat, Tenure, &c.

CORSELET, Fr. in Lat. corpusculum.]
A little body. The name of an ancient armour used to cover the body or trunk of a man: wherewith pikemen commonly set in the front and flanks of the battle were formerly armed for the better resistance of the assaults of the enemy, and the surer guard of the soldiers placed behind, who were more slightly armed for their speedier advancing to, and retreating from the attack. 4 and 5 P. & M. c. 2.

CORSEPRESENT, from the Fr. corps present.] A mortuary: and the reason why it was thus termed seems to be, that where a mortuary became due on the death of any man, the best or second best beast was, according to custom, offered or presented to the priest, and carried with the corps. See stat. 21 H. 8. c. 6. and this Dict. tit. Mortuary.

CORSNED BREAD, panis conjuratus.]
Ordeal bread. It was a kind of superstitious trial used among the Saxons, to purge themselves of any accusation, by taking a piece of barley bread, and eating it with solemn oaths and execrations, that it might prove poison, or their last morsel, if what they asserted or denied were not punctually true. These pieces of bread were first execrated by the priest, and then offered to the suspected person, to be swallowed by way of purgation: for they believed a person if guilty, could not swallow a morsel so accursed; or if he did, it would choke him.

The form was thus: We beseech thee, O Lord, that he who is guilty of this theft, when the exorcised bread is offered to him in order to discover the truth, that his jaws may be shut, his throat so narrow that he may not swallow, and that he may cast it out of his mouth, and not eat it. Du Cange: The old form, or exorcismus panis hordeaci vel casei ad probationem veri, is extant in Lindenbrogius, page 107. And in the laws of King Canute, cap. 6. Si quis altari ministrantium accusetur, et amicis destitutus sit, cum sacramentales non habeat, vadat ad judicium, quod Anglice dicitur corsned, et fiat sicut Deus velit, nisi super sanctum corpus Domini permittatur ut se purget; from which it is conjectured, that corsned bread was originally the very sacramental bread, consecrated and devoted by the priest, and received with solemn adjuration and devout expectance that it would prove mortal to those who dared to swallow it with a lie in their mouths; till at length the bishops and clergy were afraid to prostitute the communion bread to such rash and conceited uses; when to indulge the people in their superstitious fancies, and idle customs, they allowed them to practise the same judicial rite, in eating some other morsels of bread, blessed or cursed to the like uses.

It is recorded of the perfidious Godwin, Earl of Kent, in the time of King Edward the Confessor, that on his abjuring the murder of the king's brother, by this way of trial, as a just judgment of his solemn perjury, the bread stuck in his throat, and cases, to the party succeeding against his adchoked him. Ingulph. This, with other barbarous ways of purgation, was by degrees abolished, though we have still some remembrance of this superstitious custom in our usual phrases of abjuration; as, I will take the sacrament upon it :- May this bread be my poison; -or, May this bit be my last, &c. See tit. Ordeal.

CORTIS, curtis.] A court or yard before

a house. Blount.

CORTULARIUM, curtilagium.] A yard adjoining to a country farm. Cartul. Glaston.

MN. f. 42.

CORUS. A certain corn-measure heaped up, from the Hebr. cora, a hill: eight bushels of wheat in a heap, making a quarter, are of the shape of a little hill; and probably a corus wheat was eight bushels; Decem coros tritici, sive decem quarteria. Bract. lib. 2. c. 6.

COSDUNA. Custom or tribute. Mon. Angl.

tom. 1. p. 562.

COSENAGE or COSINAGE, Fr. cousinage, i. e. kindred, consinship. Is used for a writ that lies where the tresail, that is, the father of the besail, or great grandfather being seised of lands and tenements in fee at his death, and a stranger enters upon the heir and abates; then shall his heir have his writ of cosinage. Brit. c. 86: F. N. B. 221. See tit. Assise of Mort d'Ancestor.

COSENING, is an offence where any thing is done deceitfully, whether belonging to contracts or not, which cannot be properly termed by any special name. West. Symb. p. 2. §

See tit. Cheats.

COSHERING. As there were many privileges inherent by right and custom, allowed in the feudal laws; so were there several grievous exactions imposed by the lords on their tenants, by a sort of prerogative or senioral authority, as to lie and feast themselves and their followers at their tenant's houses, &c., which was called coshering, Spelm. of Parliaments, M. S.

COSMUS. From the Greek, xoomos.]-

Clean. Blount.

COSTARD. An apple: whence costardmonger, i. e. seller of apples. Cartular. Abbat. Reading, MSS. fol. 916.

COSTERA. Coast, sea-coast. Memor. in Scaccar. Pasch. 24 Ed. 1.

COSTS. EXPENSÆ LITIS.] In the prosecution and defence of actions, the parties are necessarily put to certain expences, or, as they are commonly called, Costs; consisting of money paid to the king and government for fines and stamp duties: to the officers of the courts; and to the counsel and attorneys for their fees, &c.

These costs may be considered either as between attorney and client; being what are payable in every case to the attorney, by his client, whether he ultimately succeed or not; or as between party and party, being those only which are allowed, in some particular

versary. As between party and party, they are interlocutory or final; the former are given on various interlocutory motions and proceedings in the course of the suit. The latter (to which the term of costs is most generally applied, and the rules respecting which are of the most consequence) are not allowed till the conclusion of the suit.

COSTS, I.

Much of the following abstract of the law relating hereto is taken from Tidd's Practice. Chapter on Costs; a short and comprehensive abridgment; to which, and other productions on the subject, the practitioner must necessarily have recourse in nice and particular cases.

It will be sufficient for the present purpose to arrange the information on this subject in

the following manner.

I. In what general Cases Costs are given to the Plaintiff

II. In what to the Defendant.

III. Of double and treble Costs.

IV. Costs by particular Statutes.

V. Of taxing and recovering Costs. VI. In Criminal Prosecutions.

I. In what general Cases Costs are given to the Plaintiff.-No costs were recoverable by the plaintiff or defendant at common law. 2 Inst. 288: Hardr. 152. But by the stat. of Gloucester (6 Ed. 1.) c. 1. § 2. it is provided, "that the demandant may recover against the tenant the costs of his writ purchased (which, by a liberal interpretation, has been construed to extend to the whole costs of his suit; 2 Inst. 288.); together with the damages given by that statute, and that this act shall hold place in all cases where a man recovers dama. ges." This was the origin of costs de incremento. Gilb. Eq. Rep. 195. And hence the plaintiff has, generally speaking, a right to costs in all cases where he was entitled to damages, antecedent to, or by the provisions of the stat. of Gloucester (10 Co. 116. a.); as in assumpsit, covenant, debt on contract, case, trespass, replevin, ejectment, &c.; or where, by a subsequent statute, double or treble damages are given, in a case where single damages were before recoverable (10 Co. 116. a.: 2 Inst. 289. Cowp. 368,); as upon stat. 2 H. 4. c. 11. for suing in the Admiralty Court (10 Co. 116. a. b.: Dyer, 156. b.: Carth. 297.); upon stat. 8 H. 6. c. 9. for a forcible entry (10 Co. 115. b.: Co. Lit. 257. b.: Inst. 289: Cro. El. 582.); or upon stat. 2 and 3 W. & M. sess. 1. c. 5. for rescuing a distress for rent (Carth. 321: 1 Salk. 205: 1 Ld. Raym. 19: Skin. 555: Holt, 172. S. C.) And he hath also a right to costs in all cases where a certain penalty is given by statute to the party aggrieved (Cro. Car. 560: 1 Rol. Abr. 574: Skin. 363: Carth. 230: 1 Salk. 206: 1 Ld. Raym. 172: Say. Costs, 11: H. Black. 10.); for otherwise the remedy might prove inadequate. So where a right is vested by act of parliament in a particular person or corpora-

Vol. I.-57

COSTS, 1. 446

ling the party to sue for it is an injury for which damages may be recovered, and then costs will follow. 9 Barn. & Cres. 524: 1 Cromp. & Jer. 56: see Tidd, 945. (9th ed.)

But the stat. of Gloucester did not extend to cases where no damages were recoverable at common law, as in scire facias, prohibition (Comb. 20.), &c. (but costs have been allowed on interlocutory proceedings in a writ of entry; 2 Bing. 387.); nor where double or treble damages were given by a subsequent statute, in a new case where single damages were not before recoverable; as in waste against tenant for life or years (2 H. 4. 17: 9 H. 6. 66. b.: 10 Co. 116. b.: 2 Inst. 289.); upon the stat. of Gloucester (6 Ed. 1. c. 5.);—for not setting out tithes (Moor, 915: Noy, 136: Hurdr. 152.), upon stat. 2 and 3 Ed. 6. c. 13; or for driving a distress out of the hundred (2 Inst. 289: Dyer, 177. but see Cro. Car. 560: 1 Rol. Abr. 574.), upon stat. 1 and 2 P. & M. c. 12. Nor does this statute extend to popular actions, where the whole or part of a penalty is given by statute to a common informer (1 Rol. Abr. 574: 1 Vent. 133: Carth. 231: 1 Salk. 206: 1 Ld. Raym. 172: Cas. Pr. C. B. 87: Barnes, 124. S. C.: Cowp. 366: 1 H. Black. 10: Bull. N. P. 333.); as upon stat. 5 Eliz. c. 4. § 31. for exercising a trade, without having served an apprenticeship; or upon the stat. of Usury, 12 Anne, st. 2. c. 16. In these and such like cases, therefore, the plaintiff is not entitled to costs, unless they are expressly given by the statute; but wherever they are so given, he is of course entitled to them.

Where single damages are given by a statute subsequent to the stat. of Gloucester, in a new case wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are not mentioned in the statute. The rule in Pilford's case is, that he shall not (10 Co. 116. a.); and accordingly it is holden, that he is not entitled to costs in quare impedit (2 H. 4. 17: 27 H. 6. 10: 10 Co. 116. a.: 2 Inst. 289. 362: Barnes, 140: and see Cro. Car. 360: Carth. 231: Cowp. 367, 8.); wherein damages are given by the stat. of Westm. 2. (13 Ed. 1.) c. 5. § 3. But the rule in Pilford's case is contradicted by Lord Coke himself (2 Inst. 289.), who says, that "this clause (respecting the stat. of Gloucester's holding place, in all cases where a man recovers damages) doth extend to give costs, where damages are given to any demandant or plaintiff in any action by any statute made after this parliament." And the rule has been since narrowed by several modern decisions; from whence it may be collected, that the plaintiff is entitled to costs, in all cases where single damages are given by statute to the party grieved, although costs are not particularly mentioned in the statute. 2 Wils. 91: Barnes, 151. S. C.: 3 Burr. 1723: Term. Rep. 71: Tidd's Prac. 946 (9th ed.)

tion, the withholding the right and compel- grieved by an act since the stat. of Gloucester, he is entitled to costs if he succeed, though he had no remedy before such act. Rep. 268.

In several of the foregoing cases, wherein costs were not recoverable by the plaintiff at common law, they are expressly given him by stat. 8 and 9 W. 3. c. 11; by which it is enacted, that "in all actions of waste, and actions of debt upon the statute for not setting forth tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles; and in all suits upon any writ or writs of scire facias, and suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution, after pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by capias ad satisfaciendum, fieri facias, or elegit."

This statute does not extend to a scire facias to repeal a patent, prosecuted in the name of the king. 7 Term Rep. 367. See Tidd, 947, (9th ed.) as to Costs in Scire Facias, Prohibition, Mandamus, Quo Warranto.

The plaintiff's general right to costs being thus settled and established upon the footing of the stat. of Gloucester, has been since altered, restrained and modified by several subse-

quent statutes.

To prevent trifling and malicious actions for words, for assault and battery, and for trespass, it is enacted by stats. 43 Eliz. c. 6; 21 Jac. 1. c. 16; 22 and 23 Car. 2. c. 9. § 136. that where the jury who try any of these actions shall give less damages than 40s., the plaintiff shall be allowed no more costs than damages; unless the judge before whom the cause is tried shall certify, under his hand, on the back of the record, that an actual battery (and not an assault only) was proved, or that in trespass the freehold or title of the land came chiefly in question. Also by stats. 4 and 5 W. & M. c. 23; 8 and 9 W. 3. c. 11. if the trespass were committed in hunting or sporting by an inferior tradesman, or, if it appear to be wilfully and maliciously committed, the plaintiff shall have full costs; though his damages, as assessed by the jury, amount to less than 40s.

If, in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the judge certify, under the stat. of Eliz. that the damages did not amount to 40s., the plaintiff shall have no more costs; for the interest or title of the land does not necessarily come in question in this action, and did not, in fact, in this case, where the action was brought against another commoner for a mere wrongful act. 8 East's Rep. 294. And the certificate may be granted in assault and battery, if no ac-Wherever an action is given to the party tual battery be proved. 1 New. R. 255; and see 2 New. R. 471. So in assault and battery, man and inhabitant of the city of London, with a separate count for a false imprisonment, where the verdict was for 1s. damages, and the judge certified under 43 Eliz., the Common Pleas refused to allow plaintiff his costs. 2 Bing. 333.

Where to trespass at A., and throwing down, burning, and totally destroying, the plaintiff's hedge there then erected, &c. whereby, &c. the defendant pleads the general issue, and justifies as to the throwing down the hedge, because it was erected on a common over which he prescribes for right of common, and issue is taken on such right, which is found for him, and a verdict for the plaintiff, for 20s. damages on the general issue; the facts stated in the special plea and found, cannot be taken into consideration to show that the title to the freehold could not come in question on the declaration; and as on the declaration the freehold might have come in issue, and the judge did not certify, the plaintiff is entitled to no more costs than damages. Stead v. Gamble, 7 East, 325.

If there be a certificate against any more costs than damages upon the stat. 43 Eliz. c. 6. § 2. the plaintiff shall not have the costs of the double pleas, on which all the issues were found for him; although the judge has not certified, under the stat. 4 Anne, c. 16. § 5. that the defendant had probable cause to plead the several special matters; that section only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs. Rich-

mond v. Johnson, 7 East, 583.

The stat. 43 G. 3. c. 46. § 4. enacts that in all actions brought in England or Ireland, upon any judgment recovered, the plaintiff in such action shall not recover or be entitled to any costs of suit, unless the court in which action on the judgment shall be brought, or some judge of the same court shall otherwise order. But this statute does not extend to an action brought to recover the costs of a judgment of nonsuit. 14 East's Rep. 243. Tidd. 969.

The legislature has also been obliged to interfere still farther, to guard against trifling and vexatious actions by means of what are commonly called the Court of Conscience Acts. Such are stats. 3 Jac. 1. c. 15. § 14: 14 G. 2. c. 10; which provide that if an action be brought for less than 40s. against a defendant living in London, and liable to the jurisdiction of the Court of Requests there, the plaintiff shall not recover any costs, but shall pay them to the defendant.

The London Court of Requests has jurisdiction by the stat. 39 and 40 G. 3. c. 104. over a contract for the retention of tithes by the tenant, the value of which was under 51, and therefore if the vicar sue in the superior court for the same, and recover less than 51. upon a count in assumpsit, for a quantum valebant, the defendant may enter a sugges-

trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs under the twelfth section of the act. Sandby v. Miller, 5 East, 194.

Several other acts of parliament have been also made, establishing courts of conscience in various districts in and about the metropolis, as in the town and borough of Southwark, &c. by stat. 22 G. 2. c. 47 (but see 4 G. 4. c. 123. § 14. 16. and Tidd's Prac. 958. 9th ed.); in the city and liberty of Westminster, and part of the duchy of Lancaster, by stat. 23 G. 2. c. 27.) explained and amended by stat. 24 G. 2. c. 42), and in the Tower-hamlets, by stat. 23 G. 2. c. 30. And by stat. 23 G. 2. c. 33. the county court of Middlesex was put on a different footing, for the more easy and speedy recovery of small debts. See tits. County Courts, Courts of Conscience. And see Tidd's Chapter on Costs. (9th ed.)

When it was proved that a debt originally above was reduced below 40s. by part payment before the action brought, held that the defendant was entitled to costs under the statutes establishing courts of conscience in Southwark and London. 8 E. R. 28. 347. See 14 E. R. 344. S. P.: and also 8 E. R. 239: 1 Taunt. 60.

In general, where the act is not pleaded, the proper mode to obtain the costs is for the defendant to apply to the court, by affidavit, for leave to enter a suggestion on the roll of the facts necessary to entitle him to the benefit of the act suited to his case; which suggestion may be traversed or demurred to. farther, Tidd's Chapter on Costs. (9th ed.)

These statutes might perhaps have been with equal propriety classed under the 2d division of this title; but are introduced here as forming an exception to the general title of a plaintiff to costs in the cases already instanced.

The principal statute made for restraining the plaintiff's right to costs is stat. 22 and 23 Car. 2. c. 9. (extended to Wales and the Counties Palatine by stat. 12 and 13 W. 3. c. 9.); by which it is enacted, that "in all actions of trespass, assault, and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of forty shil. lings, shall not recover or obtain more costs of suit than the damages so found shall amount unto." It seems to have been the intention of this statute that the plaintiff shall have no more costs than damages, in any personal action whatsoever, if the damages be under 40s., except in cases of battery or freehold, and not even in these without a certificate. And tion on the roll, stating that he was a free- this construction was adopted in some of the

prevailed; and it is now settled, that the statute is confined to actions of assault and battery, and actions for local trespasses, wherein it is possible for the judge to certify that the frechold or title of the land was chiefly in question. T. Raym. 487: T. Jun. 232: 2 Show. 258. S. C.: 3 Mod. 39: 1 Salk. 208: 1 Str. 577: Gilb. Eq. Rep. 195: Barnes, 131: 3 Wils. 322. S. C.: 1 H. Black. 294. Therefore it does not extend to actions of debt, covenant, assumpsit, trover (3 Keb. 31: 1 Salk. 208.), or the like; or to actions for a mere assault. 3 T. R. 391.); or for criminal conversation (3 Wils. 319); or battery of the plaintiff's servant (3 Keb. 184: 1 Salk. 208: 1 Stra. 192.), per quod consortium vel servitium amisit. In all these cases, though the damages be under 40s., the plaintiff is entitled to full costs without a certificate.

The certificate required by this statute need not, it seems, be granted at the trial of the cause; 11 Mod. 198; but may be granted within a reasonable time after the trial. 2 Barn. & Cres. 621: 4 Dow & Ry. 156. And where the defendant lets judgment go by default (Bull. N. P. 329.), or justifies the assault and battery, or pleads in such a manner as to bring the freehold or title of the land in question, on the face of the record (9 Prac. 314.), or a view is granted (1 Ld. Raym. 76: 2 Salk. 665.), a certificate is holden to be unnecessary: but it is necessary where, to a plea of a right of way, there is a replication of extra viam. Cochran v. Harrison, T. 22 G. 3. But where, in an action for an assault and battery, the defendant justifies the assault only (3 T. R. 391.), or an assault only is certified by the judge (2 Lev. 102.), the plaintiff recovering less than forty shillings is not entitled to more costs than damages; though in the latter case, to entitle him to full costs, the judge may certify, on stat. 8 and 9 W. 3. c. 11. that the assault was wilful and malicious. Wils. 326.

None of the statutes made for restraining the plaintiff's right to costs extends to actions brought in an inferior court, and removed by the defendant into a superior one. 2 Lev. 124: 4 Mod. 378, 9: 1 Ld. Raym. 395. But now, by 58 G. 3. in actions of assault and battery, commenced in courts having jurisdiction to 40s., if the jury give less than 49s. damages, the plaintiff shall have no more costs than damages. See *Tidd's Prac.* 967. (9th ed.) And it has been holden, that stat. 21 Jac. 1. c. 16. and stats 22 and 23 Car. 2. c. 9. only restrain the court from awarding more costs than damages; but the jury, not being restrained thereby, may give what costs they please.

It often happens that there are several counts or pleas, the issues upon which are some of them found for the plaintiff, and some for the defendant. The practice of the courts differed as to costs in such cases; but now,

first cases that arose upon the statute. 3 Keb., by the rules of H. T. 1832, no costs shall be 121. 247. But a different construction soon allowed a plaintiff on any counts or issues on which he has not succeeded, and the costs of all issues for the defendant shall be deducted from the plaintiff's costs. See Tidd, 975.

(9th ed.) By the Welch Judicature Act, 5 G. 4. c. 106. in all actions upon the case for words, actions of debt, trespass on the case, assault and battery, or other personal action, and all transitory actions, which shall be brought in any of his majesty's courts of record out of the principality of Wales, and the debt or damage found by the jury shall not amount to the sum of 50l., and it shall appear upon the evidence that the cause of action arose in Wales, and that the said defendant was resident in Wales at the time of the service of any writ, or other mesne process, served on him, and it shall be so testified, under the hand of the judge who tried such cause, upon the record of Nisi Prius (on such facts being suggested on the record or judgment roll), a judgment of nonsuit shall be entered thereon against the plaintiff, who shall pay to the defendant costs of suit, and the defendant shall have like remedy to recover the same, as in the case of a verdict given for the defendant; and in the taxation of all costs allowed to the defendant, the proper officer shall allow to the plaintiff, out of the defendant's costs, the full sum given by the verdict to the plaintiff for his debt or damages; and, although no judgment shall be entered for the plaintiff upon such verdict, yet nevertheless such verdict, without any judgment entered thereon, shall be an effectual bar to any action commenced by the plaintiff for the same. Provided that nothing in this act contained shall preclude any person from commencing and carrying on any action, and which may be tried at the assizes at the nearest English county to that part of Wales in which the cause of action shall be laid to arise, against any defendant so resident in Wales, and obtaining full costs in such action, if the judge before whom the cause shall be tried shall certify, on the back of the record, that the title or freehold of land was chiefly in question, or that such cause was proper to be tried in such English county. See the Welch Judicature Act, 1 W. 4. c. 70. which repeals great part of this statute; but, as far as it relates to the plaintiff's being nonsuited, and paying costs to the defendant, in transitory actions brought in the courts at Westminster, where the cause of action arose in Wiles, and the defendant was resident there at the time of the writ being served, unless the judge certify on the record that the title or freehold of land was in question or that the cause was proper to be tried in an English county, not being expressly repealed by the 1 W. 4. c. 70. it may admit of doubt whether it is not still in force. See Tidd's Supplement to Prac. (9th ed.) p. 167. and

Lastly, by stats. 7 and 8 G. 4. c. 29. § 75.

and c. 30. § 41. in all actions for any thing | judgment be affirmed after verdict, the plaindone in pursuance of the acts for consolidating and amending the laws relative to larceny, &c., or malicious injuries to property, if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs, as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and although a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be, shall certify his approbation of the action, and of the verdict obtained thereupon.

II. In what general cases Costs are given to the Defendant.-It has already been observed, that no costs were recoverable by a defendant at common law; and the reason seems to be, that if the plaintiff failed in his suit, he was amerced to the king pro falso clamore, which was thought to be a sufficient punishment, without subjecting him to the payment of costs. The first instance of costs being given to a defendant was in a writ of right of ward by the stat. of Malberge. (52 H. 3. c. 6.) Afterwards costs were given to the defendant in error by stat. 3 H. 7. c. 10; and in replevin by stat. 7 H. 8. c. 4. and stat. 21 H. 8. c. 19, &c. But in one of these cases the defendant is to be considered as an actor, and in the other of them the provision is virtually for the benefit of the plaintiff in the original action. Say. Costs, 70: Tidd's Prac. 976. (9th ed.)

In error brought by the defendant before execution (Cro. Jac. 636.), or by the plaintiff upon a judgment for the defendant, if the judgment be affirmed, the writ of error discontinued, or the plaintiff in error nonsuited, the defendant in error is entitled to costs, by stat. 3 H. 7. c. 10. and 8 and 9 W. 3. c. 11. § 2; upon the former of which statutes it has been holden, that costs are recoverable in error for the delay of execution, although none were recoverable in the original action. *Dyer*, 77: Cro. Eliz. 617. 659: 5 Co. 101. S. C.; Cro. Car. 145: 1 Str. 262: 2 Str. 1084. But see Cro. Car. 425: 1 Lev. 146: 1 Vent. 38. 166: 4 Mod. 245: Carth. 261. S. C. semb. contra.

An avowment in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to his costs on stat. 8 and 9 W. 3. which is confined to judgments for defendants on demurrer. 10 E. R. 2.

A writ of error having been quashed because brought by a feme covert without her husband, the defendant in error is entitled to costs under the stat. 4 Anne, c. 16. § 25:8 T. R. 302.

By stat. 13 Car. 2. st. 2. c. 2. § 10. if the

tiff shall pay to the defendant in error his double costs. And by stat. 4 Anne, c. 16. § 25. for preventing vexation, from suing out defective writs of error, it is enacted, that " upon the quashing of any writ of error, for variance from the original record, or other defect, the defendant shall recover against the plaintiff in error his costs, as he should have had if the judgment had been affirmed, and to be recovered in the same manner." 2 Str. 834: Cas. temp. Hardw. 137. But none of the statutes before mentioned give costs upon the reversal of a judgment. I Stra. 617.

Where the plaintiff recovered a verdict at the trial, and had judgment in C. B., and, upon a bill of exceptions returned into B. R., judgment was reversed, and the plaintiff took nothing by his writ, the defendant could not have costs. Bell v. Potts, 5 East, 49.

When, upon setting aside a verdict for plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action, the defendant is not entitled to the costs of the action. Howorth v. Samuel, 1 Barn. & Ald.

In replevin, or second deliverance, the defendant, making avowry, cognizance, or justification, for rents, customs, or services, or for damage feasant, is entitled to costs, by stat. 7 H. 8. c. 4. and stat. 21 H. 8. c. 19. § 3. if the avowry, cognizance, or justification be found for him, or the plaintiff be nonsuit, or otherwise barred: which statutes extend to avowries, &c., made by an executor (2 R. Rep. 437.); or for an estray (Cro. Eliz. 330.); and, as it should seem, for an amercement by a court leet (Cro. Jac. 520. sed vide Cro. 300.); but not to pleas of priscl en auter lieu, upon which the writ is abated (Com. Rep. 122.), or to pleas of property in the thing distrained. Hard, 153. By stat. 17 Car. 2. c. 7. § 2. the defendant obtaining judgment thereon for the arrearages of rent, or value of the goods distrained, is also entitled to his full costs of suit. And by stat. 11 G. 2. c. 19. § 22. if the defendant avow or make cognizance, according to that statute, upon a distress, for rent, relief, heriot or other service, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover double costs of suits. But this latter statute does not extend to a seizure for a heriot custom.

At length costs were given to defendants by the stat. 23 H. 8. c. 15. § 1. "in trespass upon stat. 5 R. 2. debt, covenant, detinue, account trespass on the case, or upon any statute for an offence or wrong personal, immediately supposed to be done to the plaintiff," in cases nonsuit, or verdict for the defendant.

The stat. 13 Car. 2. st. 2. c. 2. § 10. giving double costs to the defendant in error, if judgment be affirmed after verdict, is confined to cases where the judgment so affirmed is for the plaintiff below, and not where the defendant below obtained judgment upon a special verdict. Baring v. Christie, 5 East, 545.

No costs are allowed on the stat. 3 H. 7. c. 10, where a writ of error is nonpressed before the transcript of the record by the clerk of the errors of B. R. 7 East, 3. 110.

The king, and any person suing to his use (stat. 24 H. 8. c. 8.), shall neither pay nor receive costs; for besides that he is not included under the general words of the statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. And it seems reasonable to suppose that the queen consort has the same privilege; for in actions brought by her she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her. F. N. B. 101: 1 Inst. 133. And on this principle of the king not paying or receiving costs, no costs are due on a certiorari removing summary proceedings, unless a recognizance be entered into at the time of removing the pro-

ceedings. 1 Term Rep. 82. Paupers (that is, such as will swear themselves not worth 5l.) are by stat. 11 H. 7. c. 12. to have original writs and subpænas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs when plaintiffs, by the stat. 23 H. 8. c. 15. § 2. but shall suffer other punishments at the discretion of the judges. And it was formerly usual, on such paupers being nonsuited, to give them their election either to be whipped or pay the costs; though that practice is now disused. 1 Sid. 261: 7 Mod. 114: Salk. 506. And in cases of misconduct, or in certain other circumstances, they may be dispaupered; that is, deprived of their privilege of suing as paupers. It seems, however, agreed, that a pauper may recover costs, though he pays none; for the counsel and clerks are bound to give their labour to him, but not to his an-

tagonists. 1 Eq. Ab. 125.

Executors and administrators are not particularly excepted out of stat. 23 H. 8. c. 16; yet, as that statute only relates to contracts made with, or wrongs done to, the plaintiff (2 Stra. 1107.), it has been uniformly holden (Cro. Eliz. 503: Cro. Jac. 229: 2 Bulst. 261: ì Salk. 207. 313: 3 Burr. 1586: Say. Costs, 97.), that they are not liable to costs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a contract entered into with the testator or intestate (T. Jon. 47: 2 Ld. Raym. 1414: 1 Str. 682. S. C.: Cas. Pr. C. B. 157: Pr. Reg. 118. S. C.: Barnes, 141.); or for a wrong done in his life-time. Barnes, 119. So where the plaintiff sucd an executor, and was nonsuited on evidence that the supposed testator was still alive, the court refused to allow costs to the defendant, it appearing to be still doubtful whether the testator was living or not. 1 Barn. & A. 286. And where a plaintiff sued as executor for a debt, which appeared claimable, if at all, as surviving parties of the deceased, and was nonsuited, the court refused "upon process issuing out of the Court of

to refer it to the master to tax the defendant's costs, it being doubtful whether justice would be done by such an order. 3 Barn. & A. 213. But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a contract (6 Mod. 91. 181: 1 Salk. 207. S. C.: 1 Ld. Raym. 436: 1 Str. 682: Barnes, 119: 2 Str. 1106: 4 T. R. 277: 5 T. R. 234), express or implied; or in trover (Com. Rep. 162: Cas. Pr. C. B. 61: Barnes, 132: Cas. temp. Hardw. 204; but see 3 Lev. 60. semb. contra), for a conversion, after the death of the testator or intestate. 7 T. R. 358. An executor or administrator is liable to costs upon a judgment of non pros. Cas. Pr. C. B. 14. 157, 8: 3 Burr. 1585: 6 T. R. 654.

But they are not liable to costs on judgment, as in case of a nonsuit under 15 G. 2. c. 17. 2 H. B. 277. But where an executor adds some count as executor, stating a cause of action for which he might declare in his own right, if he is nonsuited, he shall be liable to costs. 2 Taunt. 116. And where he has knowingly brought a wrong action, or otherwise been guilty of a wilful default, he shall pay costs upon a discontinuance (Cas. Pr. C. B. 79: 3 Burr. 1451: 1 Blac. Rep. 451. S. C.), or for not proceeding to trial according to notice (Cas. Pr. C. B. 158: 3 Burr. 1585.); but otherwise he is not liable to costs in either of these cases. 2 Str. 871: Barnes, 133: 4 Burr. 1927. Nor, where he merely sues en auter droit, is he liable to costs upon a judgment, as in case of a nonsuit. 4 Burr.

Executors and administrators are liable to costs in error in cases where they would be liable in the original action. 1 H. B. 566.

No costs can be awarded on prohibition against executors, against whom judgment was obtained on demurrer, upon a question whether they were entitled to a general or limited probate. 3 E. R. 202.

Where plaintiff sued as executor, and was nonsuited, upon evidence at the trial that the supposed testator was still alive, the court refused to allow costs to the defendant; it appearing, by affidavits on both sides, to be still at least doubtful whether the supposed testator were living or not. Zachariah v. Page, 1 Barn. & Ald. 386.

Where an executrix pleaded, 1st. Non-assumpsit; and, 2d. Plene administravit; and issues on the first pleas were found for plaintiff, and on the last for the defendant; it was holden, that the last plea being a complete answer to the action, the defendant was entitled to the general costs of the trial. Edwards v. Bethel, 1 Barn. & A.

The stat. 23 H. 8. c. 15. only relates to cases where the plaintiff is nonsuited, or has a verdict against him. But by stat. 8 Eliz. c. 2. King's Bench, if the plaintiff do not declare in | fendant is entitled to costs under 8 Eliz. c. 2. three days after bail put in, or if after declaration he do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or be non-suited therein, the judges, at their discretion, shall award to the defendant his costs, damages, and charges, in that behalf sustained." See Tidd, 981. (9th

The plaintiff, it has been observed, is not entitled to costs in a popular action, for the whole or part of a penalty given by statute to a common informer, unless they are expressly given him by the statute. Nor was the defendant entitled to costs in such an action until they were given by the stat. 18 Eliz. c. 5. § 3. made perpetual by stat. 27 Eliz. c. 10.

There being still many cases in which the defendant was not aided by the provisions of the before-mentioned statutes, the stat. 4 Jac. 1. c. 3. gives the defendant costs on a nonsuit or verdict in all cases where the plaintiff would have been entitled to them if he had

obtained judgment.

When a defendant removes proceedings by a sc. fa. ro. from a county court into one of the superior courts, and signs judgment of non-pros. in default of plaintiff's appearing, he is entitled to costs under this statute. 1 T.R. 372.

The stats. 13 Car. 2. st. 2. c. 2. § 3; 8 and 9 W. 3. c. 11. § 2. gives costs to a defendant also in cases of non-pros. and demurrer; and the latter stat. § 1. gives costs to one of several defendants in trespass, assault, false imprisonment, or ejectment, acquitted, though the other defendants are convicted.

Though the defendant had judgment on demurrer in quare impedit, the Court of C. P. held that he was not entitled to costs under § 2. of the last mentioned statute. 1 H. B. 530.

When a feigned issue is ordered by a court of law, whether it be in a civil or criminal proceeding, the costs always follow the verdict, and must be paid to the party obtaining 1 Lil. P. R. 344: Barnes, 130: 1 Wils. 261. 331: Say. Rep. 24: 1 Wils. 324. But when a feigned issue is ordered by a court of equity, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned back to the court which ordered it, and the costs there are in the discretion of the court. Where the issue is ordered by a court of law, on a rule for an information (Say. Rep. 229: 1 Burr. 603.), or motion for an attachment (Say. Rep. 253.), the costs of the original rule or motion do not in general follow the verdict, but only the costs of the feigned issue, which costs are to be reckoned from the time when the feigned issue was first ordered and agreed to. 1 Burr. 604. Yet where it was ordered by the consent rule, that the costs should abide the event of the issue, the court directed the whole costs to be paid under it. 2 Burr. 1021: Tidd, 987. (9th ed.)

If the plaintiff enter a noli prosequi, the de-

§ 2: 3 T. R. 511.

Where a plaintiff is put to declare in prohibition, and is nonsuited at the assizes, the defendant is only entitled to his single costs under the stat. 8 and 9 W. 3. c. 11. § 3. and not to double costs under 2 and 3 Ed. 6. c. 13. § 4: 15 E. R. 574.

By 43 G. 3. c. 46. § 3. where the defendant is arrested, and the plaintiff does not recover the amount of the sum for which the defendant is arrested, the defendant shall be entitled to costs of suit, provided it appears on affidavit that the plaintiff had not reasonable or probable cause for arresting the defendant for that amount. Where a verdict was taken subject to the award of an arbitrator, and the costs were to abide the event, and the arbitrator awarded a less sum than that for which the defendant was arrested, the court held the defendant entitled to costs. 3 B. & C. 491: 5 B. & A. 663: Tidd, 983. (9th ed.)

III. Of double and treble Costs .- Where the plaintiff recovers single damages he is only entitled to single costs, unless more be expressly given him by statute. But if double or treble damages be given by statute, in a case wherein single damages were before recoverable, the plaintiff is entitled to double or treble costs, although the statute be silent respecting them (Say. Costs. 228.); as in an action upon stat. 2 H. 4. c. 11. &c. Treble costs are recoverable in action on the case for treble damages against the sheriff, on 29 Eliz. c. 4. for extortion. 2 Barn. & Ald. 293: 1 Chitt. R. 137: see Tidd. 987. (9th ed.) In some cases double and treble costs are expressly given to the plaintiff; as upon the game laws, by stat. 2 G. 3. c. 19. § 5. And wherever a plaintiff is entitled to double or treble costs, the costs given by the court de incremento are to be doubled or trebled as well as those given by the jury. 2 Leon. 52: Cro. Eliz. 582: 3 Lev. 351: Carth. 297, 321: 2 Str. 1048. But see 1 Term Rep. 252. But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. Where a statute gives double costs, they are calculated thus: 1. The common costs, and then half the common costs. If treble costs, 1. The common costs; 2. Half of these; and then half of the latter. See 4 Barn. & Cres. 889. 154: 6 Dow. & Ry. 1: 7 Dow. & Ry. 484.

Double or treble costs are also in some cases expressly given to the defendant; as in actions against parish officers, by stat. 43 Eliz. c. 2. § 19.—against justices of the peace, constables, &c. by stat. 7 Jac. 1. c. 5 .-- for distresses for rents and services, by stat. 11 G. 2. c. 19. § 21, 2.—and against officers of the excise or customs, by stat. 23 G. 3. c. 70. § 34: 6 G. 4. c. 108. § 97; and under the bankrupt act, 6 G. 4. c. 16. § 44: the jury act 6 G. 4. c. 50. § 58: the ejectment act, 1 G. 4. c. 87. § 6. In these, and such like cases, where

it does not appear on the face of the record, that the defendant is entitled to the benefit of the act (as where he plet is the general issue), and there is no particular mode appointed for recovery of the costs, the proper mode after a nonsuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll. 1 Str. 49, 50: Cas. Pr. C. B. 16: Id. 138: 2 Str. 1021. S. C.: Say. Rep. 214: 3 Wils. 442: Cas. temp. Hardw. 125. But where a particular mode is appointed by statute, for the recovery of double or treble costs, as by the certificate of the judge who tried the cause, on stat. 7 Jac. 1. c. 5. there that particular mode must be observed (2 Vent. 45: Doug. 8vo. 307, 8: but see Doug. 8vo. 308. n.); so that if the judge certify, there is no need of a suggestion; and if he do not, it is useless, except where judgment goes by default. Cas. temp. Hardw. 138, 9.

IV. Costs by particular Statutes. A justice of the peace who has prosecuted a gaoler to conviction for suffering a prisoner to escape, committed by him on a charge of felony, is not entitled to the costs of the conviction under stat. 5 and 6 W. & M. c. 11. § 3. 2 T. R 47.

If a judge on the trial of an indictment for not repairing a road certify that the defence was frivolous, without also awarding costs in express terms under 13 G. 3. c. 78. the prosecutor is entitled to costs. 6 T. R. 344.

Justices of the peace may give costs in all cases of conviction, by stat. 18 G. 3. c. 19. 5

T. R. 356.

The prosecutor of a quo warranto information against a constable of Birmingham is not entitled to costs under stat. 9 Anne, c. 20. 5 T. R. 375.

Costs are due to the plaintiff who recovers treble damages in an action on 29 Eliz. c. 4. against the sheriff for taking more than the fee allowed by that statute on levying under

an execution. 7 T. R. 267.

Persons dwelling near a steam engine which created a nuisance, and prosecuting an indictment for it, are parties grieved, entitled to their costs under 5 W. & M. c. 11. § 3. upon removal of the indictment by certiorari into K. B. by the defendants, and their conviction there. 16 E. R. 194.

The prosecutor of an indictment for obstructing an highway must show himself to be the party grieved in order to obtain costs.

1 Maul. & Selw. Rep. 268.

To entitle an officer defendant to double costs under the stat. 7 Jac. 1. c. 5. there must be a certificate of the judge that the defendant was such an officer, and that the action was brought against him for something done by him in the execution of the office. 7 T. R. 443.

The above stat., and 21 Jac. 1. c. 12. § 3. ordere giving double costs to parish officers sued, day's &c., extends not to actions against them for party.

it does not appear on the face of the record, non-feasance, as for not paying over money, that the defendant is entitled to the benefit of &c. 3 E. R. 92.

When in an action against officers of excise for scizing goods, they do not tender amends before action brought, but pay money into court, and afterwards gain a verdict, they are entitled only to single costs under the stat. 23 G. 3. c. 70. § 31. 1 H. B. 344.

In trespass against the owner of a house adjoining to the plaintiff's in the metropolis, for taking down his party wall and building on it, the defendant showing at the trial that he was authorized in doing the thing complained of by the building act, 14 G. 3. c. 78. is entitled to treble costs upon a nonsuit. 9 E. R. 322.

A person sued on stat. 25 G. 3. c. 50. for shooting without a certificate, is not entitled to treble costs on obtaining a verdict. 1 T. R. 959

Full costs were allowed in an action on the stat. of Edward VI. for treble the value of tithes not set out, where there was a verdict for the plaintiff, subject to a reference, and the arbitrator directed a verdict to be entered for 30s. treble value. 2 Chitt. R. 155: and

see 1 Bing. 182.

The statute 11 G. 2. c. 19. § 22. gives double costs against a plaintiff in replevin, only in three cases, viz. where he is nonsuit, discontinues his action, or has judgment given against him.—And therefore, where, in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, the arbitrator afterwards awarded in favour of the defendant, it was held that he is not entitled to double costs under the statute. Gurney v. Buller, 1 Barn. § Ald. 670.

V. Of taxing and recovering Costs.—Costs are taxed, as between party and party, by the master in the King's Bench, or by one of the prothonotaries in the Common Pleas, upon a bill made out by the attorney for the party entitled; or frequently without a bill, upon a view of the proceedings: and if there have been any extra expences, which do not appear on the face of the proceedings, there should be an affidavit made of such expences, to warrant the allowance of them, which is called an affidavit of increased costs. Imp. K. B. 348. It was usual among fair practisers to give notice to the opposite attorney of the time when the costs are intended to be taxed. Id. 349. But in order to enforce it, there must be a rule to be present at taxing costs; which rule was obtained from the clerk of the rules in the King's Bench, or one of the secondaries in the Common Pleas, and should be duly served; after which, if the costs were taxed without notice, the taxation was irregular, and the attorney liable to an attachment. And now by rule of T. T. 1831, it is ordered, that before taxation of costs, one day's notice shall be given to the opposite

Where a party obtains leave by consent to laction for his wages against a foreigner, the examine witnesses abroad on depositions, he is not entitled to be allowed the expence of taking the depositions in the taxation of costs, though he succeed. 8 E. R. 393. Where a defendant obtains a mandamus to examine witnesses in India, the plaintiff having obtained a verdict, is entitled to the costs of cross-

examination. 8 B. & C. 317.

The means of recovering costs, as between party and party, are by action or execution, upon a judgment obtained for them, or by attachment, upon a rule of court. Thus in ejectment, where there is a verdict and judgment against the tenant, an action may be brought, or execution taken out thereon, for the costs. Run. Eject. 140, 141. But where the plaintiff is nonsuited, for not confessing lease entry and ouster, the lessor of the plaintiff must proceed by attachment, upon the consent rule. Id. ibid.: 1 Salk. 259: Barnes, 182. And so where the nominal plaintiff is nonsuited upon the merits, or has a verdiet and judgment against him, the only remedy is by attachment against the lessor of the plaintiff. Run. Ej. 142, 3. See tit. Attachment.

Besides the ordinary method of proceeding, there are certain auxiliary means for the recovery of costs, as between party and party. These means are by moving to stay the proceedings, until security be given for the payment of costs; or until the costs are paid of a former action for the same cause; or by deducting the costs of one action from those of another. As examples of these means, it may be mentioned, that in ejectment (1 Str. 681.) and actions qui tam (Id. 697. 705: Barnes, 126.), where the plaintiff, or his lessor, is unknown to the defendant, and in case the plaintiff is a foreigner residing abroad (1 Term Rep. 267. 362. 491.), the defendant may call for an account of his residence, or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the court will stay the proceedings, until security

be given for the payment of costs.

The Court of K. B. stated that in the following three instances only they would oblige the plaintiff to give security for costs. 1. When an infant sues. 2. When the plaintiff resides abroad. 3. When there has been a

former ejectment. 1 T. R. 490.

The Court of C. P. would not compel security for costs in error, because the plaintiff in error was a lunatic. 2 B. & P. 437. Nor from a plaintiff in a qui tam action, though it appeared he was insolvent. See Tidd, 534.

After the defendant has agreed to take short notice of trial, the court will not compel the plaintiff, though a foreigner, and resident abroad, to give security for costs. Ibid.

If a foreigner sue two defendants, and only one of them puts in bail, that one may require the plaintiff to give security for costs. 6 T. R. 496.

Where a foreign seaman had brought an Vol. I.-58

court refused to compel the plaintiff to give security for costs on account of his being on a voyage on board an English ship. 2 H. B. 383. See also 1 B. & P. 96: 2 B. & P. 236: 2 Taunt. 253.

The Court of K. B. required an uncertificated bankrupt, who brought trover for goods, to give security for costs. 7 T. R. 296. But

see 2 Taunt. 61.

An application to make the plaintiff, who resided abroad, give security for the costs, was refused after notice of trial given, as the defendant might have applied earlier after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. Walters v. Frythall, 5 East, 338. See Tidd, 534. (9th ed.)

The court will compel security for costs where plaintiff resides abroad, without a previous application to his attorney: but they will not order a stay of proceedings, unless such application has been made. Baillie v. Bernales, 1 B. & A. 331. Term Rep. K. B.:

Tidd, ubi supra.

Where the plaintiff, after issue joined, had been convicted of felony, and received sentence of transportation, the court compelled him or his attorney to give security for costs retrospective and prospective. Harvey v. Jacob,

1 Barn. & A. 159.

By 59 G. 3. c. 99. § 45. sceurity may be required in an action for non-residence. An executor, plaintiff residing abroad, may be required to give it; 1 Brod. & B. 277; and so also a plaintiff in error; 5 Barn. & Ald. 265; and a defendant in replevin. 1 Brod. & B. 505. By rule 98 H. T. 1832, the application for such security must, in ordinary cases, be

made before issue joined.

The practice of deducting or setting off the costs in one action against those in another, however agreeable to natural justice, does not seem to have obtained till lately in the Court of K. B. 2 Stra. 891. 1203: Bull. N. P. 336: 4 Term Rep. 124. But in C. P. it has been frequently allowed, and that not only where the parties have been the same, but also where they have been in some measure Barnes, 145: 2 Black. Rep. 826: Bull. N. P. 336.

The lien of the plaintiff's attorney upon the debt and costs recovered in the cause, after affirmance upon a writ of error, must be satisfied before the defendants are entitled to set them off against a judgment recovered by them in another cause against the plaintiff.

1 Maul. & Selw. Rep. 240.

By rule 93 of H. T. 1832, no set-off of damages and costs between parties shall be allowed, to the prejudice of the attorney's lien for costs in the particular suit, against which the set-off is sought; provided nevertheless that interlocutory costs in the same suit awarded to the adverse party may be deducted. And see Tidd, 339. (9th ed.) and Merrifield on Costs.

As between attorney and client, the former may maintain an action against the latter for the recovery of his costs. Cro. Car. 159, 160.

—But by the stat. 3 Jac. 1. c. 7. § 1. attorneys and solicitors must deliver a bill to their clients before bringing an action: and by stat. 2 G. 2. c. 23. § 23. (explained by stat. 12 G. 2. c. 13. and made perpetual by stat. 30 G. 2. c. 10. § 75.) no attorney nor solicitor shall commence any action till the expiration of one month after the delivery of his bill: which is directed by the acts to be in a common legible hand, in English, except law-terms, and subscribed with the attorney's hand.

The said stat. 2 G. 2. c. 23. also directs the mode of taxation of attorneys' bills by the officers of the several courts; and directs that if the bill taxed be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation; but if it shall not be less, the costs shall be in the discretion of the court.

By rule 91 H. T. 1832, the order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable. One appointment only shall be deemed necessary for proceeding in the taxation of costs or

of an attorney's bill.

If the whole bill be for conveyancing, or for business done at the quarter sessions, &c. it cannot be taxed. But where an attorney had delivered two separate bills, one of which was for fees and disbursements in causes, and the other for making conveyances, a rule was made for taxing both. And so where it was moved that the master might be directed to tax those articles in an attorney's bill which related to conveyancing and parliamentary business, the rest being for management of causes in the Court of King's Bench, Lord Mansfield said, there was no doubt but the master might tax the whole. Barnes, C. B. 141, 2: 4 Term. Rep. 124: Say. Rep. 233: Say. Costs, 310.

If any part of the bill be for business done in court, the bill must be delivered according to the act. Tidd, 328. and cases there cited. And a warrant of attorncy (4 Camp. 68: 2 Stark. Ca. 538: 3 B. & C. 157.), or a dedimus potestatem charged in the bill, is sufficient to enable the court to refer it for taxation. 1 New R. 266: 4 Camp. 69: Tidd, ubi supra. So also a charge for attending at a lock-up house, filling up a bail-bond, and obtaining defendant's release. 6 Barn. & C. 86. And see Tidd, 328. (9th ed.) The K.B. will refer the bill to be taxed, though all the business was done at the sessions or in the Insolvent

Court. Tidd, ubi supra.

It is not necessary for the executor or administrator of an attorney to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action (Cas. Pr. C. B. 58.); the stat. 2 G. 2. c. 23. § 23. being confined to actions brought by the attorney himself, and not extending to his personal representatives. And in the Court

As between attorney and client, the former ay maintain an action against the latter for e recovery of his costs. Cro. Car. 159, 160. But by the stat. 3 Jac. 1. c. 7. § 1. attorneys and solicitors must deliver a bill to their clients before bringing an action: and by stat. 12 G. 2. § 23. § 23. (explained by stat. 12 G. 2.) what is due.

If an attorney refuse to deliver a bill to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney, on being served therewith, do not attend, an order will be made for delivering it, within a reasonable time. If he still neglect to deliver it, the order should be made a rule of court; and on serving the same, and making affidavit thereof, the court on motion will grant an attachment. Doug. 8vo. 199. in n. Imp. K. B. 479. The bill being delivered, the client may apply for a judge's summons, to show cause why it should not be referred to the proper officer to be taxed; upon which an order will be made, the client undertaking to pay what shall appear to be due upon such taxation. Imp. K. B. 479, 480. If the attorncy do not attend, an order will be made of But the client cannot have a sumcourse. mons for delivery of the bill, and taxing it, together. Id. 480: Barnes, C. B. 126.

By the 3 and 4 W. 4. c. 42. § 36., the judges are empowered to order the officers of the courts at Westminster indiscriminately to tax costs in respect of business done in any of such courts, but no rule has yet been made

pursuant to this authority.

By § 32. where several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or upon the trial of such action shall have a vertice pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record under his hand that there was a reasonable cause for making such person a defendant in such action.

Executors, when plaintiffs, are by the above statute made liable to costs. See Executor,

VI. 2.

A variety of regulations with regard to costs have been made by the recent rules of court, which will be found in the books of practice.

VI. In Criminal Prosecutions.—The Court of King's Bench has no power to award costs to prosecutors by indictment, nor to compel a defendant to go before the master. 6 T. R. 144. A judge cannot certify for the costs of a special jury, under 24 G. 2. c. 18. § 1. in criminal cases. 1 Esp. 226.

As to costs to prosecutors and parties grieved, on indictments relating to the non-repair of highways, see stat. 5 T. R. 272: 6 T. R. 344; 3 M. & S. 465: 2 B. & A. 522:

4 M. & S. 203.

As to costs on quo warranto information,

see 1 Anst. 178: 1 T. R. 453: 1 B. & C., lables have the signification of a little house 237: 5 T. R. 375.

On removal of an indictment to an adjoining county, under 38 G. 3. c. 62. § 12. see 4

In general by justices in all convictions under 18 G. 3. c. 19. see 5 T. R. 356: 6 T.

By justices in sessions, 4 T. R. 218: 7 T. R. 377: 8 T. R. 583.

On criminal informations, 2 T. R. 145. 190: 3 Price, 72.

Costs to prosecutors and witnesses in all cases of felony are given by stat. 7 G. 4. c. 64, § 22. and in cases of specified misdemeanors, by § 23. of the same.

Costs on summary convictions under the stat. 7 and 8 G. 4. c. 29. are given by § 67. of that act, and in 7 and 8 G. 4. c. 30. by § 33.

of that act.

In actions against magistrates and others for any thing done in pursuance of these acts, costs are given by 7 and 8 G. 4. § 75: c. 30. § 41.

Costs in Equity, are allowed for failing to make an answer to a bill exhibited; or making an insufficient answer: and if a first answer be certified by a master to be insufficient, the defendant is to pay 40s. costs; 3l. for a second insufficient answer; 4l. for a third, &c. But if the answer be reported good, the plaintiff shall pay the defendant 40s. costs. An answer is not to be filed (till when it is not reputed an answer,) until costs for contempt in not answering are paid. stat. 4 and 5, Anne c. 16. if a plaintiff in Chancery dismisses his own bill, or the defendant dismisses the same for want of prosecution, costs are allowed to the defendant.

In other cases it seems that the matter of costs to be given to either party is not in equity held to be a point of right, but merely discretionary, under stat. 17 R. 2. c. 6. according to the circumstances of the case. Yet the stat. 15 H. 6. c. 14. which requires surety to satisfy the party grieved his damages, on granting the subpæna, seems expressly to direct that, as well damages as costs shall be given to the defendant, if wrongfully vexed in this

court.

In case of a great fraud, a person may be obliged to pay such costs as shall be ascertained by the injured party's oath.—2 Vern.

The subject of costs in equity is too extensive to be satisfactorily treated of in such a work as the present, and the reader is referred for information upon it to Mr. Beames's treatise on the subject.

COT. In the old Saxon signifies cottage, and so is still used in many parts of Eng-

COTARIUS. A cottager: the cotarii, or cottagers, are mentioned in Domesday.

COTE and COT. The names of places which begin or end with these words or sylor cottage: there are likewise dove cotes, which are small houses or places for the keeping of doves or pigeons. See title Pigeon

COTELLUS, COTERIA. A small cot-

tage, house, or homestall. Cowel.

COTERELLUS. Cotarius and coterellus, according to Spelman and Du Fresne, are servile tenants: but in Domesday and other ancient MSS, there appears a distinction as well in their tenure and quality, as in their name. For the cotarius held a free socage tenure, and paid a stated firm or rent in provisions or money, with some occasional customary services; whereas the coteuellus seems to have held in mere villenage, and his person, issue and goods, were disposable at the pleasure of the lord. Paroch. Antiq. 310.

COTESWOLD. Is used for sheep-cotes and sheep feeding on hills: from the Sax. cote and wold a place where there is no

wood.

COTGARE. A kind of refuse wool, so clung or clotted together, that it cannot be pulled asunder. By stat. 13 R. 2. c. 9. it is provided, that neither denizen nor foreigner shall make any other refuse of wools but cotgare and villein.

COTLAND and COTSETHLAND. Land held by a cottager, whether in socage or vil-

lenage. Paroch. Antiq. 532.

CÖTSETHLA, COTSETLE. The little seat or mansion belonging to a small farm.

Cartular. Malmsbur. MS.

COTSETHUS. A cottage holder, who, by servile tenure, was bound to work for the lord. Cowel. Cotsets are the meanest sort of men, now termed cottagers. And cotseti are those who live in cottages. Leg. Hen. 1. c.

COTTAGE, cotagium.] A little house for habitation, without lands belonging to it.

By the stat. 31 Eliz. c. 7. cottages were prohibited to be erected without laying at least four acres of land to the same: and divers other restrictions were thereby enjoined. But this was repealed by the stat. 15 G. 3. c. 32. setting forth that the said stat. of 31 Eliz. had laid the industrious poor under great difficulties to procure habitations, and tended very much to lessen population; and in divers other respects was inconvenient to the labouring part of the nation in general.

COTTON LIBRARY. For better settling and preserving the library kept in the house at Westminster, called Cottonhouse, in the name and family of the Cottons for the benefit of the public, a statute was made, 12 W. 3. c. 7. See stats. 5 Anne, c. 30: 26 G. 2. cr 22.

COTUCA. Coat armour. Walsing. 114. COTUCHANS. Boors or husbandmen, of whom mention is made in Domesday.

COUCHER, or COURCHER. A factor that continues abroad in some place or country for traffic; as formerly in Gascoign, for

buying of wines. Stat. 37 Ed. 3. e. 16. This word is also used for the general book wherein any corporation, &c. register their particular acts. 3 and 4 Ed. 6. c. 10.

COVENABLE, Fr. covenable, Lat. ratio-

nabilis.] What is convenient or suitable.— Every of the same three sorts of goods, &c. shall be good and covenable, as in old time hath been used. Stat. 31 Ed. 3. c. 2. Covenably endowed, that is, endowed as is fitting. Stat. 4 H. 8. c. 12. See Plowd. 472.

COVENANT, CONVENTIO.] The agreement or consent of two or more by deed in writing, sealed and delivered; whereby either, or one of the parties doth promise to the other that something is done already or shall be done afterwards: he that makes the covenant is called the covenantor: and he to whom it is made, the covenantee. See Shep. Touchst. 160. and on the whole of this subject at length,

I. The several Kinds of Covenants, and by what Words they are created.

II. What Covenants are good and binding, and by whom they may be made.

III. Who shall take Advantage of Covenants, and who are bound by them.

IV. What shall be a Performance, and what a Breach of Covenant .- And of Penalties for Non-performance.

I. The several kinds of Covenants, and by what words they are created .- A covenant is generally either in fact or in law; in fact is that which is expressly agreed between the parties, and inserted in the deed; and in law, is that covenant which the law intends and implies, though it be not expressed in words; as if a lessor demise and grant to his lessee a house or lands, &c. for a certain term, the law will intend a covenant on the lessor's part, that the lessee shall, during the term, quietly enjoy the same against all incumbrances. 1 Inst. 384.

As to implied covenants, see 9 Barn. & C. 505: 1 Bing. 433. A covenant by a lessee to supply lessor and his tenants at all seasons of burning lime, with lime at a certain price, contains an implied covenant to burn lime at all such seasons. 2 Barn. & Ald. 487.

There is also a covenant real, and covenant personal: a covenant real is that whereby a man ties himself to pass a thing real, as lands or tenements; or to levy a fine of lands, &c. And covenant personal is where the same is annexed to the person and merely personal; as if a person covenants with another by deed to build him a house, or to serve him, &c. F. N. B. 145: 5 Rep. 10.

Covenants are likewise inherent, that tend to the support of the land or thing granted; or are collateral to it; and are affirmative, where somewhat is to be performed; or negative; executed, of what is already done, or executory; a covenant being to bind a man to do something in future, is for the most part executory. 1 Vent. 176: Dyer, 112. 271.

A covenant to settle or convey particular lands will not at law create a lien upon the lands; but in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for valuable consideration, and without notice of such covenant. Finch v. Earl of Winchelsea, 1 P. Wms. 282: Freemoult v. Dedire, 1 P. Wms. 429: Coventry v. Coventry, best reported at the end of Francis's Maxims. For equity considers that as done which, being distinctly agreed to be done, ought to have been done. Grounds and Rudiments of Law and Equity, p. 75.

A general covenant to settle lands of a certain value, without mentioning any lands in particular, will not create a specific lien on any of the lands of the covenantor, and therefore cannot be specifically decreed in equity. Freemoult v. Dedire, 1 P. Wms. 430. But if the covenantor expressly declares the settlement to be in execution of his power, though the particular lands to be charged be not specified, equity will ascertain them. Coventry v. Coventry, Francis's Maxims:

Gilb. Rep. 160.

It is held in all cases where words that begin any sentence are conditional, and give another remedy, they shall not be construed a covenant; and yet if words of condition and covenant are coupled together in the same sentence, as, provided always, and it is covenanted, &c., in that case they may be adadjudged both a condition and covenant. March. 103, See 8 Barn. & C. 308: 2 Bing,

The law does not seem to have appropriated any set form of words, as absolutely necessary to be made use of in creating a covenant; and therefore it seems that any words will be effectual for that purpose which show the party's concurrence to the performance of a future act; as if lessee for years covenants to repair, &c., provided always, and it is agreed, that the lessor shall find great timber. &c.; this makes a covenant on the part of the lessor to find great timber, by the word agreed; and it shall not be a qualification of the covenant of the lessee. See 1 Burr. 290.

"The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and, however transposed they may be in a deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." Per Lord Mansfield, Jones v. Berkeley, Dougl. 665. See also Hotham v. The East India Company, 1 Term Rep. 638. Where the participle doing, performing, paying, repairing, is prefixed to a covenant, it is clearly a mutual covenant, and not a condition precedent. Boone v. Eyre, 2 Black Rep. 1312: Allen v. Babington, Sid. 280: Atkinson v. Morrice, 12 Mod. 503. But where the covenant goes to the whole consideration on both sides, there it is a condition precedent. Duke of St. Alban's v. Shore, 1 H. Black. Rep. 270. See Bac. Ab. tits. | act which he could not prevent was no breach.

Pleas and Pleading (7th. ed.)

If one makes a lease for years, reserving a rent, action of covenant lies for non-payment of the rent; for the reddendum of the rent is an agreement for payment of it, which will make a covenant. 2 Danv. 230. See 1 Barn. and Cres. 410. A lease is made to two, and one seals the deed, but the other doth not; if he accepts the estate, and occupies the land, he is bound to perform the covenants for payment of the rent, reparations, and the like. 1 Shep. Abr. 458.

If one man covenants to pay another 201. at a day, although he may have action for debt for the 201., yet it is said he may have covenant at his election. 2 Danv. 229.

It is agreed that A. B. shall pay to C. D. 100l. for lands in E.; this is a mutual covenant, whereon action of covenant may be brought if C. D. will not convey. 1 Sid. 423. But where there are mutual covenants, and the one not to be performed before a precedent covenant, in such case one covenant is not suable till the other is performed: though if the covenants are distinct and mutual, several actions may be brought by and against the parties. 1 Lil. Abr. 350: 2 Mod. 74. In a covenant to pay another so much money, he making him an estate in such land, &c., it has been adjudged, that if he tender the covenantor a feoffment, and offer to make livery, he may have action of covenant for the money, as if he had made a title. 3 Salk.

Where a man covenants that he hath power to grant, and that the grantee shall quietly enjoy notwithstanding any claiming under him; these are distinct covenants, for one goes to the title, and the other to the posses-

sion. 1 Mod. 101.

There is this difference, however, between a covenant and condition; a condition gives entry, and covenant gives an action only. Owen, 54. A person cannot have action of covenant upon a verbal agreement, for it cannot be grounded without writing, except by special custom. F. N. B. 145.

II. What covenants are good and binding, and by whom they may be made .- All covenants between persons must be to do what is lawful, or they will not be binding; and if the thing to be done be impossible, the covenant is void. Dyer, 112. But where the thing is lawful at the time of the covenant made, and afterwards the matter agreed to be done is prohibited by act of parliament, yet such covenant will be binding. 3 Mod. 39. And if a man covenants to do a thing before a certain time, and it becomes impossible by the act of God, this shall not excuse him, inasmuch as he hath bound himself precisely to do it. 2 Danv. Abr. 84. Where a party covenanted that he had not done nor suffered to be done any act whereby an estate was: encumbered, it was held that assenting to an

6 Barn. & Cres. 295.

Though a covenant to stand seised of lands to be after purchased be void at law, unless there be some new act to be done; yet it seems that a covenant to settle lands of such a value will charge after-purchased lands, though the covenantor had none at the time of executing the covenant. Took v. Hastings, 2 Vern. 97.

If a person covenants expressly to repair a house, and it is burnt down by lightning, or any other accident, yet he ought to repair it, for it was in his power to have provided against it by his contract. Alleyn, 26, 27: 1 Lil. Abr. 149. But he is not so bound by covenant in law. Where houses are blown down by tempest, the law excuses the lessee in an actian of waste; though in a covenant to repair and uphold, it will not. 1 Plowd.

A proviso in a lease granted by a tenant for life (under a power to lease, reserving the usual covenants,) that in case the premises were blown down or burnt, the lessee should rebuild, otherwise the rent should cease, is void, the jury finding such a covenant to be unusual. 1 T. R. 705.

A lessee of a house who covenants generally to repair, is bound to repair if it is burnt by an accidental fire; 6 T. R. 650; and equity will not relieve or stay the action by injunction. 18 Ves. 115: 3 Anst. 687. And so is the assignee of a lease containing such a covenant. 2 Chitt. 608. And so even a tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent, notwithstanding the premises are destroyed by fire. 3 Const. 687.

On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an extra-

ordinary flood. 6 T. R. 750.

Under a covenant that the tenant "should and would substantially repair, uphold, and maintain," a house, he is bound to keep up the inside painting. 1 C. & P. 265.

If a lessee for years, rendering rent, covenants for him and his assigns to repair the house, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and then the covenant is broken; notwithstanding acceptance of rent from the assignee, action of covenant lies against the first lessee, on his express covenant to repair; and this personal covenant cannot be transferred by the acceptance of the rent. 2 Danv. Abr. 240. See tit. Assignment and post, III.

Action of covenant also lies on covenant for payment of rent against such lessee; but not action of debt after acceptance. 3 Rep. 24. In covenant upon a demise, rendering rent, the defendant eannot say, that part of it was to be allowed, for this is a covenant against a covenant. Comb. 21.

An infant within age may bind himself ap-

statute may be bound by covenant for his apprenticeship, so as to make him liable to an action of covenant if he depart, &c. But by the custom of London, he may bind himself by his covenant at fourteen years old. 1 Cro. 129: Winch. 63.

A covenant by a tenant to yield up in re-pair, at the expiration of his lease, all buildings which should be erected during the term upon the demised premises, includes buildings erected and used by the tenant for the purpose of trade and manufacture, if they be let into the soil or otherwise fixed to the freehold, but not where they rest merely upon blocks or patterns. 1 Taunt. 19.

III. Who shall take Advantage of Covenants, and who are bound by them .- There may be an agreement and covenant only to be performed by the parties themselves; and there are some covenants which none but the party and his heirs may take advantage of, being such as concern the inheritance, and descend to the heir, as knit to the estate: covenants in gross go to the executors, &c. 1 Rol. Abr. 520: 2 Danv. 235. Not only parties to deeds, but their executors and administrators, shall take advantage of inherent covenants, though not named; and every assignee of the land may have the benefit of such covenants: likewise executors and assigns are bound by them, although not named, as a covenant to repair, &c. 5 Rep. 16, 17: 1 Cro. 552. If a man covenants with another to do any thing, his heir shall not be bound, unless he be expressly named: and yet where a lessee covenants to repair, the heir shall have the benefit of the covenant, though not named, because it runs with the land. 2 Lev. 92: 5 Rep. 8.

The executors and administrators of the covenantor will be bound by the covenant, though not named, unless the covenant be of such a nature as not to allow of it being performed by any other person but the covenantor. See Dyer, 14. pl. 69: 1 Roll. Abr. 519. l. 35: Hyde v. Dean and Canons of

Windsor, Cro. Eliz. 553.

One who covenants for himself, his heirs, &c., and under his own hand and seal, for the act of another, shall be personally bound by his covenant, though he describe himself in deed as covenanting for and on the part and behalf of such other person. Appleton v. Binks, 5 East, 148. See Burrell v. Jones, 3 Appleton v. Barn. & A. 47. Though a covenant be joint in its terms, yet if the interests of the covenantees be several, each may sue separately for a breach. 5 D. & R. 106: 3 B. & C. 254: and see 10 Barn. & C. 410: 6 Barn. & C. 718.

A covenant with two and every of them is joint though the two are several parties to the deed. 3 Taunt. 87.

Where the assignees of a bankrupt advertised the lease of certain premises, of which

prentice; but neither at common law nor by the bankrupt was lessee, for sale by auction (without stating themselves to be the owners or possessed thereof,) and no bidder offering, they never took possession in fact of the premises; held that this was no more than an experiment to ascertain the value, whether the lease was beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term; nor support an averment in a declaration in covenant against them by the landlord that all the estate, right, title, interest, &c. of the bankrupt in the premises came to the defendants by assignment thereof. Turner v. Richardson and another, assignces of Burber, 7 East, 335. See 4 Camp. R. 368. But if there is a purchaser, and a deposit paid, it is an acceptance, although the contract go off. 1 Holt, Ca. 290; and see 1 Dow. & Ry. 205: 1 Ry. & Moo. 207: 2 Stark. 309.

By the new bankrupt act, 6 G. 4. c. 16. § 75. the bankrupt is discharged from the covenants in the lease if the assignces accept the lease, and also in case they decline it, if the bankrupt deliver up the lease to the lessor within fourteen days after he has notice of their declining it. See Bac. Abr. tit. Bankrupt. (F.) (ed. 7. by Gwillim and Dodd.)

All persons to whom the land descended were by the common law entitled to the benefit of covenants which run with the land; but grantees of the reversion were not. The stat. 32 Hen. 8. c. 34. therefore enacted, "that all grantees, &c. of reversions should have the like advantages against the lessees, their executors, &c. by entry for non-payment for the rent, or for doing waste, or other forfeiture; and the same remedy, by action only, for not performing other conditions, covenants, or agreements contained in the leases, against the lessees, as the lessors or grantors had." The statute also gives the lessees the same remedy against the grantees of the reversion, which they might have had against their grantors. It must not, however, be understood from the general words of the statute, that the grantee of the reversion can take benefit of every forfeiture by force of a condition, Lord Coke conceiving the operation of the statute to be confined to such conditions as are either incident to the reversion, as rent, or for the benefit of the state; as for not doing of waste, for keeping the houses in repair, for making of fences, or such like; and not for the payment of any sum in gross, delivery of corn, wood, or the like. See Co. Lit. 215. where a variety of resolutions upon this statute are stated, and the authorities referred to. See also 6 Vin. Ab. Covenant, (K. 3.) p. 397: Webb v. Russell, 3 T. R. 393.— See farther, Bac. Ab. Covenant, (E. 6.): Vin.

Ab. Covenant, (K. 3.)
The liability of the assignee does not extend to covenants broken before the assignment; as a covenant to build within a certain time, which was past before the assignment. Grescott v. Green, 1 Salk. 199: St. Saviour's, Southwark v. Smith, 3 Burr. 1271: 1 Black. dity of such assignment was denied. R. 351. Nor is the assignee to be affected by any covenant broken after he has assigned over. Boulton v. Canon, 1 Freem. 336.

Upon a covenant to repair and keep in repair during the continuance of the term, an action may be maintained for breaches before the term has expired. Luxmore v. Robson,

1 Barn. & A. 584.

A collateral covenant to be done upon the land, as to build de novo, shall bind the assignee by express words; in this case the assignees are bound by the terms of the covenant, for unless named, they would not be bound by law; "for the covenant concerns a thing which was not in esse, at the time of the demise made; but to be newly built after, and therefore shall bind the covenantor, his executors, and administrators, and not the assignee; for the law will not annex the covenant to a thing which hath no being." Spencer's case, 5 Co. 16. b. But as the law would sustain such a covenant against the covenantor and his assigns, if expressly included in the covenant, and give damages for its non-performance, it should seem to follow, that the covenantee would be entitled in equity to a decree for the specific performance of such covenant to build; and of this opinion Lord Hardwicke appears to have been in the case of the City of London v. Nash, 3 Atk. 515: 1 Vez. 12. But in the case of Lucas v. Commerford, 3 Bro. C. R. 166. Lord Thurlow, C. J. held, " that there could not be a decree to build in pursuance of a covenant, for that he could no more undertake the conduct of a rebuilding than of a repair."

In a lease of ground with liberty to make a water-course, and erect a mill, the lessee covenanted for himself, &c., and his assigns, not to have persons to work in the mill who were settled in other parishes without a certificate. The court held that this covenant did not run with the land, or bind the assignce

of the lessee. 10 E. R. 130.

A covenant by a lessor to supply the demised premises with a sufficient quantity of good water at a certain rate runs with the land, and the assignee of the lessee may sue the reversioner upon it. 4 Barn. & A. 266. So also a covenant to insure premises within the bills of mortality against fire. . 5 Barn.

& A. 1.

At law the assignee is liable only for the rent actually incurred, or covenants broken during his possession. Boulton v. Canon, 1 Freem. 336. If therefore he assign the very day before the rent becomes due, the lessor cannot maintain his action for it. Tovey v. Pitcher, Carth. 177: 4 Mod. 71: 3 Co. 22:1 Salk. 81: 1 Frèem. 326. See Paul v. Nurse, 8 Barn. & C. 486. Nor will the circumstance of such assignment being per fraudem, as to a beggar, alter the case. Leroux v. Nash, Str. 1221: Buller's N. P. 159. But see Knight v. Freeman, 1 Vent. 329. 331: T.

whatever may the rule of law upon this point, it seems to be now settled, that courts of equity will compel an assignee of a term to account for the rent the whole time he enjoyed the Treacle v. Coke, 1 Vern. 105. ther equity will, in order to secure the future rents, under any circumstances, restrain an assignee from assigning to a beggar or insolvent person, was considered, but not determined in the case of Philpot v. Hoare, 2 Atk. 219. It seems such an assignment is valid. 2 Madd. R. 330: 1 Bos. & P. 21. If the assignee offer to give up the possession to the lessor on reasonable terms, and the lessor refuse to accept such surrender, it were clearly too much for a court of equity, in restriction of a legal right, to prevent the assignment. Vaillant v. Dodomede, 2 Atk. 546. But supposing the lessor to be willing to accept of a surrender of the term, and the assignee wantonly to insist on his legal right to assign, when and to whom he pleased, it seems that, under certain circumstances, a court of equity might, without impropriety, interpose to prevent the abuse of such right: and this Lord Hardwicke appears to admit in Vaillant v. Dodomede; for having stated the legal right and the propriety of courts of equity in general following the rule of law, he observes, "but it is true in some sort of assignments, made by tenants, the court has interposed;" nor does the difficulty reported to have occurred to Lord Hardwicke, in Philpot v. Hoare, appear, upon examination, to have been entitled to much attention. His lordship is reported to have said, " As to the accruing rents, it is a point of more difficulty; for the covenant in this lease not to assign, does not run with the land to the assignee, because assignees are not bound by name in the covenant." Whence it might be inferred, that if assignees had been expressly included in the covenant, his lordship would have considered them bound by the covenant. But whether assignees be bound or not by a covenant, does not (except in the case of a collateral covenant to be done upon the land) depend upon their being named in the covenant; for if the covenant run with the land, assignees are bound, whether named or not; and if the covenant do not run with the land, but is a a personal contract, or respects something to be done purely collateral to, and not on the land, they are not bound, though they be expressly named. See Spencer's case, 5 Co. 16. b. 17. a. Therefore, whether the assignee was named or not, was immaterial to the question, whether the assignee was bound by the covenant not to assign without consent of the lessor? Nor does it appear as having been necessary in order to determine whether a court of equity should restrain an assignment to a beggar, previously to determining whether the assignee was bound by the covenant not to assign; for supposing the assignee to Raym. 303: T. Jones, 109. in which the vali- be bound at law by the covenant, equity may

restrain the wanton and fraudulent breach of a covenant; and supposing him not to be bound, yet he may be affected in conscience upon the same principle that the assignee of a merely personal covenant may be affected in conscience, though not bound at law. See City of London v. Richmond, 2 Vern. 421: Treat. of Equity, 350. in n.

An action of covenant lies against the assignee of a lessee of an estate, for a part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract, and in case of eviction the rent may be apportioned as in debt or replevin. Aliter in covenant against the lessee himself, who is liable on his personal

contract. 2 E. R. 575.

The assignee of the reversion of part of the premises may sue upon the covenant to repair, for the covenant is divisible, though it is otherwise as to a condition. Twynam v. Pickard, 2 Barn. & A. 105.

The devisee of the equity of redemption (the legal fee being in a mortgagee) is not liable in covenant as assignee of all the estate, right, title, and interest of the original cove-

nantor. 3 E. R. 487.

A party taking an assignment by way of mortgage is liable on the covenants as assignee. Williams v. Bosanquet, 1 Brod. & B. 238. Unless the interest passing to the assignee is of a real nature, he is not liable to covenants made by the grantee or lessed in respect of it. Portman v. Bunn, 1 Barn. & C. 694.

A covenant in a lease that the lessee, his executors, and administrators, shall constantly reside on the demised premises during the demise, is binding upon the assignee of the lessee, though he be not named, being quodam modo annexed and appurtenant to the thing

demised. 2 H. B. 133.

The grantee of a reversion may bring action of covenant against a lessee, as well in the county where the demise was made, as in the county where the lands lie. Carthew, 183. A person covenants with another, to pay him money at a time to come, and doth not say to his executors, &c.; if the covenantee die before the day, yet his executors or administrators shall have the money. Dyer, 112. 127. And in every case where the testator is bound by a covenant, the executor shall be bound by it; if it be not determined by his death. 48 Ed. 3, 2: 2 Danv. 232.

If A. seised of land in fee, conveys it to B., and covenants with B., his heirs and assigns, to make any other assurance upon request: and after B. conveys it to C., who conveys it to D., and then D. requires A. to make another assurance, according to the covenant: if he refuses, D. shall have an action of covenant against him, as assignee to B. 2 Dans. 236. A lessor made a lease of a house for years, excepting two rooms and free passage to them; the lessee assigned the term, and the lessor brought covenant against the as-

signee for disturbing him in his passage to those rooms; and adjudged that the action lies; for the covenant as to the passage goes with the tenement, and binds the assignee. 1 Salk. 196. If a man who leases for years ousts the lessee, he shall have covenant against him. 48 Ed. 3. 2.—See 2 Danv. 234. A man grants a watercourse, and alterwards stops it; for this voluntary misfeasance, covenant lies. 1 Saund. 322. Though where the use of a thing is demised, and it runs to decay, so that the lessee cannot have the benefit of it, for this nonfeasance no action of covenant lieth: nor may covenant be brought for a thing which was not in esse at the making of the lease. 2 Danv. 233.

If a person covenants that he hath good right to grant, &c., and he hath no right, it is a breach of covenant, for which action of

covenant lies. 3 Bul. 12.

A covenant for the lessee to enjoy against all men: this extends not to tortious acts and entries, &c., for which the lessee hath his proper remedy against the aggressors. Vaugh. 111. 120.

Where there is a covenant to save harmless against a certain person, there the covenantor must save the covenantee harmless against the entry of that person, be it by wrong or rightful title: but if it be to save harmless against all persons, the entry and eviction must be by lawful title. Cro. Eliz. 213. Acc.: 1 Barn. & Cres. 29: 2 Dow. & Ry. 33: and see 2 Will. Saund. 178. a. The reason is because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has properly restrained it within its reasonable import, that is, to lawful title. Per Ellenborough, 5 Maule & S. 374. Where the covenant is to do a thing, and no time appointed for performance, it must be done in convenient time. 2 And. 72: Dyer, 57. 150: Hob. 28.

But a covenant must wait upon and join with the grant; so that if it be to make such assurance as shall be reasonably devised, it must be of an assurance that differs not from the bargain: and when the estate to which a covenant is annexed is at an end, the covenant is gone. Hob. 276: 1 Leon. 179. In an indenture, the word covenant is the word both of lessor and lessee; and therefore if the lessee covenants to pay the rent, this is a reservation. Though when there is a covenant for a lessee to repair, and he makes an under-lease to one who is in possession, the under-lessee is not liable to that covenant, in law or equity.

1 Rol. Rep. 80: 1 Vern. 87.

If a lessor covenant with a lessee that he shall have housebote, &c. by assignment of his bailiff, this is a good covenant: and yet it doth not restrain the power that the lessee hath by law to take those things without as-

signment: but if a lessee covenants that he in such case; but where a jointure or dower will not cut any timber without the leave or is recovered it is. Skin. 397: Moor, 859: Palm. assignment of the lessor; by this he will be

restrained. Dyer, 19, 115.

Covenant lies by devisee of lands in fce, upon a covenant, made by defendant to the testator, to whom defendant conveyed the lands in fee, that the defendant was lawfully seised, &c. For such covenant runs with the land, and though broken in the lifetime of the testator, is a continuing breach in the lifetime of the devisee: and it is sufficient to allege for damage, that thereby the lands are of a less value to the devisee, and that he is prevented from selling them so advantageously as he otherwise might do. Kingdom v. Nottle, 4 Maule & S. 53.

Covenant lies by the heir, upon a covenant made to the ancestor and his heirs, to whom the lands are conveyed in fee by husband and wife, that he and his wife shall make farther assurance upon request of the ancestor and his heirs; and the heir may well assign for breach that his ancestor requested the husband that he and his wife would levy a fine to pass the estate of the wife legally to him and his heirs, which they refused to do be-fore their decease, per quod after the death of the ancestor, the devisee of the wife ejected the heir. Jones v. King, 4 Maule & S. 188.

IV. What shall be a Performance, and what a Breach of Covenant; and of Penalties for Non-performance.—The most frequent use of a covenant is to bind a man to do something in future, and therefore it is for the most part executory; and if the covenantor do not perform it, the covenantee may thereupon for his relief have an action or writ of covenant, against the covenantor, so often as there is any breach of the covenant. Shep. Touchst. 161. et seq.

Not any duty or cause of action arises on a covenant, till it is broken; and as to breaches of covenant, if a person by his own act disables himself to perform a covenant, it is a breach thereof. 5 Rep. 21. Though there can be no covenant or breach, where a lease, &c. is void. Yelv. 18, 19. But here, although when a covenant concerns the interest of the lease, as where it is for paying rent, it is void, if the lease be so; yet where covenants are collateral to the lease and interest, though that be void, the covenants may be could Owen, 136. And if a covenant to do a thing is performed in substance, and according to the intent, it is good, though it differs from the words; and on the other hand, although the covenantor performs the letter of his covenant, if he does not act to defeat the intent and use of it, he is guilty of a breach. Mod. Ent. Eng.

In covenant that a person shall hold land free from all incumbrances, and be kept indemnified from arrears of rent; there, till an action is brought, or distress made, he is not damnified; and a suit in Chancery is no breach | for a breach by the defendant; for the damage

339. When the intention of the parties can be collected out of a deed, for the doing or not doing of the thing, covenant shall be had thereupon. Chanc. Rep. 294. A covenant, being one part of a deed, is subject to the are general, shall be expounded by the first words, which are special and particular. Vent.

When a covenant is to two persons jointly, or plead alone, but both must join. 1 Nels. 558. If a man is bound to perform all the covenants in an indenture, and they are all in the affirmative, he may plead performance generally. Co. Lit. 303. Performance of covenants in the negative must be pleaded specially. Itid. 330. When some covenants are in the negative, and some in the affirmative, the defendant is to plead specially to the negative covenants that he had not done the thing. and performance generally as to the affirmative; and where the negative covenants are against law, and the affirmative agreeable to Moor, 856. If any of the covenants are in the disjunctive, so that it is in the election of the that it may appear what part hath been performed. Cro. Eliz. 23: 1 Nels. 573. And see I Will. Saund. 117. And commonly where an act is to be done, according to a covenant, he who pleads performance ought to do it specially. 1 Leon. 136.

In debt upon bond for performance of covenants, one for peaceable enjoyment, and free from all incumbrances, and another for farther assurance, &c., the defendant should plead specially, that the house was free from incumbrances at the time of the conveyance made, and not charged at any time since, and or such an assurance which he had executed. &c.; yet where a defendant pleaded generally,

in this case it was held good. I Lutw. 603.

The plaintiff, in equity, if he has not performed his part of the agreement, must not having performed it, but must also allege that he is still ready to perform it: whereas, at law, if the covenants be not precedent, but not allege a performance of his covenants, to entitle him to recover against the defendant for a breach of his. Pordage v. Cole, 1 Saund. 320: Nichols v. Raynbred, Hob. 88. But see Calonel v. Briggs, 1 Salk. 112: Goodison v. Nunn, 4 Term Rep. 761.

Where the covenants are mutual and distinet, the defendant cannot plead a breach by the plaintiff, in bar of the plaintiff's action may be unequal, and therefore each party the plaintiff shall have judgment for all that must recover against the other the damages are well assigned, for they are as several ache sustained. Cole v. Shallet, 3 Lev. 41: Thompson v. Noel, 1 Lev. 16: Howlett v. Strictland, Cowp. 56. But see Calonel v. Briggs, 1 Salk. 122: Goodison v. Nunn, 4 Term Rep. 761.

When a breach is assigned, it must not be general, but must be particular; as in action of covenant for not repairing of houses, the breach ought to be assigned particularly, what is the want of reparation. Cro. Jac. 369.

But on mutual promise for one to do an act, and in consideration thereof another to do some act, as to sell goods, &c. for so much money, a general breach that the defendant hath not performed his part, is well assigned. 3 Lev. 319.

Breaches assigned ought to be according to the very words of the condition or covenant; when they may be well enough, though too general. 1 Lutw. 326. But the covenant may be stated according to its legal effect, and then

the breach may be so also.

Where a thing is to be done by a person or his assigns, the breach is to be, that it was not done either by the one or the other. 5 Mod. 133. If a person is to tender a conveyance, &c. to another, his heirs or assigns, breach assigned that the defendant did not tender a conveyance to the plaintiff, without the words, "his heirs or assigns," is good; but if the tender be to be made by another man, his heirs, &c., and not to him, it is otherwise. 1 Salk. 139.

A covenant not to assign, transfer, or set over, or otherwise do or put away the lease or premises, does not extend to an underlease for part of the term. 2 W. Black. 766. Such a covenant does not bind the assignee of the lessee. 5 Taunt. 795: S. C. 1 Marsh. 359. Letting lodgings is not a breach of a covenant not to underlet. 4 Campb. 77. A covenant that the lessee shall not exercise the trade of a butcher on the premises, is broken by his selling raw meat by retail, though no beasts are slaughtered. 1 B. & A. 117: and see 1 Maule & S. 95. A covenant that A. shall not exercise a particular trade, does not bind his executors. 2 W. Black. 856: S. C. 3 Wils. 380. Covenant by lessee that he will at all times during the time plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry; held that ploughing the rabbit-warren or sheep-walk was a breach of covenant. St. Alban's D., v. Ellis,

When a lessee for years is to leave all the timber on the land, which was growing there at the time of the lease, and he cut down any trees, though he leaves the timber on the land at the end of his lease, this is a breach of covenant; for in contracts the intention of the parties is chiefly to be considered. Raym. 464. If several breaches are assigned, and the defendant demurs upon the whole declaration,

tions. Cro. Jac. 557.

A lessor possessed of considerable freehold and leasehold property lying together, covenanted in a lease of parcel, that if he, his heirs, or assigns, should during the term have any advantageous offer for the disposing of a certain adjoining freehold parcel, he, the lessor, his heirs or assigns, should not dispose of the same without previously making an offer of that parcel to the lessee, his executors, administrators, or assigns, at five per cent. less than that offer. The lessor sold his entire property, including the demised land and the adjoining parcel, for an entire consideration in one entire contract, without offering the parcel to the covenantor. Held that this was no breach of the covenant. Collinson v. Lettsom, 6 Taunt. 224.

Covenants are generally taken most strongly against the covenantor, and for the covenantee. Plowd. 287. But it is a rule in law, that where one thing may have several intendments, it shall be construed in the most favourable manner for the covenantor. 1 Lut. 490. The common use of covenants is for assuring of land, quiet enjoyment free from incumbrances, for payment of rent reserved, and concerning repairs, &c. And in deeds of covenant, sometimes a clause for performance, with a penalty, is inserted in the body of the deed: at other times, and more frequently, bonds for performance, with a sufficient penalty, are given separate; which last being sued, the jury must find the penalty; but on covenant, only the damages. Wood's Inst. 250. Vide the stat. 8 and 9 W. 3.c. 11. And vide ante and post, and tit. Bond.

Covenant for non-payment of rent was referred to the master as to the rent, and on payment thereof process to stay as to that; but there being another breach as to not repairing, the plaintiff might proceed for that. Anon. Wils. Rep. Par. 1. p. 75. In an action of covenant, it is not necessary to aver generally that the plaintiff performed his covenants. Joddrell v. Cowell, Rep. temp. Hardw. 343, 4. But if there is a condition precedent, performance of it must be specially shown.

By stat. 8 and 9 W. 3. c. 11. in actions on bonds, for performance of covenants, plaintiff may assign as many breaches as he pleases, and the jury, on the trial of the action, or on a writ of inquiry, may assess damages; on defendant's paying damages, execution may be stayed, but judgment shall remain to answer any farther breach, and plaintiff may have a scire facias against the defendant. See tit. Bond, VI.

"Where a penalty is intended merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred." Per Thurlow, C. Sloman v. Walter, 1 Bro. Rep. 418. And upon this construction of a penal- whatsoever, is not broken by the States of ty, courts of equity will interpose, to restrain proceedings at law to recover the penalty. But the principles of equal justice require that courts of equity should enforce the specific performance of the act agreed to be done, or restrain from the doing of that which was agreed should not be done. And upon this principle, wherever the primary object of the agreement be the securing of the specific subject of the covenant, the party covenanting is not entitled to elect whether he will perform his covenant or pay the penalty. See Hobson v. Trever, 2 P. Wms. 191: Parks v. Wilson, 10 Mod. 517: Chilliner v. Chilliner, 2 Vez. 528. But if the covenant be to do or not to do some particular act, or doing it or neglecting to do it, to pay a certain sum, by way of liquidated damages, courts of equity will not relieve against the payment of such damages. East India Company v. Bunt, Finche's Rep. 117: Ponsonby v. Adams, 2 East India Company v. Blake, Bro. P. C. 431: Rolfe v. Peterson, 2 Bro. P. C. 436 (8vo. ed.): Lowe v. Peers, 4 Burr. 2228. See also Small v. Lord Fitzwilliam, Pre. Ch. 102. And as courts of equity will not relieve against stipulated damages, they will not in general interpose to enforce the performance of the covenant, or to restrain its violation. Therefore, where the lessee covenanted not to plough certain land, or if he did to pay 20s. per acre per annum, the court refused to restrain the lessee from ploughing. Woodward v. Gyles, 2 Vern. 119. But there are some circumstances which will induce the court to interfere, though stipulated damages be reserved; as where the lessee had covenanted not to plough ancient meadow, or if he did to pay an increase of rent, the court, upon his threatening to plough, appears to have granted an injunction. Webb v. Clarke, 8th of May, 1782. See also Dulwich College v. Davis, M. 1787.

Where there is a covenant to pay a sum for liquidated damages on breach of the agreement, there is no exact rule as to where it is to be held a penalty for securing damage actually sustained, and where it is to be held liquidated damages. It seems that where a larger sum is to secure a smaller, the larger sum is regarded as a penalty. Astley v. Weldon, 2 Bos. & Pull. 346. And Bayley, J., said where the sum fixed on will in case of breaches of agreement, be in some instances too large, and in others too small, a compensation for the injury thereby occasioned, that sum is to be considered a penalty. 6 Barn. & Cres. 223. And see Holt's Ca. 43: 1 Bing. R. 302: 1 Moo. & Malk. 41. The question depends on the whole of the words of the instrument taken together.

A covenant in a conveyance of lands in America, during the time of the rebellion in that country, that the grantor had a legal title, and that the grantee might peaceably enjoy without the let, interruption, &c. of the grantor and his heirs, or of any other person

America seizing the lands as forfeited, for an act done previous to the conveyance. 3 T. R.

It is held an action of covenant may be laid in London for non-payment of rent on a lease of lands in any other place. 1 Sid. 401. The action of covenant between lessor and lessee, or between the assignee of the lessor and the lessee, is founded in priority of contract, and may be laid in any county; but between the lessor and the assignee of the lessee it is local, and must be laid in the county where the premises are situate. 1 Will. Saund. 241. c. d. And if in this action a sum be miscast, either too little or too much, it is amendable. In action of covenant, the plaintiff must have recourse to the deeds or writings, and the circumstances of time, place, &c., and take notice what particular covenant in deed it is best to insist upon, to lay a breach right, &c. The words of covenanting are, covenant, grant, promise, and agree, &c.; but there needs no great exactness in words to make a covenant. See tit. Bonds, Leases, Agreements, Conveyances, &c., and ante, I.

What shall be a real and what a personal covenant, see Vin. Abr. Covenant Bac. Abr. Covenant (E.): Com. Dig. Covenant (A. 2.): Gilb. Law of Covenants, 105. As to collateral covenants, 4 Burr. 2446: 2 Wils. 27: 1 Vez. 56. As to affirmative and negative covenants, Vin. Abr. Covenant (D. a.): 1 Wood, 356. By what words an express covenant may be created, Vin. Abr. Covenant (C.): Gilb. c. 2. As to covenants created by implication of law, and action thereon, Vin. Abr. Covenant (G.): Com. Dig. Covenant (A.): Garranty (A.): Bace Abr. Covenant. (B.)

How a covenant shall be expounded with regard to the context, or to synonymous or vin. Abr. Covenant (L. 4.) As to covenants for quiet enjoyment, Shep. Touchst. 170: Vangh. 118: Dy. 328. a.: Gilb. 117: Vin. Abr. Condition (U. a. pl. 6, 7): Ib. Covenant (Z.) For the construction of the words in a covenant, "notwithstanding any act done by the covenantor," Vin. Abr. Covenant (T.): Cro. Jac. 233. Proctor v. Johnson. As to covenants for farther assurance, Vin. Abr. Covenant (W.) (G. a.): 1 Wood. 117: Gilb. Covenant, 209. 226: Cro. Jac. 251. Of covenants to repair, Vin. Abr. Covenant (L. 5.): Shep. Touchst. Finch. Rep. 86: Lant v. Norris, 1 Burr. 287: 1 Wils. p. 1. 75. Of covenants to convey lands of a certain value, or that lands are of such a value fully, Ld. Raym. 365: Cro. El. 43: 1 Ro. Abr. 429: Langton v. North, 2 Ch. Rep. 140. Of covenants that the grantor is seized in fee, Vin. Abr. Cove. nant (Y.): Paroles (D. pl. 4): Cro. Jac. 369: 3 Lev. 46. Of covenants to be free from incumbrances, Vin. Abr. Covenant (A. 2.): 1 Wood, 415: Gilb. Covenant, c. 31.

See fully in what cases, and in what man-

ner, covenants shall be said to be suspended, a thing present. Ploud. 307. 398: Finch's defeated, discharged, or void, Bac. Abr. Cove- Law, 49. See tits. Conveyance, Use. nant (G.) (7th ed.) Gilb. 470: 1 Wood, 397. 429: Com. Dig. Covenant (F.): Chancery, 2

(X. 3.): Vin. Abr. Covenant. (O.)

COVENANT TO STAND SEISED TO USES, is when a man that hath a wife, children, brother, sister, or kindred, doth by covenant in writing, under hand and seal, agree that for their, or any of their provision or preferment, he and his heirs will stand seised of land to their use, either in fee simple, fee tail, or for life. The use being created by the stat. 27 H. 8. c. 10. which conveyeth the estate as the uses are directed, this covenant to stand seised is become a conveyance of the land since the said statute. The considerations of these deeds as in tural affection, in ringe, &c., and the law allows, in such cases, consideration of blood and marriage to raise uses, as well as money, and other valuable considcration, when a use is to a stranger. Plowd. 302. There are no considerations now to raise uses upon covenants to stand seised but natural love and affection, which is for advancement of blood; and consideration of marriage, which is the joining of the blood and marriage together: other considerations, as money, &c. for land, though the words in the deeds are stand seised, yet they are bargains and sales, and without enrolment they raise no use. Carter, 138: Lil. Abr. 353.

The usual covenant to stand seised to uses need not be by deed indented and inrolled. And where a man limits his estate to the use of his wife for life, this imports a sufficient consideration in itself; also if a person cove-nants to stand seised to the use of his wife, son, or cousin, it will raise an use without any express words of consideration; for sufficient consideration appears. 7 Rep. 40.

In case of a covenant to stand seised, so

much of the use as the owner doth not dispose of remains still in him. 1 Vent. 374. and after grant another lease to another bona And where a use is raised by way of covenant, fide, but without any fine or rent; in this the covenantor continues in possession; and there the uses limited, if they are according to law, shall rise and draw the possession out of him: but if they are not, the possession shall remain in him until a lawful use ariseth.

1 Leon. 197: 1 Mod. 159, 160.

If on a covenant to stand seised to uses, no use doth arise, yet it may be good by way of covenant, and give remedy to the covenantee in an action; as if the covenant be future, that, in consideration of a marriage, lands shall descend or remain to a son and the heirs of his body on the body of his wife; in this! case the covenantee may have writ of covenant upon the covenant against the covenantor. But if a covenant be, that a man and his heirs shall from henceforth stand and be seised to such and such uses, and the uses will not arise by law: here no action of covenant lies on the covenant, for this action will never lie upon any covenant, but such as is either to do a thing hereafter, or where the thing is already done, and not where it is for !

see Bac. Ab. Uses (E.) (7th ed. by Gwillim & Dodd): Gilbert on Uses, by Sugden.

COVERTURE, Fr.] Any thing that covers, as apparel, a coverlet, &c.; but it is by our law particularly applied to the state and condition of a married woman, who is sub potestate viri, and therefore disabled to contract with any, to the damage of herself or husband, without his consent and privity, or his allow once and confirmation thereof. Bract. lib. 1. c. 10. lib. 2. 15. &c. Bro. Abr. When a woman is married, she is called a feme covert; and whatever is done concerning her during the marriage is said to be during the coverture: all things that are the wife's are the husband's, nor hath the wife power over herself, but the husband; and if the husband alien the wife's land during the coverture, she cannot avoid it during his life; but after his death she may recover by cui in vita. Terms de la Ley. See tits. Baron and Feme; Cui in Vita.

COVIN, covina.] A deceitful compact between two or more to deceive or prejudice others; as if tenant for life or in tail conspires with another, that he shall recover the land in reversion. Plowd. 546. Covin is commonly conversant in and about conveyances of lands by fine, feoffment, recovery, &c. And then it tends to defeat purchasers of the lands they purchase, and creditors of their just debts; and so it is used in deeds of girt of goods: it may be likewise sometimes in suits of law, and judgments had in them. But wherever covin is, it shall never be intended unless it appears, and be particularly found; for covin and fraud, though proved, yet must be found by the jury, or it will not be good.

Brownl. 188: Bridgm. 112.

If one make a lease to a person by covin, case the second lessee may not avoid the first lease, because he is not a purchaser that comes in for money. 3 Rep. 83. On recovery by a good title, there may be covin; as where tenant for life by assent, &c., suffers a recovery by nil dicit, without making any defence; and if a man hath a rightful and just cause of action, and of covin and consent, shall raise up a tenant by wrong against whom he may recover; the covin doth so suffocate the right, that the recovery, although it be upon good title, shall not bind. Bro. Covin, 47: Co. Lit. 357: 1 Shep. Abr. 365. A. is tenant for life, remainder in tail to B., and a præcipe is brought against them as joint tenants, by covin, between the demandant and A., and an answer procured for B. as joint tenant, and they join the mise (or issue); and after make default, whereby final judgment is given; this shall not defeat the estate of B, who may bring a writ of disceit, and shall be restored to land. Rol. Abr. 621.

If a man that has a right to certain lands,

by covin causes another to oust the tenant of Br. 111. And in the stat. 1 Ed. 3.c. 4. See the land, to the intent to recover it from him, and he recovers accordingly against him by action tried; yet he shall not be remitted to his ancient right; but is in, of the estate of him who made the ouster; and an assise lies against him. 2 Danv. Abr. 309. Land is aliened, pending a writ of debt, by covin, to avoid the extent thereof for the debt; the land so aliened shall be extended when the covin appears upon the return of the elegit by the sheriff. Ibid. 311. If a man makes a deed of gift, &c., of his goods in his lifetime by covin, to oust his creditors of their debts. after his death the donee or vendee shall be charged for them. See the several stats. of Frauds. If goods are sold in market overt by covin, on purpose to bar him that hath right, this shall not bar him thereof. 2 Inst. 713. See tit. Frauds, &c.

COUNCIL. See tit. Privy Council.

In the city of London there is a common council, consisting of members called common councilmen, chosen in every ward at a court of wardmote, held by the aldermen of the respective wards on St. Thomas's day yearly; they are so chosen out of the most sufficient men, and sworn to give true counsel for the common profit of the city, &c. Lex Londi. num, 117. In the court of common council are made laws for advancement of trade, and committees yearly appointed, &c.; but acts made by them are to have the assent of the lord mayor and aldermen, by stat. 21 G. 1. c. 11. See this Dict. tit. London.

COUNSELLOR, consiliarius.] A person retained by a client to plead his cause in a court of judicature. A barrister. See tit.

Barrister.

Counsel for Prisoners. See tit. Trial, and

COUNT. The original declaration of complaint in a real action. As declaration is applied to personal, so count is applicable to real causes; but count and declaration are oftentimes confounded, and made to signify the same thing. F. N. B. 16. 60. In passing a recovery at the Common Pleas' bar, a serjeant at law counts upon the pracipe, &c. See tits. Counters, Declaration, Pleading.

COUNTEE, Fr. comte.] The most eminent dignity of a subject before the Conquest, and those who in ancient times were created countees were men of great estate; for which reason, and because the law intends that they assist the king with their counsel for the public good, and preserve the realm by their valour, they had great privileges; as they might not be arrested for debt or trespass, or be put on juries, &c. Of old the countee was præfectus, or præpositus comitatûs, and had the charge and custody of the county: but this authority the sheriff now hath. 9

Contenement.

COUNTER, Computatorium, from the Lat. computare.] The name of two prisons in London, the Poultry Counter and Woodstreet Counter [now consolidated into one new-built prison], for the use of the city, to confine debtors, peace-breakers, &c. Cowel.
COUNTERFEIT LETTERS. See tit.

False Pretences.

COUNTERFEITS. See tit. Cheats.

Counterfeiting the King's seal, or money, &c. is treason. See tit. Treason and Coin. And counterfeiting Exchequer bills, Bank bills, lottery orders, &c. is felony. See tits.

Felony, Forgery, Fraud.

COUNTERMAND, contramandatum.] Is where a thing formerly executed is afterwards, by some act or ceremony, made void by the party that first did it; and it is either actual by deed or implied. Actual, where a power to execute any authority, &c. is by a formal writing, for that very purpose, put off for a time, or made void; and implied, is where a man makes his last will and testament, and thereby devises his land to A. B.: land, here this feoffment is a countermand to the will, without any express words for the same, and the will is void as to the disposition of the land. Also if a woman, seised of land in fee-simple, makes a will, and deviseth the same to C. D. and his heirs, if he survive her; and after she intermarries with the said C. D., there, by taking him to husband, and coverture at the time of her death, the will is countermanded. Terms de la Ley. But if a woman makes a lease at will, and then marries, this marriage is no countermand to the lease, without express matter done by the husband to determine the will. If a woman submits differences to arbitration, and then marries, the marriage countermands the authority of the arbitrator. Charnley v. Winstanley, 5 East, 266.

Where land is devised, and after a lease made thereof for years only, it shall not be a countermand of the will, which is good notwithstanding, for the reversion after the lease for years is ended; but in case a man have a lease for years, and gives it by his will, and after surrenders it, it is a countermand of the Dyer. 47: Goldsb. 93. See tit. Devise. If a copyholder, like to die, do surrender his estate to the use of his wife or children, without any consideration of money, &c., and he recover before the presentment and admittance, it may be countermanded; it is otherwise if it be to the use of a stranger. Kitch. 82. If there be a feoffment, with letter of attorney to make livery and seisin, and before it is made the feoffor makes a feoffment or bargain and sale Rep. 46. A countee or count is an earl. Law of the land, or lease to another, it will be a Fr. Dict. See tits. Earl, Sheriff.

COUNTENANCE. This word seems to the letter of attorney. 2 Brownl. 291. A perbe used for credit or estimation. Old. Nat. son may countermand his command, authority, licence &c., before the thing is done; and if he dies it is countermanded. There is also a countermand of notice of trial, &c., in law proceedings. See tits. Trial, Process.

COUNTERPART. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts; though of late it is most frequent (and better) for all the parties to execute every part, which renders them all originals. 2 Comm. 296. See tit. Deeds.

COUNTERPLEA, is when the tenant in any real action, tenant by the curtesy, or dower, in his answer and plea, vouches any one to warrant his title, or prays in aid of another who hath a larger estate; as of him in reversion, &c.: or where one that is a stranger to the action comes and prays to be received to save his estate; then that which the demandant allegeth against it, why he should not be admitted, is called a counterplea; in which sense it is used stat. 25 Ed. 3. c. 7. So that counterplea is in law a replication to Aid Prier, and is called counterplea to the voucher. But when the voucher is allowed, and the vouchee comes and demands what cause the tenant hath to vouch him, and the tenant shows his cause, whereupon the vouchee pleads any thing to avoid the warranty, that is termed a counterplea of the warranty. Terms de la Ley; stat. 3 Ed. 1. c. 39. There is also a counterplea to the plea of clergy.

See tit. Clergy, Benefit of, II.

COUNTER-ROLLS. The rolls which
sheriffs of counties have with the coroners of
their proceedings, as well of appeals as of

inquests, &c. Stat. 3 Ed. 1. c. 10.

COUNTORS, Fr. Contours.] Have been taken for such serjeants at law which a man retains to defend his cause, and speak for him in any court, for their fees. Horn's Mirror, lib. 2. And as in the Court of C. B. none but serjeants at law may plead, they were anciently called Serjeant counters. 1 Inst. 17.

COUNTY. Comitatus.] Signifies the same with shire, the one coming from the French, the other from the Saxon. It contains a circuit or portion of the realm, into which the whole land is divided, for the better government of it, and the more easy administration of justice: so that there is no part of this kingdom that lies not within some county; and every county is governed by a yearly officer, the sheriff. Fortescue, cap. 24. Of these counties, the numbers have been different at different times; there are now in England forty, besides twelve in Wales, making in all fifty-two. It seems that this division of the kingdom was made by King Alfred. See 4 Comm. 410. The names of the counties are as follows. In England; Bedford, Berks, Bucks, Cambridge, Chester, Cornwall, Cumberland, Derby, Devon, Dorset, Durham, Essex, Gloucester, Hereford, Hertford, Huntingdon, Kent, Lancaster, Leicester, Lincoln, Middlesex, Monmouth, Norfolk, Northampton, Northumberland, Nottingham, Oxford, Rutland, (the smallest), Salop (commonly called Shropshire), Somerset, Stafford, Suffolk, Surry, Sussex, Southampton (Hants or Hampshire), Warwick, Westmorland, Worcester, Wilks, York (the largest):—In North Walles, Anglesea, Caernarvon, Denbigh, Flint, Merioneth, and Montgomery:—In South Walles, Brecknock, Cardigan, Caermarthen, Glamorgan, Pembroke and Radnor.

As to the divisions of many of these counties for the purposes of representation, see the Boundary Act, 2 and 3 W. 4 c. 64. and see tit. Parliament: and as to divisions of counties with reference to quarter and petty sessions, see 9 G. 4. c. 43: 10 G. 4. c. 46.

Three of the counties above enumerated, viz. Chester, Durham, and Lancaster, are called Counties Palatine. The two former are such by prescription or immemorial custom; or at least as old as the Norman conquest (Seld. tit. Hon. 2. 5. 8.); the latter was created by King Edward III. in favour of Henry Plantagenet, first Earl, and then Duke of Lancaster (4 Inst. 204.), whose heiress being married to John of Gaunt, the king's son, the franchise was greatly enlarged and confirmed in parliament to honour John of Gaunt himself, whom, on the death of his father-in-law, the King had also created Duke of Lancaster. Plowd. 215: T. Raym. 138.

Counties Palatine are so called a palatio: because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had in those counties jura regalia as fully as the king hath in his palace: regalem potestatem in omnibus, as Bracton expresses it. Lib. 3. c. 8. § 4. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's, and all offences were said to be done against their peace, and not, as in other places, contra pacem domini regis. 4 Inst. 204. And indeed by the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace, in whose court they were tried; in a court-leet, contra pacem domini: in the court of a corporation, contra pacem ballivorum; in the sheriff's courts or towns, contra pacem vice-comitis. Seld. in Heng. Magnu,

The Palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first feodal kingdoms in Europe) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland: in order that the inhabitants, having justice administered at home, might not be obliged to go out of the country, and leave it open to the enemy's incursions: and the owners being encouraged by so large an authority might be the more

COUNTY.

watchful in its defence. And upon this | condition, separate from the crown of Engaccount also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire; the latter now united with Northumberland; but these were abolished by parliament, the former in 27 H. 8. the latter in 14. Eliz. And in the time of Hen. VIII. likewise, the powers beforementioned of owners of Counties Palatine were abridged; stat. 27 H. 8. c. 24; the reason for their continuance in a manner ceasing, though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them. 4 Inst. 205.

Of these three, the county of Durham is now the only one remaining in the hands of a subject. For the earldom of Chester, as Camden testifies, was united to the crown by Hen. III., and has ever since given title to the king's eldest son. And the County Palatine, or Duchy of Lancaster, was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from King Richard II. and assumed the title of King Henry IV. But he was too prudent to suffer this to be united to the crown; lest if he lost one, he should lose the other also. For as Plowden (215.) and Sir Edward Coke (4 Inst. 245.) observe, "he knew he had the Duchy of Lancaster by sure and indefeasible title, but that his title to the crown was not so assured; for that after the decease of Richard II. the right of the crown was in the heir of Lionel Duke of Clarence, second son of Edward III., John of Gaunt, father to this Henry IV., being but the fourth son." And therefore he procured an act of parliament, in the first year of his reign, ordaining that the Duchy of Lancaster, and all other his hereditary estates, with all their royalties, and' franchises, should remain to him and his heirs for ever: and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity; and thus they descended to his son and grand-son, Henry V. and Henry VI., many new territories, and privileges, being annexed to the duchy by the former. Parl. 2 H. 5. n. 30: 3 H. 5. n. 15.—Henry VI. being attainted in 1 Edward IV. this duchy was declared in parliament to have become forfeited to the crown (1 Ventr. 155.); and at the same time an act was made to incorporate the Duchy of Lancaster, to continue the County Palatine (which might otherwise have determined by the attainder; 1 Ventr. 157.); and to make the same parcel of the duchy: and farther, to vest the whole in King Edward IV. and his heirs, Kings of England, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. VII. another act was made to resume such part of the duchy lands as had been dismembered from it in the reign of Edward IV., and to vest the inheritance of the whole in the king and his heirs for ever; as amply and largely, and in like manner, form, and

land and possession of the same, as the three Henry and Edward IV. or any of them, had and held the same.

467

The Isle of Ely is not a County Palatine, though sometimes erroneously called so, but only a royal franchise, the bishop having, by grant of King Henry the First, jura regalia within the Isle of Ely; whereby he exercises a jurisdiction over all causes, as well criminal as civil. 2 Inst. 220: and see 3 East,

The Counties Palatine are reckoned among the superior courts: and are privileged as to pleas, so as no inhabitant of such counties shall be compelled by any writ to appear or answer out of the same; except for error, and in case of treason, &c.; and the Counties Palatine of Chester and Durham are by prescription, where the king's writ ought not to come, but under the seal of the Counties Palatine; unless it be writs of proclamation. Cromp. Juris. 137: 1 Danv. Abr. 750.

But certiorari lies out of B. R. to justices of a County Palatine, &c. to remove indictments and proceedings before them. 2 Hawk.

P. C. c. 27. § 23.

There is also a Court of Chancery in the Counties Palatine of Lancaster and Durham, over which there are Chancellors; that of Lancaster called Chancellor of the Duchy, &c. See tit. Chancellor. And there was a Court of Exchequer at Chester, of a mixed nature, for law and equity, of which the Chamberlain of Chester was judge. There was also a Chief Justice of Chester; and other justices in the other Counties Palatine. to determine civil actions and pleas of the

But the jurisdiction of the court of the County Palatine of Chester, and of the Chamberlain and Vice-Chamberlain, are totally abolished by 1 W. 4 c. 70. § 14. and the jurisdiction of the courts at Westminster now

extends to that county.

The bishop of Durham has that County Palatine: and if any erroneous judgment be given in the courts of the bishopric of Durham, a writ of error shall be brought before the bishop himself; and if he give an erroneous judgment thereon, a writ of error shall be sucd out, returnable in B. R. 4 Inst. 218.

Infants in Countics Palatine enabled to convey by order of the respective courts belonging to those counties. 4 G. 3. c. 16.

The king may make a County Palatine by his letters patent without parliament. 4 Inst.

As to farther matter relative to the several Counties Palatine, see titles Chester, Durham, and Lancaster; and particularly as to Chester, stats. 43 Eliz. c. 15: (and this Dict. tit. Fines:) 22 G. 2. c. 46: 26 G. 2. c. 34: 27 G. 3. c. 43.

By stat. 7 G. 4. c. 64. § 9. where the principal felony has been committed in one county, and any accessorial act takes place in another county, the accessory may be tried in either: and by § 12. felonies or misd meanors | by Lambert called Conventus, in his explicacommitted near the boundaries of countres, or within five hundred yards of such boundaries, or shall be begun in one county and completed in another, may be tried in either of such counties; and by § 13, effences (felony or misdemeanor, committed in or upon any premises, or on or in any respect of any property in or upon any coach or other carriage, or on board any ves-el upon any navigable river, can; I, or may gettion, may be tried in any county through which the coach. or vessel passed; and when the sib, centre, back, &c. of any river, canal, or highway, constitutes the boundaries of two countres, the offence may be tried in either of the said counties through, or adjoining to, or by the boundary of any part whereof such coach or vessel shall have passed in the course of the therein, &c. journey or voyage.

By § 15. of the same stat, in any indictment or information for any bloom or nisdemeanor committed in upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole or in part at the expence of any county, riding, or division, or on or in respect of any goods provided for in any county, &c. to be used for making, altering, &c. any bridge, or any highway, at the ends thereof, in any court or other building, such property, real or personal, may be stated to belong to such county, riding, or division, without specifying the names of the inhabitants.

Counties Corporate, are certain cities and towns, some with more, some with less territory annexed to them, to which, out of special grace and favour, the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein.

The stat. 3 G. 1. c. 15. for the regulation of the office of sheriffs, enumerates twelve cities and five towns, which are counties of themselves, and which have consequently their own sheriffs. The cities are London, (by grant of Hen. 1.) [See 2 Inst. 230, that it is a corporatioon by prescription.—The office of sheriff of London, &c. is always united with that of Middlesex. See 2 Inst. 248.] Chester (42 Eliz.), Bristol, Coventry, Canterbury, Exeter, Gloucester, Litchfield, Lincoln, Norwich, Worcester, York (32 Hen. 8.) The towns are, Kingston-upon-Hull, Nottingham, Newcastle-upon-Tyne, Pool, Southampton. 1 Comm. 116. 119. To these Cirencester is added in Impey's Sheriff; but, on what authority does not clearly appear. By the Reform Act, 2 W. 4. c. 45. thirteen cities and towns, which are counties of themselves, are, for the purposes of representation, for the plaintiff, judgment is entered, and a included in the adjoining counties. See | fieri facias may be awarded against the de-Schedule G. of the Act.

COUNTY COURT, caria comitatus.] Is tion of Saxon words, and divided into two sorts; one retaining the general name, as the county court held every month, by the sheriff or his deputy; the other called the turn, held twice in every year, viz. within a month after Easter and Michaelmas; of both which see Cromp. Jurisd. fol. 241. All administration of justice was at first in the king's hands; but afterwards, when by the increase of the people the burden grew too great for him, as the Lingdom was divided into counties, huncreds, &c., so the administration of justice was distributed amongst divers courts, of which the sheriff had the county court for government of the county, and lords of liberties had their lects and law-days, for the speeding and easier administering justice

Before the courts at Westminister were erected, the county courts were the chief courts of the kingdom; and among the laws of kin Eurer it is organia d, that there be two county courts kept in the year, in which there shall be a bishop and an alderman, or earl, as judges; one to judge according to the common law, and the other according to the ecclesiastical law; but these united powers of a bishop and earl to try causes were separated by William the First, called the Conqueror; and soon after the business of ecclesiastical cognisance was brought into its proper courts, and the common law business

That the county court, in ancient times, had the cognisance of pleas of the crown, indictments of felony, &c. appears by Glanv. lib. 1. c. 2, 3, 4; by Bracton and B. itton, in divers places; and Fleta, lib. 2. c. 62. But the power of this court was much reduced by Magn. Chart. c. 17; and by 1 Ed. 4. c. 2. by the former of which it is expressly provided, that " no sheriff shall hold pleas of the crown." It had formerly, and now hath, the determination of certain debts, &c. under 40s. Over some of which causes the inferior courts have by the express words of the stat. of Gloucester, 6 Ed. 1. c. 8. a jurisdiction totally exclusive of the king's superior courts.

This court may also hold plea of many of ward. 4 Inst. 266; 3 Inst. 312. And of all personal actions to any amount, by virtue of a writ of justices, which is in nature of a commission to the sheriff to do it. 4 Inst. 266. Here the plaintiff takes out a summons, and if the defendant do not appear, an attachment or distringas is to be made out against him; but if the defendant appears, the plaintiff is to file his declaration, and after the defendant is to put in his answer or plea; and the plaintiff having joined issue, the trial proceeds, &c.; whereupon if verdict is given fendant's goods, which may be taken by virtue thereof, and be appraised and sold to satisfy the plaintiff. But if the defendant hath no goods, the plaintiff is without remedy in this court; for no capias lies therein, but an action may be brought at common law, upon the judgment entered. Greenwood of Courts, p. 22: Finch, 318: F. N. B. 152.

No sheriff is to enter in the county court any plaint in the absence of the plaintiff; nor above one plaint for one cause, under penalties. The defendant in the county court is to have lawful summons; and two justices of peace are to view the estreats of sheriffs, before they issue them out of the county court, &c. By stat. 11 H. 7. c. 15. causes are to be removed out of the county court, by recordare, pone, and writ of false judgment into B. R. &c. The stats. 9 H. 5. c. 35. 2 E. 6. c. 25. enact, that no county court shall be adjourned for longer than one month, consisting of 28 days.

All popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever

be made in full county court.

As this court hath of ancient times belonged to the sheriff, and is incident to his office, the king cannot grant by letters patent the office of county clerk, nor the fees; but it of right belongs to the sheriff. 4 Co. Mitton's case.

See stats. 7 & 8 W. 3. c. 25. as to the county courts in Yorkshire, and 27 H. 8. c. 26; 34 H. 8. c. 26. as to those in Wales. Blackstone (3 Comm. 82.) observes, on the late erection of numerous courts of conscience (see that tit. post) that it is to be wished that the proceedings in the county and hundred courts should be again revived and improved, an experiment that has been tried, and succeeded, in Middlesex. For by stat. 23 G. 2. c. 33. it is enacted—1. That a special county court shall be held, at least once a month, in every hundred of the county of Middlesex, by the county clerk. 2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year. 3. That in all causes not exceeding the value of 40s. the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses, on oath, without the formal process anciently used; and shall make such order therein as they shall judge to be agreeable to conscience. 4. That no plaints shall be removed out of this court by any process whatever, but the determination herein shall be final. 5. That if any action be brought in any of the superior courts, against a person resident in Middlesex, where the jury shall find less than 40s. damages, the plaintiff shall not recover, but pay, costs. (See

Blackstone remarks, that this plan wants only to be generally known, to secure its universal reception. See tit. Courts of Conscience.

COUNTY RATES. By stat. 12 G. 2. c. 29. justices of peace at their quarter sessions (and by stat. 13 G. 2. c. 18. justices of liberties and franchises not subject to the county commissioners) may make one general rate, to answer all former distinct rates, which shall be assessed on every parish, &c., and collected and paid by the high constables of hundreds to treasurers appointed by the justices; which money shall be deemed the publie stock, and be laid out in repairing of bridges, gaols, or houses of correction, on presentment made by the grand jury at the assizes or quarter sessions, of their wanting reparation; but appeal lies by the churchwardens and overseers of the poor of the parishes to the justices at the next sessions, against the rute on any particular parish. And as to this appeal, see also stat. 22 G. 3.

The stat. 18 G. 3. c. 19. which enables the court in certain cases to make an order on the treasurer of the county, riding, or division, where the offence was committed, to pay the prosecutor and his witnesses their expenses, extends to inferior districts, having jurisdiction to try felons, and raising their own rates similar to county rates. 6 T. Rep. 237.

Where, before the stat. 12 G. 3. c. 29. the county rates had been assessed upon the district or place of H. within C., but the two townships of H. and C. separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves; yet, as that statute only establishes the accustomed proportions of contribution to the county rates, as between the entire districts which were before assessed to such rates, within the limits of the respective counties, &c., and does not meddle with the proportions which had been used to be observed as between the subdivisions of those districts, this case was held to fall within § 3. of the statute, which provides that where there is no poor's rate in the parish, township or place, assessed to the county rates (by which must be understood no entire poor's rate co-extensive with the place or district assessed to the county rates,) the county rates shall be raised by the petty constables, in such manner as by law the poor's rate is to be assessed and levied, that is, by an equal rate on all the inhabitants, &c. R. v. Yorkshire, W. R. Justices, 13 East's Rep. 117.

A charter granting jurisdiction to borough justices over a district not within the borough, without words of exclusive jurisdiction, was held not to exclude the county justices from rating the district to a county rate. Bates v. Winstanley, 4 Maule & S. 429.

By stat. 52 G. 3. c. 110. for amending 12

G. 2. c. 29. and remedying defects in the laws relative to the repairing of county bridges, &c. the quarter sessions are empowered to appoint, annually at Easter, &c. two or more justices to superintend the occasional repairs of bridges; who may order any expenditure not exceeding 201. for such repairs, which shall be paid by the sessions on certificate of the justices. Justices at sessions may contract with commissioners of turnpike-roads for repair of bridges, &c. for any term not exceeding seven years.

By stat. 43 G. 3. c. 59. amended by 54 G. 3. c. 90; 55 G. 3. c. 143. justices are empowered to purchase land, houses, &c. for the widening, altering, and improving of county bridges; and also of old bridges repaired by hundreds and general divisions of counties.

See farther tit. Bridges.

By stat. 55 G. 3. c. 51. additional provisions are made for the more equally and effectually making and levying the county rates .- By this act, justices in general, or quarter sessions, are empowered to make a fair and equal county rate in any county, whenever circumstances appear to require it.-For this purpose they may require churchwardens and overseers of the several parishes to make returns to the justices of the respective divisions in petty sessions, of the annual value of all rateable property, which such justices must certify to the quarter sessions, who may make the county rate thereon. By this act the treasurers of counties are required to publish an abstract of their receipts and expenditure yearly, as audited by the justices.—And the high-constable, employed in levying the rates, may be required by the quarter sessions to give security; and if he fails, the rates shall be paid directly to the treasurer.

The first section of this act is confined to franchises having a separate jurisdiction co-extensive with that possessed by the county justices; and, therefore, when the justices of a city had no jurisdiction by charter to try felons, it was held that such city was liable to

the county rate. 5 B. & A. 665.

A high constable may be appointed, and a county rate levied de novo, for a town erected into a county of itself by charter many years before, though no such officer had been appointed or such rate levied before. 6 T. R. 228.

In what cases the sessions have power to order the expense of certain litigations to be paid out of the county rates. See 4 T. R. 491, 4, 5, 6: 7 T. R. 377: 1 B. & A. 312: 2 B.

& A. 522. By 55 G. 3. c. 51. an appeal is given against a county rate made in fixed proportions invariably adopted for a series of years. 2 Barn. & C. 771. As to the notice of appeal against a county rate, see 10 B. & C. 226.

792.

By stat. 56 G. 3. c. 49. extra-parochial places are made rateable, and the sessions are empowered to ascertain boundaries, &c.—

Stat. 57 G. 3. c. 94. regulates the mode of appeal against rates, which are to remain in force until quashed on such appeal, &c.

By the 4 and 5 W. 4. c. 48. all business relating to the assessment and application of county rates shall be transacted at the quarter sessions in open court; and two weeks' notice shall be given, by advertisement in two county papers, of the time of holding such sessions, and of the day and hour when such business will be transacted.

Several local acts have been passed for regulating the county rates in particular

counties.

COUNTING-HOUSE OF THE KING'S HOUSEHOLD, Domus Computas Hospitii Regis.] Usually called the Board of Green Cloth; where sit the lord steward, and treasurer of the king's house, the comptroller, master of the household, cofferer, and two clerks of the Green Cloth, &c. for daily taking the accounts of all expences of the household, making provisions, and ordering payment for the same; and for the good government of the king's household servants, and paying the wages of those below stairs. Stat. 39 Eliz. c. 7.

COURIER, from the Fr. Courir to run.]

An express messenger of haste.

COURRACIER, Fr.] A horse courser. 2 Inst. 719.

COURTESY. See CURTESY.

COURTS.—A COURT, Curia.] The king's palace or mansion; but more especially the place where justice is judicially administered. Co. Lit. 58. The superior courts are those at Westminster; and of courts, some are of record, and some not; which are accounted

base courts, in respect of the rest.

A court of record is that court which hath power to hold plea, according to the course of the common law, of real, personal, and mixed actions, where the debt or damage is 40s. or above; as the King's Bench, Common Pleas, &cc. A court not of record is where it cannot hold plea of debt or damages amounting to 40s., but of pleas under that sum: or where the proceedings are not according to the course of the common law, nor inrolled, as the county-court, and the court-baron, &c. 1 Inst. 117. 260: 4 Rep. 52: 2 Rol. Abr. 574. See Record.

Every court of record is the king's court, in right of his crown and dignity, though his subjects have the benefit of it; and therefore no other court hath authority to fine and imprison: so that the very erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record. Salk. 200: 12 Mod. 388: Finch. L. 231. The free use of all courts of record and not of record is to be granted to the people: the leet and tourn are the king's courts, and of record. 2 Danv. 259. The rolls of the superior courts of record are of such authority, that no proof will be admitted against them; and these records are only triable by them-

selves. 3 Inst. 71. But as the county-court, judges who give the judgment, and any officer court-baron, &c. are not courts of record, the proceedings therein may be denied, and tried by a jury; and upon their judgments a writ of error lies not, but writ of false judgment. 1 Inst. 117. See post, Court-Baron, Record.

In the courts at Westminster the plaintiff need not show at large in his declaration that the cause of action arises within their jurisdiction, it being general: inferior courts are to show it at large, because they have particular jurisdiction. 1 Lil. Abr. 371. Also nothing shall be intended to be within the jurisdiction of an inferior court, but what is expressly so alleged: and if part of the cause arises within the inferior jurisdiction, and part thereof without it, the inferior court ought not to hold plea. 1 Lev. 104: 2 Rep. 16. See tit. Abatement, I. 1.

An inferior court, not of record, cannot impose a fine, or imprison: but the courts of record at Westminster may fine, imprison,

and amerce. 11 Rep. 43.

The king, being the supreme magistrate of the kingdom, and intrusted with the execu-tive power of the law, all courts superior or inferior, ought to derive their authority from the crown: Staundf. 54; though the king himself cannot now, as anciently, sit in judgment in any court upon civil causes, nor upon indictments, because there he is one of the parties to be suit. 2 Hawk. P. C. c. 1. § 1, 2. The king hath committed all his power judicial to one court or the other. 4 Inst. 71. And by stat. 52 H. 3. c. 1. it is enacted, that all persons shall receive justice in the king's courts, and none take any distress, &c. of his own authority, without award of the king's courts.

It is said the customs, precedents, and common judicial proceedings of a court, are a law to that court; and the determinations of courts make points to be law. 2 Rep. 12: 4 Rep. 53: Hob. 298. All things determinable in courts, that are courts by the common law, shall be determined by the judges of the same courts; and the king's writ cannot alter the jurisdiction of a court. 6 Rep. 11. The court of B. R. regulates all the inferior courts of law in the kingdom, so that they do not exceed their jurisdictions, nor alter their forms, &c. And as the Court of King's Bench hath a general superintendency over all inferior courts, it may award an attachment against any such court usurping a jurisdiction not belonging to it: but it is sometimes usual first to award a writ of prohibition, and afterwards an attachment, upon its continuing to proceed. 2 Hawk. P. C. c. 22. § 25. Qu. whether the Court of K. B. has authority to direct a prohibition to the lord chancellor sitting in bankruptcy. Ex. p. Cowan. 3 B. & A. 123.

If a court, having no jurisdiction of a cause depending therein, do nevertheless proceed, the judgment in such court is coram non ju- being suitors are the judges; and this cannot

that executes the process under them: though where they have authority, and give an ill judgment, there the party who executes the process, &c. upon the judgment shall be excused. 1 Lil. Abr. 370.

471

Judges of inferior courts may be punished for misbehaviour either by information or attachment. Moravia's case, Hardw. 135. Any defects in the proceedings of an inferior court cannot be amended by the return, which is not part of the record. The King v. Holmes, Id. 365. Where an inferior court returns its proceedings, no diminution can be alleged.

Sayer v. Curtis, Ibid. 367.

Action on the case lies against the plaintiff for suing one in an inferior court, where the cause of action is out of its jurisdiction. 1 Vent. 369. And if a plaintiff on a contract for a large sum, splits it into several actions for small sums to give an inferior court jurisdiction, a prohibition shall go. Mod. Cas. 90. A. became indebted to B. in a sum not exceeding 40s. for the carriage of parcels, and in a month after incurred another debt to B. for the carriage of another parcel. A. brought two actions in the county court for the respective debts. It was held that the causes of action were distinct, and that A. was entitled to sue separately for each debt, and the court refused a prohibition. 1 Barn. & Adol. 672.

Striking in the courts at Westminster was formerly punished by cutting off the right hand, and forfeiture of goods, &c. How contempts to courts in general are punishable by fine and imprisonment, &c., see tits. Attach, ment, Misprison. See farther as to particular courts, post, Court Baron, &c., and under tits. King's Bench, Chancery, Common Pleas, and

Exchequer.

A by-stander was fined and imprisoned for disturbing the court. 6 Term Rep. 530. Where a defendant, in addressing a jury at Nisi Prius, is guilty of a contempt, the court has the power of fining him. 2 Burn. & Ald. 320: and see Tidd's Prac. 480. (9th ed.)

By stat. 7. G. 4. c. 64. § 15. in indictments and imprisonments for felony or misdemeanour committed in, upon, or with respect to any court, &c., erected or maintained, in whole, or in part, at the expence of any county, riding, or division, the property, real or personal, may be stated to belong to the coun-

COURT OF ADMIRALTY. See tit. Admiralty. COURT BARON, Curia Baronis.] A court which every lord of a manor hath within his own precinct; it is an inseparable incident to the manor: and must be held by prescription. for it cannot be created at this day. 1 Inst. 58: 4 Inst. 268. A court baron must be kept on some part of the manor, and is of two na-

1. By common law, which is the barons' or freeholders' court, of which the freeholders dice, and void; and an action lies against the be a court baron without two suitors at least. The steward of this court is rather the regis- | wrong person. 2 B. & A. 473. And it must ter than the judge. 2. By custom, which is be held before two free suitors. 4 Term Rep. called the customary court; and concerns the customary tenants and copyholders, whereof the lord or his steward is judge. See tit. Copyhold, and see tit. Court Baron, Bac. Ab. (7th)

The court baron may be of this double nature, or one may be without the other; but as there can be no court baron at common law without freeholders, so there cannot be a customary court without copyholders or customary tenants. 4 Rep. 26: 6 Rep. 11, 12: 2

Inst. 119. See tit. Copyhold.

The freeholders' court, whose most important business is to determine, by writ of right, all controversies relating to lands within the manor, and which hath also jurisdiction for trying actions of debt, trespasses, &c. under 40s. may be held every three weeks, and is something like a county court, and the proceedings much the same: though on recovery of debt, they have not power to make execution, but are to distrain the defendant's goods, and retain them till satisfaction is made. See 5 Barn. & A. 691.

The proceedings on a writ of right may be removed into the county courts by a precept from the sheriff called a tolt (quia tollit causam). 3 Rep. Pref. And the proceedings in all other actions may be removed into the superior courts by the king's writs of pone, or accedas ad curium, according to the nature of

the suit. F. N. B. 4. 70: Finch L. 444, 5.

After judgment given also, a writ of false judgment lies to the courts at Westminster to re-hear and re-view the cause: and not a writ of error; for this is not a court of record : and therefore in some of these writs of removal, the first direction given is to cause the plaint to be recorded; recordari facias loquelam. F.

The other court baron, for taking and passing of estates, surrenders, admittances, &c., is held but once or twice in a year (usually with the court leet), unless it be on purpose to grant an estate; and then it is holden as often as requisite. In this court the homage jury are to inquire that their lords do not lose their services, duties, or customs; but that the tenants make their suits of court, pay their rents and heriots, &c., and keep their lands and tenements in repair; they are to present all common and private nuisances, which may prejudice the lord's manor; and every public trespass must be punished in this court, by amercement, on presenting the same. By stat. Extent. Man. 4 Ed. 1. it shall be inquired of customary tenants, what they hold, by what works, rents, heriots, services, &c.; and of the lord's woods, and other profits, fishing, &c.

The steward is not merely the minister, but a constituent and essential part of this court, which cannot be held without him, and he is therefore not civilly responsible for the mistake of the bailiff, in taking the goods of a

446. n.

By stat. 1 (vulgo 2) Jac. 1. c. 5. stewards of courts leet, or courts baron, being guilty of extortion, shall forfeit 40l. and be incapacita-

COURT OF CHANCERY. See Chancery.

COURT OF CHIVALRY, Curia Militaris.] Otherwise called the marshal court, the judges of it are the lord high constable of England, and the earl marshal; this court is said to be the fountain of the martial law, and the earl marshal hath both a judicial and ministerial power; for he is not only one of the judges, but is to see execution done. 4 Inst. 123. See tit. Court Martial.

The court of chivalry is the only court military known to, and established by, the permanent laws of the land; it was formerly held before the lord high constable and earl marshal of England, jointly: but since the extinguishment of the former office, it hath usually, with respect to civil matters, been before the earl marshal only. See tit. Constable.-From the sentence of this court an appeal lies immediately to the king in person. 4 Inst. 125. This court was in great reputation in times of pure chivalry, and afterwards, during our connections with the Continent, by the territories which our princes held in France; but it is now grown almost entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments. 3 Comm. 68.

The jurisdiction of this court is declared by stat. 13 R. 2. c. 2. to be this: "that it hath cognizance of contracts touching deeds of arms, or of war, out of the realm; and also of things which touch war within the realm, which cannot be determined or discussed by the common law; together with other usages and customs to the same matters appertaining." So that wherever the common law can give redress, this court hath no jurisdiction; which has thrown it entirely out of use, as to matters of contract, all such being usually cognizable in the courts of Westminster-hall, if not directly, at least by fiction of law: as if a contract be made at Gibraltar, the plaintiff may suppose it made at Westminster, &c.; for the locality or place of making it, is of no consequence with regard to the validity of the

The words, "other usages and customs," support the claim of this court. 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour; and 2. To keep up the distinction of degrees and quality. Whence it follows, that the civil jurisdiction of this court of chivalry is principally in two points; the redressing injuries of honour, and correcting encroachments in matters of coat-armour, precedency and other distinctions of families.

As a court of honour, it is to give satisfaction to all such as are aggrieved in that point,

a point of a nature so nice and so delicate, descents, and coat-armour), that though forthat its wrongs and injuries escape the notice merly some credit has been paid to their of the common law, and yet are fit to be re- testimony, now even their common seal will dressed somewhere; such for instance as not be received as evidence in any court of calling a man coward, or giving him the lie; justice in the kingdom. 2 Roll. Abr. 686: 2 for which, as they are productive of no-immediate damage to his person or property, no compiled when progresses were solemnly and action will lie in the courts of Westminster; and yet they are such injuries as will prompt dom, to inquire into the state of families, and every man of spirit to demand some honourable amends, which by the ancient law of were verified to them upon oath, are allowed the land was appointed to be given in the court of chivalry. Year Book, 37 Hen. 6.21: Selden of Duels, c. 10: Hal. Hist. C. L. 37. But modern resolutions have determined, that sent lie therein. Salk. 583: 7 Mod. 125: 2
Hawk. P. C. c. 4. § 7, 8. And it hath always been most clearly holden (Hal. Hist. C. L. 37.), that as this court cannot model. how much soever such a jurisdiction may be 37.), that as this court cannot meddle with any thing determinable by the common law, it therefore can give no pecuniary satisfaction or damages, inasmuch as the quantity and determination thereof is ever of common law cognizance. And therefore this court of chivalry can at most only order reparation in point of honour; to compel the defendant mendacium sibi ipsi imponere, to take the lie he has given upon himself, or to make such other submission as the laws of honour may require. 1 Ro. Ab. 128. Neither can this court, as to the point of reparation in honour, hold a plea of any such word or thing wherein the party is relievable by the courts of common law. As if a man give another a blow, or call him thief or murderer; for in both these cases the common law has pointed

out his proper remedy by action.

As to the other point of jurisdiction, the redressing of encroachments and usurpation in matters of heraldry and coat-armour; it is the business of this court, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c., and also rights of place or precedence, where the king's patent or act of parliament (which cannot be over-ruled by this court)

have not already determined it.

The proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat. Co. Lit. 261. See tit. Battel. as it cannot imprison, not being a court of record, and as by the resolutions of the supeperior courts, it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom is now greatly disregarded; and has this court to make such orders between the fallen into the hands of certain officers and parties touching such debts, as they should attendants upon this court, called heralds, find stand to equity and good conscience, who consider it only as a matter of lucre, and The stat. 3 Jac. 1. c. 15. fully establishes not of justice; whereby such falsity and confusion have crept into their records, (which is by summons, to which if the party appear, ought to be the standing evidence of families,

Jon. 224. But their original visitation-books, regularly made into every part of the kingto register such marriages and descents, as to be good evidence of pedigrees. And it is much to be wished, that this practice of visitation at certain periods were revived; for the failure of inquisitions post mortem, by the abolition of military tenures, combined with be indeed remedied for the future, with respect to claims of peerage, by a standing order, (11th May, 1767) of the House of Lords; directing the heralds to take exact accounts, and preserve regular entries of all peers and peeresses of England, and their respective descendants; and that an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by Garter, the principal King-atarms. But the general inconvenience, affecting mere private successions, still continues without a remedy. 3 Comm. 103-6.

COURT-CHRISTIAN, Curia Christianitatis.] The ecclesiastical judicature opposed to the civil court or lay-tribunal: and as in secular courts, human laws are maintained, so in the Court-Christian, the laws of Christ should be the rule. And therefore the judges are divines; as archbishops, bishops, arch-deacons, &c. 2 Inst. 488. See post. tit. Courts

Ecclesiastical.

COURTS OF CONSCIENCE, Curiæ Conscientiæ.] Courts for the recovery of small debts by summary process before commissioners appointed for that purpose. In the 9th year of King Henry VIII. the Court of Conscience or Court of Requests, in London, was erected: there was then made an act of common council, that the lord mayor and aldermen should assign monthly two aldermen and four discreet commoners, to be commissioners to sit in this court twice a week, to hear and determine all matters brought before them between party and party, between citizens and freemen of London, in all cases where the debt or damage was under 40s. And this act of common council was confirmed by stat. 1 Jac. 1 c. 14. which empowered the commissioners of

amining the witnesses of both parties, or | ket gardener, who rented a stand with a shed the parties themselves on oath, and as they see cause, give judgment. And if the party summoned appear not, the commissioners may commit him to the compter prison till he does; also the commissioners have power to commit a person refusing to obey their orders, &c.

By stat. 14 G. 2. c. 10. the proceedings of the Court of Conscience are regulated; and in case any person affront or insult any of the commissioners, on their certifying it to the lord mayor, he shall punish the offender by fine, not exceeding 20s. or may imprison him ten days. See 25 G. 3. c. 45: 26 G. 3. Debtors.

By 39 and 40 G. 3. c. 104. (a local act) the acts 3 Jac. 1. c. 15. and 14 G. 2. c. 10. are explained and amended, and the jurisdiction of the London Court of Conscience extended to 5l. See 7 East, 47. 50: 14 E. R. 301.

There are some distinctions deserving notice between the former acts of parliament, for the recovery of small debts in London, and the 39 and 40 G. 3. c. 104. By the former acts the Courts of Requests had no jurisdiction in a suit, unless both the plaintiff and defendant were resident within the city. 2 H. Blac. 220. and see 5 Durnf. & East, 535, 6. (a.) 8: Moore, 429: 1 Bing. 388. S. C. But this is not necessary under the 39 and 40 G. 3. c. 104. which extends the jurisdiction of the court to debts not exceeding 5l. due to any person or persons, whether residing within the city or elsewhere. It is necessary, however, under the latter act, that the defendant should be a person residing or inhabiting within the city or its liberties, or keeping a house, &c., or seeking a livelihood there: and if a party's residence be out of the jurisdiction of the Court of Requests for London, his occasionally underwriting a policy at Lloyd's Coffee-house, where he has a seat, is not his seeking a livelihood within the city, so as to subject him to the jurisdiction of the court; it must be followed as a trade or business. 5 Esp. Rep. 19; and see 1 Smith R. 334. So where a defendant resided in Middlesex, and kept a warehouse in the city of London jointly with another person, but told the plaintiff that he did not keep the warehouse, and the plaintiff, upon inquiry in the neighbourhood where it was, could obtain no intelligence respecting him, the Court of Common Pleas would not, under the above act of parliament, exempt the defendant from paying costs on the ground of the verdict being under 51., and that he ought to have been summoned to the Court of Requests. 1 New. Rep. But where a person rented a counting house in the City of London, jointly with another person, and received orders there for his business, the Court of Common Pleas held that he was within the jurisdiction of the Court of Requests for the City of London, town and county of the town of Kingston-though he slept and resided in Southwark. 5 upon-Hull, by the 48 G. 3. c. 109. In the Taunt. 648: 1 Marsh, 269. S. C. So a mar-city of Bath, and its environs, the jurisdiction

over it, in l'leet-market, at an annual rent, which he occupied three times a week on market-days, till 10 o'clock in the morning. after which, and on all other days, it was occupied by others, was held not to keep a stand, within the meaning of the London Court of Request's act, so as to be privileged to be sucd there for a debt under 5l. 8 East,

The Court af Requests for London having been found extremely beneficial, courts of a similar nature were established by act of parliament in various populous districts; as in the cities of Bristol and Gloucester, by 1 W. & M. sess. 1. c. 8: in the town and borough of Southwark, &c., by the 22 G. 2. c. 47: (explained and amended by the 32 G.2. c. 6.): 46 G. 3. c. 87: and 4 G. 4. c. 123. in the city and liberty of Westminster, and part of the Duchy of Lancaster, by the 23 G. 2. c. 27. (explained and amended by the 24 G. 2. c. 42.): in the Tower Hamlets, by the 23 G. 2. c. 30. explained and amended by the 19 G. 3. c. 68.); in the city of Lincoln, &c., by the 24 G. 2. c. 16; in the town of Birmingham, &c. by the 25 G. 2. c. 34; in the town and port of Liverpool, &c., by the 25 G. 2. c. 43: in the borough of Great Yarmouth by the 31 G. 2. c. 24; and in the town and county of the town of Kingston-upon-Hull, by the 2 G. 3. c. The county court of Middlesex was also put upon a different footing, by the 23 G. 2. c. 33. for the more easy and speedy recovery of small debts. For the fees of the county clerk of Middlesex, see 4 Dowl. & Ryl. 273; and for decisions on the above statute, see Pratt's Courts of Requests, 39, 40: 5 Barn. & Cres. 532: 8 Dowl. & Ryl. 155. S. C. And in the late reign the jurisdiction of these courts was in several instances extended to sums not exceeding five pounds; as in London, by the 39 and 40 G. 3. c. 104. before mentioned; in the Isle of Wight, by the 46 G. 3. c. 66: in the town and borough of Southwark, and the eastern half of the hundred of Brixton, by the 46 G. 3. c. 87. (but see the statute 4 G. 4. c. 123. § 12. &c.) in the western division of the same hundred, by 46 G. 3. c. 188; in the hundreds of Blackheath, Bromley, and Beckenham, &c., by the 47 G. 3. sess. 1. c. 4; in the town and port of Sandwich, and the vills of Ramsgate, &c., by the 47 G. 3. sess. 1 .c. 35; in the parishes of St. John the Baptist, &c. in the Isle of Thanet, by the 47 G. 3. sess. 2. c. 7. in the town of Gravesend, &c., by the 47 G. 3. sess. 2. c. 40; in the city of Rochester, &c., by the 48 G. 3. c. 51; in Birmingham, by the 47 G. 3. sess. 1. c. 14; in Manchester, by the 48 G. 3. c. 43; in the manors of Sheffield and Ecclesall, by 48 G. 3. c. 103. (a writ of accedas ad curiam does not lie from this court to the Common Pleas, 10 Moore, 32.): and in the

of the court of requests has been extended to the courts of the counties palatine of Chester, sums not exceeding 10l. by the statute 45 G. 3. c. 67; and in the city of Bristol, &c., to sums exceeding two pounds, and not amounting to any sum for which an arrest on mesne process may by law take place, in all actions or causes of debt or contract, whereon money would be recoverable in the courts of common law, under the common counts, in an action of assumpsit, by the 56 G. 3. c. 76. For an alphabetical list of the names of the places having courts of conscience, with the statutes by which they are created, see Man. Ex. Append. 135, &c.

In order to proceed under the Court of Requests' act for Southwark, both plaintiff and defendant must be resident within the jurisdiction of the court. 8 Moore, 429: 1 Bing. 388. S. C. But where the defendant lodged within the jurisdiction of that court, he was holden to be entitled to the benefit of the statutes 22 G. 2. c. 47: 46 G. 3. c. 87: and 4 G. 4. c. 123; although he carried on his business, and the goods were delivered out of the jurisdiction, and the plaintiff had no knowledge of his lodging within it till after the process was sued out; 15 East, 647; but see stat. 4 G. 4. c. 123. § 14. 16. by which the clauses in the Southwark acts respecting costs being repealed, the plaintiff obtaining a verdict for any sum, however trifling, is entitled to costs as in other cases. And no person to whom a debt is owing, not exceeding five pounds, and recoverable by the stats. 25 G. 2. c. 34. and 47 G. 3. sess. 1. c. 14. from any person resident within the jurisdiction of the Birmingham Court of Requests can recover costs, if he sue elsewhere than in that court, wheresoever the plaintiff may reside, or the cause of action accrue. 4 Taunt. 150: 1 Chit. Rep. 636. in notis. So a defendant residing within the jurisdiction of the Court of Requests for the city of Bath is entitled to be sued in that court for a debt under ten pounds, though the cause of action accrued, and the plaintiff resided, out of the jurisdiction; and if such an action be brought elsewhere, the court on motion will deprive the plaintiff of costs. 3 Barn. & Ald. 210: 1 Chit. Rep. 635. S. C.: and see 3 Dowl. & Ryl. 51.

By stat. 19 G. 3. c. 70. so much of all acts for recovery of small debts as authorizes the arrest of a defendant for less than 10l. is repealed, § 3. And by § 4. of the same act it is provided that in all cases when final judgment shall be obtained in any inferior court, and affidavit made thereof in any court of record at Westminster, and of execution being issued against the person or effects of the defendant; and that the same cannot be found within the jurisdiction of the inferior court; the record of such judgment may be removed into the superior court, and writs of execution issued to the sheriff of any county, &c. By 33 G. 3. c. 68. these provisions are extended to judgments in the courts of great

Lancaster, and Durham.

By 25 G. 3. c. 45. as to the courts of conscience in London, Middlesex, and Southwark, and by 26 G. 3. c. 38. which extends to all courts of conscience in the kingdom, the time of imprisonment of debtors in execution is regulated, so that it shall not last more than twenty days for debts not exceeding 20s., nor more than forty days for debts not exceeding 40s. Like limitations are made by subsequent local acts for the respective jurisdictions.

COURT, COUNTY. See tit. County Court. COURT OF DELEGATES. See post, tit. Courts Ecclesiastical, 6.

Courts Ecclesiastical, Curiæ Ecclesiasticeæ, Spiritual Courts.] Are those courts which are held by the king's authority as supreme governor of the church, for matters which chiefly concern religion. 4 Inst. 321. And the laws and constitutions whereby the church of England is governed, are. 1. Divers immemorial customs. 2. Our own provincial constitutions; and the canons made in convocations, especially those in the year 1603. 3. Statutes or acts of parliament concerning the affairs of religion, or causes of ecclesiastical cognizance: particularly the rubricks in our Common Prayer Book, founded upon the statutes of uniformity. 4. The articles of religion, drawn up in the year 1562, Articuli Cleri, 9 Ed. 2. and established by 33 Eliz. c. 12. and it is said, by the general Canon Law, where all others fail.

As to suits in spiritual or Ecclesiastical Courts, they are for the reformation of manners. or for punishing of heresy, defamation, laying violent hands on a clerk, and the like; and some of their suits are to recover something demanded, as tithes, a legacy, contract of marriage, &c. And in causes of this nature, the courts may give costs, but not damages: things that properly belonging to these jurisdictions are matrimonial and testamentary; and such defamatory words, for which no action lies at law; as for calling one adulterer, fornicator, usurer, or the like. 11 Rep. 54:

Dyer, 240.
The proceedings in the Ecclesiastical Courts are, according to the civil and canon law, by citation, libel, answer upon oath, proof by witnesses, and presumptions, &c., and after sentence, for contempt, by excommunication: and if the sentence is disliked, by appeal.

The jurisdiction of these courts is volun tary, or contentious; the voluntary is merely concerned in doing what no one opposes as granting dispensations, licenses, faculties.

The punishments inflicted by these courts are censures, punishments pro salute anima, by way of penance, &c. They are not courts of record. See farther tit. Prohibition.

Much oppression having been exercised through the channel of these courts, on persessions, and county courts in Wales, and to sons charged with trifling offences within

c. 44. limits the time of commencing suits for defamatory words to six months-and for incontinence and beating in the church-yard to eight months. See tits. Limitations, Forni-

By stat. 53 G. 3. c. 127. for the better regulation of Ecclesiastical Courts in England, and the more easy recovery of church rates and tithes (and a similar act, 54 G. 3. c. 68. for Ireland,) it is enacted, that excommunication and all proceedings thereupon, in all cases (except on definitive sentences or decrees pronounced as spiritual censures for offences of ecclesiastical cognizance,) shall be discontinued; and instead thereof a writ de contumace capiendo (in the form required by the act) shall issue to compel the party to obedience, and be executed in like manner as the writ de excom. cap. See 2 Barn. & Adol. 139: see tit. Excommunication, &c. By this act justices of peace are empowered to determine complaints respecting tithes, not exceeding 101.; and in case of Quakers, not exceeding 50l. All suits for tithes must be brought within six years after they are due. Provisions are made for the recovery of church and chapel rates, before justices of the peace; and proctors are prohibited from practising in the several ecclesiastical courts,

unless duly admitted and enrolled.

By 2 and 3 W. 4. c. 93. for enforcing process upon contempts in Courts Ecclesiastical of England and Ireland, when any suitors having privilege of peerage or of parliament, or residing out of the jurisdiction of the Ecclesiastical Courts, shall have been duly cited to appear in court, or to comply with any order of such court, and shall refuse obedience, or when any such person shall cominit a contempt in face of the court or other contempt, the judge of the court may pronounce such person contumacious and in contempt, and within ten days signify the same to the lord chancellor, in the form mentioned in the 53 G. 3. c. 127. and thereupon in case the party shall not be privileged of peerage or parliament, a writ de contumace capiendo shall be issued from Chancery, directed and returnable as a writ de excommunicato capiendo, and shall have the same force and effeet: and all rules and regulations applicable to the writ de excommunicato capiendo shall be applicable to the writ de contumace capiendo, and the proceedings thereupon; and the officers of Chancery in England and Ireland are directed to issue such writ accordingly, and sheriffs, gaolers, &c. are to execute the same by taking and detaining the body of the party; and upon the due appearance of the party, or his due submission, the judge of the Ecclesiastical Court may pronounce him absolved from the contempt, and order the sheriff, gaoler, &c. to discharge him: and on the party paying his lawful costs, the sheriff shall discharge him.

By § 2. in all cases where persons, whether

their spiritual jurisdiction, the stat. 27 G. 3. | privileged or not, domiciled, or residing in England or Ireland, shall have been ordered by order or decree of such court to pay any money, and shall refuse or neglect, or in any way neglect to perform any order or decree of such court, the judge may pronounce him contumacious and in contempt, and within ten days certify the order to the lord chancellor. When such party shall be seized or possessed of any real or personal estate in England, the lord chancellor shall cause a copy of the order to be enrolled in Chancery, and order process of sequestration to issue against the real and personal estate of such party in order to enforce obedience, as if the cause had been instituted in Chancery; and the lord chancellor may make order in respect of the sequestration, and in respect of such real and personal estate as he shall think fit, or for payment of the money levied into the Bank of England to the credit of the party obtaining the order, if the same was for payment of money, or if not, to the credit of the High Court of Chancery.

§ 3. Makes the like provisions as to parties possessed of real or personal estate in Ire-

§ 4. The provisions of the act not to extend to orders or decrees made more than six years before the passing of the act.

§ 5. Actions for any thing done under the act to be brought within three calendar months, and party may plead the general issue, and shall have treble costs on verdict, or if plaintiff non-suited or discontinue, &c.

In briefly recounting the various species of Ecclesiastical Courts, or, as they are often styled, Courts Christian (curia christumitatis,) we may begin with the lowest, and so ascend gradually to the supreme court of

appeal.

1. The Archdeacon's Court is the most inferior court in the whole ecclesiastical polity. It is held, in the archdeacon's absence, before a judge appointed by himself, and called his official: and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. From hence, however, by stat. 24 H. 8. c. 12. an appeal lies to that of the bishop.

2. The Consistory Court of every diocesan bishop is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor, or his commissary, is the judge; and from his sentence an appeal lies, by virtue of the same statute, to the archbishop of

each province respectively.

3. As to The Court of Arches, see tit.

Arches Court.

4. The Court of Peculiars is a branch of, and annexed to, the Court of Arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical

causes, arising within these peculiar or ex- cases, to revise the sentence of the Court of empt jurisdictions, are, originally, cogniza-ble by this court; from which an appeal lay formerly to the pope, but now by the stat. 25 H. 8. c. 19. to the king in Chancery.

5. The Prerogative Court is established for the trial of all testamentary causes, where the deceased hath left bona notabilia within two different dioceses. In which case the probate of wills belongs to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies, of such persons, are originally cognizable herein, before a judge appointed by the archbishop, called the judge of the Prerogative Court, from whom an appeal lies by stat. 25 H. 8. c. 19. to the king in Chancery, instead of the pope as formerly.

6. The Great Court of Appeal in all ecclesiastical causes was the Court of Delegates, appointed by the king's commission under his Great Seal, and issuing out of Chancery; but the power and franchises of this court are now by 2 and 8 W. 4. c. 92. transferred to the Privy Council (see-infra). This commission was frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster, and doctors of the civil law. Appeals to Rome were always looked upon by the English nation, even in time of popery, with an evil eye; as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first introduced in very turbulent times in the sixteenth year of King Stephen (A. D. 1151); at the same period (Sir Henry Spelman observes) that the civil and canon laws were first imported into England. Cod. Vet. Leg. 315. But in a few years after, to obviate this growing practice, the constitutions made at Clarendon, 11 Hen. II. on account of the disturbances raised by Archbishop Beckett and other zealots of the Holy See, expressly declare (chap. 8.) that appeals in causes ecclesiastical ought to lie, from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and are not to proceed any farther without special licence from the crown. But the unhappy advantage that was given in the reigns of King John and his son Henry III. to the encroaching power of the pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length riveted the custom of appealing to Rome in causes ecclesiastical so strongly, that it never could be thoroughly broken off till the grand rupture happened in the reign of Henry VIII., when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the crown, to which it originally belonged; so that the stat. 25 H. 8. was but declaratory of the ancient law of the realm. 4 Inst. 324.

7. A Commission of Review was a commission sometimes granted, in extraordinary

Delegates; when it was apprehended they had been led into a material error. But it is now abolished from the 1st Feb. 1833, and the final appeal from the Ecclesiastical and Admiralty Courts is to the king in council. 2 and 3 W. 4. c. 92.

These are now the principal courts of ecclesiastical jurisdiction; none of which are allowed to be courts of record; no more than was another much more formidable jurisdiction, but now deservedly annihilated, viz. the Court of the King's High Commission in causes ecclesiastical. This court was erected and united to the regal power by virtue of the stat. 1 Eliz. c. 1. instead of a larger jurisdiction, which had before been exercised under the pope's authority. It was intended to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities; under the shelter of which very general words means were found in that and the two succeeding reigns to vest in the high commissioners extraordinary and almost despotic power of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons, this court was justly abolished by stat. 16 Cur. 1. c. 2. See 3 Comm. 64. & seq.

The wrongs or injuries cognizable by the Ecclesiastical Court not for the reformation of the offender himself, relate chiefly to the non-payment of tithes or other ecclesiastical dues, and fees; for spoliations and dilapidations of church benefices, churches, &c.; matrimonial causes and testamentary causes: as to all these see the proper titles in this

See farther on the general principles as to the jurisdiction of Ecclesiastical Courts, this Dict. tits. Canon Law, Civil Law.

In 1830, a commission superseding one appointed the preceding year, issued to inquire into the practice of the ecclesiastical courts in England and Wales. The commissioners in the course of the years 1831 and 1832 made two reports, one special and one general; and a bill, founded in a great measure upon the recommendations of the commissioners, was introduced into the House of Commons by the then Attorney-General, in the beginning of the present session, which was abandoned on the retirement of Sir Robert Peel. Another measure is in contemplation by Lord Melbourne's ministry.

Courts of Equity. See title Equity. COURTS OF GUERRA. Courts holden upon Neighbour Feuds and Riots. Scotch Dict.

COURT OF HUSTINGS, Curia Hustingi.] The highest court of record, holden at Guildhall. for the City of London, before the Lord mayor and aldermen, the sheriffs and recorder. 4 Inst. 247. This court determines all pleas

tenements, and hereditaments, rents, and services, within the City of London and suburbs of the same, are pleadable in two Hustings; one called Hustings of plea of lands, and the other Hustings of common pleas. In this court the burgesses to serve for the city in parliament, must be elected by the livery of

the respective companies. In the Hustings of plea of lands are brought writs of right patent, directed to the sheriffs of London, on which writs the tenant shall have three summonses at the three hustings next following, and after the three summonses there shall be three essoins at three other hustings next ensuing, and at the next hustings after the third essoin, if the tenant makes default, process shall be had against him by grand cape, or petit cape, &c. If the tenant appears, the demandant is to declare in the nature of what writ he will; without making

protestation to sue in nature of any writ;

then the tenant shall have the view, &c.; and if the parties plead to judgment, the judgment

shall be given by the recorder: but no dama-

ges, by the custom of the city, are recovera-

ble in any such writ of right patent. In the Hustings of common pleas are pleadable, writs ex gravi querela, writs of gavelet, of dower, waste, &c.; also writs of exigent are taken out in the hustings; and at the fifth hustings the outlawries are awarded, and judgment pronounced by the recorder.

If an erroneous judgment is given in the hustings, the party grieved may sue a commission out of Chancery, directed to certain persons to examine the record, and thereupon do right. 1 Rol. Abr. 745.—See farther the Privilegia Londini; and this Dict. tit. London.

See King's COURT OF KING'S BENCH. Bench.

COURT OF THE DUCHY OF LANCASTER. Sec

tit. Chancellor of the Duchy, &c.

COURT LEET; or LEET. The word Leet is not to be found either in the Saxon law, or in Glanvil, Bracton, Britton, Fleta, or the Mirror, our most ancient law writers: nor in any statute prior to stat. 27 Ed. 3. c. 28. though it is allowed to occur in the Conqueror's charter for the foundation of Battle Abbey, and not unfrequently in Domesday Book. Spelm. in Leta. It seems to be derived from the Saxon, lead, plebs; and to mean the populi curia, or folkmote, as the sheriff's tourn or Leet of the county (at least) appears to have been once actually called (see Spelman in verb. Folkmote), in contradiction, perhaps, to the Halmote, or Court Baron, which consisted of the free tenants only, who being few in number, might conveniently assemble in the lord's hall; whereas the Leet, which required the attendance of all the resiants, within the particular hundred, lordship, or manor, and concerned the administration of public justice, was usually held in the open air. Spelman in verb. Mallobergium. According to times thrice, but most commonly twice in the

real, personal, and mixt: and here all lands, Hawkins (Leach's Hawk. P.C. ii. 112. which see) a Court Leet is a court of record, having the same jurisdiction within some particular precinct which the sheriff's tourn hath in the

county. See also 4 Comm. 273.

The view of frank-pledge, visus franciplegii, means the examination or survey of the freepledges, of which every man, not particularly privileged, was anciently obliged to have nine, who were bound that he should be always forthcoming to answer any complaint. The better to understand this, we are to be informed, that the kingdom being divided by King Alfred into counties or shires, and each county into hundreds, and each hundred into tithings, each tithing containing ten families or households; the heads of these families were reciprocally bound and responsible for each other; so that, in fact, of every ten householders throughout the kingdom, each man had nine pledges or sureties for his good

Leet is also a word used for a law-day, in several of our ancient statutes. See Dyer,

That the leet is the most ancient court in the land for criminal matters, (the court baron being of no less antiquity in civil), has been pronounced by the highest legal authority, 7 H. 6. 12. b: 1 Roll. Rep. 73. For though we do not meet with the word among the Saxons,

there can be no doubt of the existence of the

Lord Mansfield states that this court was cocval with the establishment of the Saxons here, and its activity "marked very visibly both amongst the Saxons and the Danes." 3 Burr. 1860. In those times whoever possessed a vill or territory, with the liberties of soc, sac, &c. (a long string of barbarous words) was the lord of a manor, had a court leet, court baron, and, in a word, every privilege which it seems to have been possible for the monarch to bestow, or for the subject to acquire. See Spelman in verb. Manerium.

The leet is a court of record for the cognizance of criminal matters, or pleas of the crown, and necessarily belongs to the king; though a subject, usually the lord of a manor, may be and is entitled to the profits, consisting of the essoign pence, fines, and amercia-

ments.

It is held before the steward (or was, in ancient times, before the bailiff) of the lord. Mirror, passim: Finch's Law, 248. See also Kennett's P. A. 319. This officer, who should be a barrister of learning and ability, is a judge of record, may take recognizance of the peace, may fine, imprison, and, in a word, as to things to which his power extends, hath equal power with the justices of the bench. By stat. 1 Jac. 1. c. 5. he is prohibited from taking to the value of 12d. for his own use, by colour of any grant of the profits of this court.

The court is held sometimes once, some-

year: that is, within a month after Easter, | amerciaments thus ascertained are then esand a month after Michaelmas; and cannot, unless by adjournment, be held at any time not warranted by ancient usage. See Mag. Char. c. 35. and Spelman in v. Leta; according to whom this court should be held regularly only once a year, though sometimes, by custom, twice, when it is called residuum letæ. As to the place in which it is held, that, it has been said, may be any where within the precinct. 8 H. 7. 3: Owen, 35. But, more strictly speaking, ought to be certain and accustomed. Rastall's Entries, 151.

All persons above the age of twelve years, and under sixty, except peers, clerks, women, and aliens, resiant within the district, whether masters or servants, owe personal suit and attendance to this court, and ought to be here sworn to their fealty and allegiance. Inst. 120, 121. And here also, by immemorial usage and of common right, that most ancient constitutional officer, the constable (4 Inst. 265,), and sometimes by prescription the mayor of a borough (see stat. 2 G. 1. c. 4.), are elected and sworn. A custom for a steward of a court leet to nominate certain persons to the bailiff to be summoned on the jury, is

good. 2 Barn. & Cres. 54.

The general jurisdiction of the court extends to all crimes, offences, and misdemeanors, at the common law, as well as to several others which have been subjected to it by act of parliament. These are inquired after by a body of the suitors, elected, sworn, and charged, for that purpose, who must not be less than twelve, nor more than twenty-three; and who, in some manors, continue in office for a whole year, while in others they are sworn and discharged in the course of a day. Whatever they find they present to the steward, who, if the offence be treason or felony, must return the presentment (in these cases called an indictment) to the king's justices of over and terminer, and gaol delivery. See stats. W. 2. c. 13: 1 Ed. 3. st. 2. c. 17. In all other cases he has power, upon the complaint of any party grieved, or upon suspicion of the concealment of any offence, to cause an immediate inquiry into the truth of the matter, by another jury. See stats. 33 H. S. c. 6. and 1 Eliz. c. 17. § 10. But the presentment, being received, and the day passed, shall be held true, and unless it concern the party's freehold, shall not be shaken or questioned by any tribunal whatever. Hale, P. C. 153. 5: Leach's Hawk. P. C. ii. 111, 112: and 11 Co. 44. Upon every presentment of the jury retained by the court, an amerciament follows of course, which is afterwards assessed in open court agreeable to Magna Charta, c. 14. by the pares curiæ, that is, the peers or equals of the delinquent; and affeered or reduced to a precise sum, by two or more suitors, sworn to be impartial. 8 Rep. 39. See also stat. W. 1. c. 6. And that these statutes were in this particular but in affirmation of the common law, see 8 Rep. 33. b.: 2 Inst. 27. The

treated (or extracted) from the roll or book in which the proceedings are recorded, and levied by the bailiff, by distress and sale of the party's goods (8 Rep. 41.), by virtue of a warrant from the steward to that effect, or may be recovered by other means, as by a process of levari facias (Hardr. 471.), or action of debt. Bull. N. P. 167. No crime in those remote ages appears to have been punished by death, unless it were open theft, where the offender is taken with the mainour, that is, with the thing stolen upon him; and of this crime, and this only, the cognizance did not belong to the lect. All other offences, of what nature or degree soever, subjected the party to mulet or pecuniary fine, which was in many cases determined and fixed. This pecuniary composition, with respect to certain capital offences, was abrogated, and the punishment of death substituted in its place, by King Henry I. Spelman in v. Felo: Wilkins, LL. Sax. 304.

It is not improbable that the distinction of indictments for felonies, and presentments of inferior offences, owes its origin to the above

It has been said, that by the clause nullus vicecomies, &c. in the Great Charter, c. 17. the jurisdiction of the leet was abridged, and its power to hear and determine taken away; but this has been said and repeated without due attention either to the nature and constitution of the court, or to the law of the time. No offence, it is well known, is at this day, or, for aught that appears, ever was, heard and determined in the leet (nor, before the period referred to, by any other criminal court in the kingdom), otherwise than upon the presentment of twelve men, or what we now call in most courts the grand jury. This presentment, as has been already observed, found and established the fact; and judgment, whether of misericordia, mutilation, or death, followed as an incident or matter of course, precisely, indeed, as the punishment does at this day on the verdict for the king of the petty jury. In fact, therefore, the jurisdiction of the leet was not in the least abridged or affected by that charter; nor is it at all probable that the barons would either seek or suffer the diminution of their own privileges. of which, on the contrary, there is an express

That this court has no power to inquire of the death of a man, or of a rape, is a more ancient, but not less erroneous opinion. The contrary is most directly and expressly held in the Stattutum Wallie, in Britton, Fleta, the Mirror, and the stat. of 18 Ed. 2. (which statute, though it enumerates certain particulars of the jurisdiction of the leet, does not confine it to them only); all much older and better authorities than the Book of Assizes. 41 Ed. 3. p. 40. in which that opinion first

appears.

The steward of a leet may award to prison

persons either indicted or accused of felony before him, or guilty of any contempt in the face of the court. Stat. Westm. 2. c. 13. which, however, seems to apply only to the sheriff's tourn. See Crom. J. P. 92. b.: Ow. 113. A steward of a court leet having told W. H. that he was a resiant, who replied he lied, thereupon the steward fined him 20l., and adjudged good, without a prescription so to do; and debt lies for the fine. 3 Salk. 33. In a presentment in a court leet, it is not necessary to show how or by what right the court is held. 1 Salk. 200.

By 1 (vulgo 2) Jac. 1. c. 5. stewards of courts leet and courts baron guilty of extortion shall forfeit 40l., and be incapacitated. See farther, for the whole of this subject,

Com. Dig. tit. Leet.

The court leet has now been for a long time in a declining way; its business, as well as that of the tourn, having for the most part gradually devolved on the quarter sessions.

See 4 Comm. 274: 3 Burr. 1864.

This last circumstance is very pathetically lamented by the ingenious author from whom the above account of the court leet is principally drawn, and to whom the editor of the present work is indebted for much of the information under tit. Constable. How far the restoration of the power of the court leet in the present extensive deluge of crimes is advisable or not, is a question not to be determined in the compass here allotted to the subject. Every one desirous of being accurately informed of the foundations of the English law will wish that the learned author, from whom the above extracts have been made, would spend his time rather in examining the ancient than condemning the present state of our jurisprudence. For the former task he is eminently qualified; the latter is only worthy of inferior talents.

COURT OF MARSHALSEA, Curia Palatii.] A court of record to hear and determine causes between the servants of the king's household and others within the verge; and hath jurisdiction of all matters within the verge of the court, and of pleas of trespass, where either party is of the king's family, and of all other actions personal, wherein both parties are the king's servants; and this is the original jurisdiction of the Court of Marshalsea. 1 Bulst. 211. But the Curia Palatii, erected by King Charles I., by letters-patent, in the 6th year of his reign, and made a court of record, hath power to try all personal actions, as debt, trespass, slander, trover, actions on the case, &c., between party and party, the liberty whereof extends twelve miles about Whitehall. Stat. 13 R. 2. st. 1. c. 3. Which jurisdiction was confirmed by King Charles II.

The judges of this court are the steward of the king's household, and knight marshal for the time being, and the steward of the court, or his deputy, being always a lawyer. Crompt. Jurisd. 102; Kitch. 199, &c.: 2 Inst.

This court is kept once a-week in Southwark; and the proceedings here are either by capias or attachment, which is to be served on the defendant by one of the knight-marshal's men, who takes bond with sureties for his appearance at the next court; upon which appearance he must give bail to answer the determination of the court; and the next court after the bail is taken the plaintiff is to declare and set forth the cause of his action. and afterwards proceed to issue and trial by a jury, according to the custom of the common law courts. If a cause is of importance, it is usually removed into B. R. or C. B. by an habeas corpus cum causa; otherwise, causes are here brought to trial in four or five court-days. The inferior business of this court hath of late years been much reduced by the new courts of conscience in and near London, for which the four counsel belonging to the court were indemnified by salaries during their lives, by stat. 23 G. 2. c. 27.

By stat. 28 Ed. 1. c. 3. the steward and marshal of the king's house are not to hold plea of freehold, &c. Error in the Marshalsea Court may be removed into the King's Bench. Stat. 5 Ed. 3. st. 2. c. 3. And the fees of the Marshalsea are limited by the stat. 2 H. 4. c. 23. This Marshalsea is that of the household; not the King's Marshalsea, which belongs to the King's Bench. See Court of

the Lord Steward, &c.

COURT MARTIAL. Curia Martialis.] A court for trying and punishing the military offences of officers and soldiers.

I. Of the Origin II. Of the Jurisdiction of Courts Martial.

I. Of the Origin of Courts Martial .-Though the authority of the Court of Chivalry, with regard to matters of war, &c., both within and without the realm, not determinable by the general municipal law, was first established by the common law, and afterwards confirmed by several statutes; and was never objected to, even in criminal cases, till the post of high constable was laid aside (see tits. Constable, Court of Chivalry); yet we find its jurisdiction encroached upon much earlier; for by the stat. 18 H. 6. c. 19. desertion from the king's army was made felony, and by stats. 7 H. 7. c. 1: 3 H. 8. c. 5. benefit of clergy is taken away, and authority given to justices of peace to inquire thereof, and hear and determine the same. And Rapin quotes an instance of Hen. VII. having ordered those accused of holding intelligence with the enemy after the battle of Stoke, 1487, to be tried by commissioners of his own appointing, or by courts martial, according to the martial law; instead of the usual court of justice, which was not so favourable to his design of punishing them only by fines. This, however, seems to have been an avaricious, arbitrary, and illegal exertion of power, not authorised by any law of the land.

From the time that the Court of Chivalry was abridged of its criminal jurisdiction by the suppression of the post of high constable until the Revolution, there appears to have been no regular established court for the administration of martial law. For although the Court of Chivalry still continued to be held from time to time by the earl marshal, its authority extended only to civil matters; and notwithstanding desertion was by stat. 2 and 3 Ed. 6. c. 2. made felony without benefit of clergy, and other military crimes were made punishable by fines, imprisonment, &c., and by stat. 39 Eliz. c. 17. idle and wandering soldiers and mariners were to be reputed as felons, and to suffer, as in cases of felony, without benefit of clergy (with some excep-tions); and the justices of assize and gaol-delivery were to hear and determine these offences; yet there are instances during this period of other courts being erected for the administration of martial law, and not only military persons made subject to it, but many others punished thereby; some entirely at the discretion of the crown, and others by appointment of the parliament only; and it was a circumstance of nearly a similar nature that occasioned the enacting the Petition of Right, 3 C. 1. c. 1. one clause of which was, that the commissions for proceeding by martial law should be dissolved and annulled, and no such commission be issued for the future.

Though undoubtedly these commissions were illegal, yet the necessity of subordination in the army, and the impossibility of establishing that subordination without martial law, soon became apparent, and the two houses of parliament, in the beginning of their rebellion against Charles I. passed an ordinance, appointing commissioners to execute martial law; which was certainly at least as unconstitutional an act without the assent of the king as any proceedings of his had been without consent of parliament. true is it that necessity has no law, and that usurped power is always obliged to have recourse to means to support itself at least as severe as, and generally more violent than, those which it previously condemns in a lawful government, which it may for a while succeed in overturning, on false and specious pretexts of undefined liberty.

This ordinance was passed in 1644, and afterwards renewed by the parliament; and in process of time adopted as a model for the Mutiny Act passed after the Revolution: as many other regulations made during the powerful, but tyrannical, usurpation of sovereign authority, were afterwards modified to the true genius of the British constitution.

At the restoration, one of the first steps taken by the parliament was to disband the army, and to regulate the militia, among whom a military subordination was established whenever they were drawn out, and fines and imprisonments imposed on them for particular delinquencies. See tit. Militia.

Charles II., however, kept up 5,000 regular troops, for guards and garrisons, by his own authority; which his successor, James II., by degrees increased to 30,000, and more numerous armies were occasionally raised by authority of parliament; yet we find no statute for the government of these troops, nor was it till after the Revolution that a regular act of the whole legislature passed for punishing mutiny and desertion, &c., by courts martial.

This act was first occasioned by a mutiny, in a body of English and Scotch troops, upon their being ordered to Holland, to replace some of the Dutch troops which Will. III. had brought over with him, and intended to keep in England. The king immediately communicated this event to the parliament, who readily agreed to give their sanction to punish the offenders; and on the 3d April, 1689 (1 W. & M.), passed an act for punishing mutiny and desertion, &c., which was to continue in force only until November following. It was, however, renewed again in January, and has, with the interruption of about three years only, from April, 1698, to February, 1701, been annually renewed ever since, with some occasional alterations and amendments, as well in times of peace as war.

II. Of the Jurisdiction of Courts Martial.— Martial law, as formerly exercised at the discretion of the crown, and too often made subservient to bad purposes, justly became obnoxious to the people; and not only the propriety, but the legality, of its being executed in times of peace, has been absolutely denied. It is laid down (3 Inst. 52.) that if a lieutenant or other, that hath commission of martial law, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder, for it is against Magna Charta. And Hale (Hist. C. L. c. 2.) declares martial law to be, in reality, no law, but something indulged rather than allowed as law; that the necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land; and if a court martial put a man to death in time of peace, the officers are guilty of murder. See H. P. C. 46.

As future exigencies, however, have arisen in the state, it has become necessary to alter and amend the old laws, and enact new ones; and, since the custom of keeping up standing armics in time of peace as well as war has become prevalent and general throughout Europe (a custom, as it seems, originally introduced by Charles VII. of France about 1445), the legislature of Great Britain has also judged it necessary, for the safety of the kingdom, the defence of its possessions, and the balance of power in Europe (as the preamble to the Mutiny Act expresses it), to maintain, even in times of peace, a standing body of troops; and to authorise the exercise of martial law among them,

between martial law, as formerly executed, entirely at the discretion of the crown, and unbounded in its authority, either as to persons or crimes, and that at present established, which is limited with regard to both. Courts martial are at present held by the same authority as the other courts of judicature of this kingdom; and the king (or his generals, when empowered to appoint them) has the same prerogative of moderating the rigour of the law, and pardoning and remitting punishments, as in other cases; but he can no more add to, nor alter the sentence of a court martial, than he can a judgment given in the courts of law. Martial law is now exercised within its proper limits, by the advice and concurrence of parliament, and the condemnation of criminals by courts martial acting under such authority, cannot be regarded as illegal, or contrary to Magna Charta; since, during the existence of the statute by which these courts are held, martial law, so modified and restrained, is as much part of the law of the land as Magna Charta itself.

Courts martial being established in this country by positive law, their proceedings, and the relation in which they stand to the courts of Westminster-hall, must depend upon the same rules with all other courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the courts of Westminster for a prohibition. 2 H. Blackst.

100.

Courts martial are bound by the same rules and principles of evidence as the courts of law, and their proceedings, when not otherwise regulated by statute, must be in accordance therewith. 1 East, 313.

It is not incidental to the duty of the office of a commander-in-chief of a squadron to hold a court martial on an inferior officer. 1 T. R. 493. affirmed in Dom. Proc. 1 T. R. 784.

If a superior officer imprisons his inferior officer for disobedience of an order not within the scope of military authority, he is liable in trespass, although there has been a trial by court martial for the offence. 4 Taunt. 67.

Courts martial cannot sit before eight in the morning, or after three in the afternoon, except in cases which require an immediate example; the attendance, therefore, of the members does not exceed seven hours at a time, and they are at liberty to adjourn from day to day till they have fully considered the matter before them; and when they come to give their opinions, they are not under the necessity of being unanimous, but the prisoner is condemned or acquitted by a majority of voices; except in cases of death, where nine out of thirteen, or two-thirds, if there be more than thirteen present, must concur in opinion. Articles of War, § 15. a. 8, 9.

As to general courts martial, the Mutiny Act and Articles of War are very explicit, both as to the number they shall consist of, Gould, 2 H. Black, Rep. 69.

A proper distinction then should be made | and the rank of the officers who are to compose them.

The crimes that are congnisable by a couft martial, as repugnant to military discipline, are pointed out by the Mutiny Act and Articles of War, which every military man is, or ought to be, fully acquainted with, and therefore not necessary to be recited here; and as to other crimes, which officers and soldiers being guilty of are to be tried for in the ordinary course of law, it is needless to enter into a detail of them.

By the last article in the code of military laws, courts martial are authorised to take cognizance of all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, which are not enumerated in the preceding articles, and punish them at their discretion. Art. of War, § 20. a. 3. Upon the authority of this article it has been too much the custom in the army to try soldiers by courts martial for thefts, and other crimes cognizable before the courts of But it seems questionable whether an exception might not, in many such cases, be made to their jurisdiction; for the Mutiny Acts and Articles of War, § 11. a. 1. expressly direct, that any officer, non-commissioned officer, or soldier, who shall be accused of any capital crime, violence, or offence, against the person, estate, or property of any of his majesty's subjects, punishable by the laws of the land, shall be delivered over to the civil magistrate by the commanding officer, under penalty of his being cashiered in case of refusal. There was formerly an article, of late omitted, particularly authorizing courts martial to take cognizance of all soldiers accused of stealing from their comrades.

The persons liable to martial law are likewise enumerated in the act and the articles. The latter mention only officers, soldiers, and persons serving with the armies in the field; but Hale and others are of opinion that aliens, who in a hostile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but must be dealt with by martial law. H. P. C. cc. 10. 15: 3 Inst. This, however, means martial law in the strict sense of the word, in which it cannot be applied to proceedings under the Mutiny Act, and which kind of martial law is unknown in this kingdom. The receiving pay as a soldier subjects the receiver to military jurisdiction. The Court of C. P. therefore refused to grant a prohibition to prevent the execution of the sentence of a court martial, passed against one who received pay as a soldier, but who assumed the military character merely for the purpose of recruiting, in the usual course of that service; and this though the proceedings of the court martial appeared, in some instances, to be erroneous. Grant v. Sir Charles

Officers on half-pay are not liable to trial, ceeding; for the Court of King's Bench, beby court martial. See opinions of the judges: MArthur on Courts Martial, v. 1. 196: Barne's Notes, 432. But it is otherwise as to officers holding brevet commissions. MArthur, v. 1. 201.

The Articles of War in a few cases point out the express sentence to be passed on criminals, without any alternative; in some an optional power is given of punishing with death, or otherwise, and in others offenders are punished at the discretion of the court, omitting the word death; evidently meaning thereby to exclude the power of punishing capitally in such cases.

In cases where an optional power is vested in the court to punish with death or otherwise, the question to follow that of guilty or not guilty (upon the court, or the majority of it, declaring for the former), is whether or not the prisoner shall suffer death? If twothirds of the court do not concur in the affirmative, the votes of the affirmants are considered as void. A lesser number than twothirds being, as was before said, incompetent to give judgment of death, another question becomes necessary to be proposed to every member, what punishment other than death shall the prisoner undergo? And each member gives his voice, de novo, on this question, wherein a majority is competent to determine.

The crimes cognizable by a court martial may be divided into felonies and misdemeanors; or, more properly, into capital offences, and offences only criminal, and not capital; and if, on the evidence, a prisoner does not appear guilty of a crime of so capital a nature as is set forth in the charge, the court may find him guilty in a less degree; but they cannot declare him guilty of a mutiny, or any other distinct crime or offence, unless it be likewise in the charge given against him, before the

trial commences.

By stat. 37 G. 3. c. 140. his majesty is enabled more easily and effectually to grant conditional pardons to persons under sentence by naval courts martial, and to regulate imprisonment under such sentences, viz.

By § 1. if his majesty shall extend his mercy to persons liable to death by the sentence of a naval court martial, a justice of the King's Bench, &c. may, on notification from the secretary of state, allow the benefit of such conditional pardon as if it had passed under the Great seal, and shall make orders accordingly.

The justice or baron allowing the pardon shall direct the notification, and order it to be filed with the clerk of the crown of the Court of King's Bench. § 2. Like provisions are made with respect to the army by the annual

Mutiny Acts.

The judgments of courts martial, besides being open to the disapprobation of the king, or his commanders in chief, are liable, like those of other courts, to be taken cognizance of, and the members punished, for illegal pro- orders committed in them; so called because

ing the supreme court of common law, hath not only power to reverse erroneous judgments given by inferior courts, but also to punish all inferior magistrates, and all officers of justice, for all wilful and corrupt abuses of authority against the known, obvious, and common principles of justice. 2 Hawk. P. C. c. 3. § 10; c. 27. § 22. The Mutiny Act directs that every action against any member or minister of a court martial, in respect to any sentence, shall be brought in some of the courts of record at Westminster, &c. § 63. And there have been many instances of actions of this nature in Westminster-hall. See NAVY, III. ad finem. An officer on a court martial, however, is not liable to be punished for mere mistakes which an honest well-meaning man may innocently fall into; and if the plaintiff or prosecutor becomes non-suited, or the defendant has a verdict, he shall recover treble costs. Mutiny Act, § 62. There is also another tribunal before which the proceedings of courts martial are liable to censure at least, namely, the House of Commons.

It is enacted by the Mutiny Acts that no officer or soldier, being acquitted or convicted of any offence, shall be liable to be tried a second time by the same or any other court martial for the same offence, unless in the case of an appeal from a regimental to a general court martial; and by the Articles of War, "If upon a second hearing the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished at the discretion of the general court martial." No sentence given by any court martial, and signed by the president, is liable to be revised more than once; and this may be rather deemed an appeal to the same court than a new trial, since in this case the same persons only are to re-consider what they have already done, without any new judges being added to them, or any new witnesses produced.

A distinction is made in the oath taken by the president and members of a court martial. and that of the judge advocate. The former are sworn not only to conceal the vote or opinion of each particular member, but also the sentence of the court, until it shall be approved by his majesty, or by some person duly authorised by him; the latter is only sworn not to divulge the opinion of any par-ticular member of the court martial. Witnesses summoned to court martial are liable to attachment for non-attendance. See Mutiny Act, 7 and 8 G. 4. c. 4. § 28.

For farther particulars, see Adye's Treatise on Courts Martial, from whence most of the above is abridged. See also this Dict. tit. Soldiers. And, as to naval courts martial, tit. Navy. See also M'Arthur on Courts Martial,

2d ed. 1805.

Court of Piepowder, Curia pedis pulverisati.] Is a court held in fairs, to do justice to buyers and sellers, and for redress of dis-

they are most usual in summer, when the suitors to the court have dusty feet; and from the expedition in hearing causes proper thereunto, before the dust goes off the feet of the plaintiffs and defendants. 4 Inst. 272. Or from pied pouldreaux, a pedlar. Barrington Anc. stats. 337. It is a court of record incident to every fair, and to be held only during the time that the fair is kept. Doct. & Stud. c. 5. As to the jurisdiction, the cause of action for contract, slander, &c. must arise in the fair or market, and not before at any former fair, nor after the fair; it is to be for some matter concerning the same fair or market, and must be done, complained of, heard and determined the same day. Also the plaintiff must make oath that the contract, &c. was within the jurisdiction and time of the fair. See stats. 17 Ed. 4. c. 2:1 Rich. 3. c. 6.

The Court of Piepowder may hold a plea of a sum above 40s., and it is said, judgment may be given at another fair, at a court held there, and a writ of error lies upon a judgment given. Dyer, 133: F. N. B. 18. This court may not meddle with any thing done in a market without a special custom for it, but for what is done in a fair only: and not there for slanderous words, unless they concern matters of contract in the fair; as where it is for slandering the wares of another, and not of his person in the same fair. Moor. Ca. 854. The steward before whom the court is held is the judge, and the trial is by merchants and traders in the fair; and the judgment against the defendant shall be quod amercietur. If the steward proceeds contrary to the stat. 17 Ed. 4. c. 2. he shall forfeit 5l.

From this court a writ of error lies, in the nature of an appeal to the courts at Westminster. Cro. Eliz. 773. And those courts are now bound by the stat. 19 G. 3. c. 70. to issue writs of execution in aid of its process, after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction. See Piepowder.

COURT OF REQUESTS, Curia Requisitionum.] Was a court of equity of the same nature with the Court of Chancery, but inferior to it, principally instituted for the relief of such petitioners as in conscionable cases addressed themselves by supplication to his majesty. Of this court the lord privy seal was chief judge, assisted by the master of requests; and it had beginning about the 9 H. 7. according to Sir Julius Casar's Tractate on this subject; though Mr. Gwyn, in his Preface to his Readings, saith it began from a commission first granted by King Hen. VIII.

This court having assumed great power to itself, so that it became burdensome, Mich. anno 40 and 41 Eliz., in the Court of Common Pleas it was adjudged, upon solemn argument, that the Court of Requests was no court of judicature, &c. And by the stat. 16 and 17 Car. 1. c. 10. it was taken away. 4 Inst. 97. See tit. Courts of Conscience.

COURT OF SESSION in Scotland. See the acts 48 G. 3. c. 151. 59 G. 3. c. 45. 6 G. 4. c. 120. for the better regulation of this court.

COURT OF THE LORD STEWARD OF THE KING'S HOUSE. The lord steward, or, in his absence, the treasurer and controller of the king's house, and steward of the Marshalsea, may inquire of, hear, and determine in this court all treasons, murders, manslaughter, bloodsheds, and other malicious strikings, whereby blood shall be shed, in any of the palaces and houses of the king [or within the limits, i.e. 200 feet from the gate, 4 Comm. 276.] or in any other house where his royal person shall abide. And this jurisdiction was given by the stat. 33 H. 8. c. 12. 3 Inst. 140. But this court was at first intended only to inquire of and punish felonies, &c. by the king's servants, against any lord or other person of the king's council. 3 H. 7 c. 14. See 4 Comm. 276.

COURT OF STAR-CHAMBER, Curia Cameræ Stellatæ. A court of very ancient original, but new-modelled by stats. 3 H. 7. c. 1: 21 H. 8. c. 20. which ordained, That the lord chancellor, treasurer, and lord privy seal, calling a bishop, and lord of the king's council, and the two chief justices, to their assistance, on bill or information might make process against maintainors, rioters, persons unlawfully assembling, and for other misdemeanors, which, through the power and countenance of such as did commit them, lifted up their heads above their faults, and punish them as if the offenders had been convicted at law by a jury, &c. But this act was repealed, and the court, dissolved, by stat. 16 and 17 Car. 1. c. 10. having been used to oppress the subject, particularly in matters of state.

Courts of Universities. These are the chancellor's courts in the two universities of England, Oxford and Cambridge; which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold is concerned; and these, by the University Charter, they are at liberty to try and determine, either according to the common law of the land, or according to their own local customs, at their discretion; which has generally led them to carry on their process in a course much conformed to the civil law.

These privileges were granted that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. The oldest charter, it appears, containing this grant to the University of Oxford, was 28 H. 3. A. D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to King Hen. VIII., in the 14th year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted

to Cambridge in the 3d year of Queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters patent. Therefore, in the reign of Queen Elizabeth a statute was passed (13 Eliz. c. 29.,) confirming all the charters, of the two universities, and those of 14 II. 8. and 3 Eliz. by name; which statute established this high privilege without any doubt or opposition. Jenk. Cent. 2. pl. 88.; Cent. 3. pl. 33: Hard. 504: Godb. 201: Hist. C. L. 33.

This privilege, so far as it relates to civil causes, is exercised at Oxford in the chancellor's court; the judge of which is the vice-chancellor, his deputy, or assessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of convocation; and if they all three concur in the same sentence, it is final, at least by the statutes of the university (Tit. 21. § 18.), according to the rule of the civil law. (Cod. 7. 70, 1.) But if there be any discordance or variation in any of the three sentences, an appeal lies, in the last resort, to judges' delegates, appointed by the crown under the great seal in Chancery. 3 Comm. 83—5. See 2 Ld. Raym. 1346. that it is the same at Cambridge. See farther tit. University.

Courts of Wales, Curiæ Principalitatis Walliæ.] The courts of the principality of Wales. These courts are now abolished, by I W. 4. c. 70. and the courts at Westminster have now jurisdiction in Wales. The principality is divided into two circuits: one judge goes through the six counties of South Wales, and another judge through the six counties of North Wales; and they meet at Chester, and together hold the assizes for that county, the palatine jurisdiction of which

is abolished by the same statute.

For farther satisfaction, as to the several courts within this kingdom, see 4 Inst. and

the Commentaries.

COURT-LANDS. Domains or lands kept in the lord's hands to serve his family. See Curtiles terræ.

COUSENAGE. See Cosenage.

couthutLaugh. From the Sax. couth, i. e. sciens, and utlaugh, exlex.] A person that willingly and knowingly receives a man outlawed, and cherishes or conceals him; for which offence he was in ancient times to undergo the same punishment as the outlaw himself. Bract. lib. 3. tract. 2. cap. 13.

COWS. See tit. Cattle.

CRAIERA, crayer.] A small vessel of lading; a hoy or smack. Pat. 2. R. 2: Stat. 14 Car. 2. c. 27.

CRAIL. An engine made use of to catch fish. *Blount*.

Vol. I.-62

CRANAGE, cranagium.] A liberty to use a crane for drawing up of goods and wares of burden from ships and vessels, at any creek of the sea or wharf, unto the land, and to make profit of it; it also signifies the money paid and taken for the same. Stat. 22 Car. 2.c. 11.

• CRANNOCK. An ancient measure of corn. Cartular. Abbot. Glaston. MS. f. 39.

CRASPISCIS. A whale, viz. piscis crassus. Blount.

CRASTINO SANCTI VINCENTII. The morrow after the feast of St. Vincent the Martyr, i. e. the 22d of January, which is the date of the statutes made at Merton, anno. 20 H. 3. There are likewise certain return days of writs in terms, in the courts at Westminister, beginning with Crastino, &c. as Crastino Animarum, the Morrow of All Souls, in Michaelmas term; Crastino Purificationis beats Marine Virginis, in Hilary term; Crastino Ascensionis Domini, in Easter term; and Crastino Sancte Trinitatis, in Trinity term, See stats. 51 H. 3. st. 2. and 3: 32 H. 8, c. 21: 16 Car. 1. c. 6: 14 G. 2. c. 48.—See Days in Bank, Terms.

CRATES, Lat.] An iron grate before a prison, used in the time of the Romans. 1

Vent. 304.

CRAVARE. To impeach. Si homicida divadietur ibi vel cravetur, &c. Leg. H. 1. c. 30.

CRAVEN, or CRAVENT. The word of obloquy where, in the ancient trial by battle, the victory should be proclaimed, and the vanquished acknowledged his fault, or pronounced the word cravent, in the name of Recreontisse, &c., and thereupon judgment was given forthwith; after which the recreant should become infamous, &c. 2 Inst. 248. If the appellant joined battle, and cried cravent, he should lose liberam legem; but if the appellee cried out cravent, he was to be hanged. 3 Inst. 221. See tits. Battle, Champion.

cd. 3 Inst. 221. See tits. Battle, Champion. CREAMER. A foreign merchant, but generally taken for one who hath a stall in a

fair or market. Blount.

CREANSOR, CREDITOR, from Fr. croyance.] Signifies him that trusts another with any debt, money, or wares; in which sense it is used in Old Nat. Br. 66, and 38 Ed. 3. c. 1.

CREAST, or CREST, crista.] Any imagery, or carved work, to adorn the head of wainscot, &c., like our modern cornices but this word is now applied by the heralds to their devices set over a coat of arms. Kennett's Paroch. Antiq. 573.

CREATION-MONEY. This is mentioned in at. 12 Car. 2. c. 1. See 1 Inst. 836. in

n. and this Dict. tit. Peers.

CRECHE. A drinking-cup. Mon. Ang. tom. 1. p. 104.

CREDITORS. See tits. Executor, v. 7; Real Estate.

CREEK, creca, crecca.] A part of a haven where any thing is landed from the sea; so

that it is observed, if when you are out of the privileged by his non-age, if under twenty-main sea within the haven, you look round one, though above fourteen years. Vide 1 and see how many landing places there are, Hale, 20: Bac. Ab., tit. Infancy, II. (7th ed.) so many creeks may be said to belong to that haven. Crompt. Jurisd. fol. 110. It is also their subjection to others: this head is prinsaid to be a shore or bank whereon the water beats, running in a small channel from any part of the sca; from the Lat. crepido. This word is used in the old stats. 4 H. 4. c. 20. 5 Eliz. c. 5.

CREMENTUM COMITATUS. The sheriffs of counties anciently answered in their accounts for the improvement of the king's rents, above the ancient vicontiel rents, under the title of Crementum [incrementum, increase], Comitatus, or Firma de Cremento Comitatus. Hale's Sher. Acco. p. 36. CREPARE OCULUM. To put out an

eye; which had a pecuniary punishment of Leg. H. 1. 60s, annexed to it.

CREST. See Creast.

CRETINUS, cretena.] A sudden stream Histor. Croyland. contin. 485. 617.

CRIMES. As the guilt of offending against the law arises from the disobedience being wilful, it follows that those who are incapable of understanding it, or conforming themselves to it, cannot with propriety be said to transgress or incur the penalty instituted for the punishment of crime; persons, therefore, under a natural disability of distinguishing between good and evil, as infants under the age of discretion, idiots, and lunatics, are not punishable by any criminal prosecution. See 1 Hawk. P. C. 1: 1 Hale Hist. 14: 4 Black. Com. 20. As to the trial and ultimate safe custody of persons charged with felony, and acquitted thereof by the jury on the ground of insanity, see 39 and 40 G. 3. c. 94.

Persons sending or delivering any letter containing menacing demands of money, &c., or threatening to accuse of any crime punishable with death, or any infamous crime, guilty of felony by 7 and 8 G. 4. c. 29. § 8; § 9. declares what shall be deemed an infamous

crime. If an infant be infra seven years old, he cannot be guilty of felony, whatever circumstances proving discretion may appear; for, ex presumptive juris, he cannot have discretion, and no averment shall be received against that presumption. 1 H. H. 28: Plowden, 19. a.: Fost. 349.

As to misdemeanors, and offences not capital, in some cases an infant is privileged by his non-age; and herein the privilege is all one, whether he be above or under the age of fourteen, if he is under twenty-one. However, there is this distinction: if an infant under twenty-one is indicted for a misdemeanor, as riots or battery he shall not be privileged barely by reason that he is under twenty-one; but if the offence charged be a mere non-feasance (unless it be of a thing he is bound to do by tenure, as repairing a bridge, &c.), then in some cases he shall be

As to those who are excusable in respect to cipally confined to the case of a wife acting of her husband. Neither children or servants are excused the commission of any crime by the command or coercion of the father or master. 1 Hawk. P. C.: 5 Dalt. 504: 1 Hale, 44. A wife shall not be punished for committing theft or burglary in company with or by coercion of her husband; the law considering her as acting by compulsion, and not of her own will. 10 Mod. 63: Kel. 31: 1 Hale, 45. But if the act be a voluntary and separate one, she is punishable as if she were sole. 1 Hawk. 4: 2 East, 91: P. C. 559: Dalt. 157. See tit. Baron and Fcme, VII.

It has been held that a person is excused of guilt who acted under unavoidable But this will not extend to justify murder. 1 Hale, 51. Thus persons who were compelled to join with rebels were acquitted by judgment of the court. 1 Hale, 50. But the fear of having house burnt, or goods spoilt, is no excuse; nor any thing but the fear of present death. Fost. 14. 216. Nor will necessity for the want of victuals excuse a theft. 1 Hale, 54: 4 Bl. Com. 31. Of other cases in which the plea of necessity arises from legal duty, as in the arrest or execution of criminals, or from the right of self-defence. See East, P.

CRIMINAL CONVERSATION. See tits. Adultery, Baron and Feme.

CROCARDS. A sort of old base money.

See Pollards, and tit. Coin.
CROCIA. The crosier or pastoral staff, so called a similitudine crucis, which bishops, &c. had the privilege to carry as the common ensign of their religious office, being invested in their prelacies by the delivery of such a crosier; hence the word crocia did sometimes denote the collation to, or disposal of, bishoprics and abbeys, by the donation of such pastoral staff: so as when the king granted large jurisdictions, exceptis crociis, it is meant, except the collation or investiture of episcopal fees, &c. Addit. to Cowel. See tit. Bishops.

CROCIARIUS. 'The crociary or crossbearer, who, like our verger, went before the prelate, and bore his cross. Liber de Miraculis Tho. Episc. Heref. M. S. anno 1290.

CROFT, Sax. croftum and crofta.] A little close adjoining to a dwelling-house, and enclosed for pasture or arable, or any particular use. In some old deeds crufta occurs as the Latin word for a croft; but cum toflis et croftis is most frequent. Ingulph. It seems to be derived from the old English word creaft, signifying handy-craft; because such grounds are usually manured and extraordinarily drest by the hand and skill of the owner. See CROISES, and croisado. See Croyses.

CROK, crocus.] Turning up the hair into curls or crocks; whence comes crook, crooked, &c. Pat. 21 H. 3.

CROP, croppa.] The seeds or products of the harvest in corn, &c. Fleta, lib. 2. c. 82.

CROSS-BOWS. None shall shoot in, or keep any cross-bow, hand-gun, hagbut, &c., but those who have lands of the value of 100l. per annum; and no person shall travel with a cross-bow bent, or gun charged, except in time of war; or shoot within a quarter of a mile of any city, or market-town, unless for defence of himself or his house, or at a dead mark, under the penalty of 10l. Stat. 33 H. 8. c. 6. See tits. Arms, Game.

CROSSES. By stat. 13 Eliz. c. 2. (repealed by 3 G. 4. c. 41. § 2.) crosses, beads, &c. used by the Roman Catholics, were prohibited to be brought into this kingdom, on pain of a præmunire, &cc. In ancient times, it was usual for men to creet crosses on their houses, by which they would claim the privileges of the templars to defend themselves against their rightful lords; but this was condemned by the stat. Westm. 2. c. 37. It was likewise customary in those days to set up the nobility rested, as it was carried to be buried, that à transeuntibus pro ejus anima deprecetur. Walsing. anno 1201. were several of these crosses erected over England, especially in honour of the resting places of our kings, on their bodies being transmitted to any distant place for burial; but these superstitions sunk in this kingdom with the Romish religion.

CROY. Marsh land, Ingulphus, p. 853.—

Blount.

CROYSES, cruce signati.] Is used by Britton for pilgrims, because they wear the sign of the cross upon their garments. Of these and their privileges, Bracton hath treated, lib. 5. part 2. cap. 2. part 5. cap. 9. Under this word are also signified the Knights of St. John of Jerusalem, created for the defence of pilgrims; and likewise all those persons who in the reigns of King Henry II., Richard I., Henry III., and Edward I. cruce signati, took upon them the croisado, dedicating and listing themselves to the wars, for the recovery of Jerusalem and the Holy Land. Greg. Syntag. lib. 15. cap. 13, 14. See a general account of the croisades in Robertson's Hist. Emp. C. V. vol. 1. p. 22. &c.

CROWN. See tit. King.

CROWN OFFICE. An office belonging to the Court of King's Bench, of which the king's coroner or attorney there is commonly master, who holds his place for life by letters patent under the great seal. The attorneygeneral, and clerk of the crown exhibit informations in this office, for crimes and misdemeanors; the one ex officio, and the other usually by order of court; and here informations may be laid for offences and misdemeanors at common law, as for butteries, conspi-

racies, libelling, nuisances, contempt, seditious words, &c. wherein the offender is liable to pay a fine to the king. Finch. 340: Show.

By stat. 4 and 5 W. & M. c. 18. the clerk of the crown, in B. R. is not to receive or file any information for trespuss, battery, &c .. without express order of court: nor to issue any process, without taking a recognizance in 201. penalty to prosecute with effect; and if the party appear, and the plaintiff do not pro-cure a trial in a year, or if verdict pass for the defendant, &c., the court shall award the defendent costs; but this act doth not extend to informations in the name of the king's coroner, or attorney, &c. See farther, 1 Chitty, cap. 156. and the authorities there cited.

When a battery is committed privately, so that the person injured can make no proof thereof by witnesses at law; it is usual to bring an information in this oflice, or to prefer an indictment, the most legal method, where the party may be a witness for the king, it being his suit. See tits. Indictment, Information, King's Bench, Quo Warranto,

CROWN LANDS. See tit. King, V. 4. CRUSTUM, was a garment of purple, mixed with many colours. Mon. Ang. tom. 1. p. 210.

CRY DE PAIS. On a robbery or other felony done, hue and cry may be raised by the country in the absence of the constable. which is called cry de pais. 2 Hale's Hist. P. C. 100. See tit. Hue and Cry.

CRYPTA. A chapel or oratory under ground, or under a church or cathedral. Du

CUCKING STOOL. See tit. Castigatory. CUDE. A cude cloth is a chrysom or facecloth for a child baptized. Vide Chrismale.

CUI ANTE DIVORTIUM. A writ for a woman divorced from her husband to recover her lands and tenements which she had in fee-simple, or in tail or for life, from him to whom her husband did alienate them during the marriage, when she could not gain-

CUI IN VITA. A writ of entry, for a widow against him to whom her husband aliened her lands or tenements in his life

Where the husband and wife exchange the lands of the wife for other lands, if the wife agree unto the exchange after the husband's death, she shall not have a cui in vita. Also if the wife do accept of parcel of the land in dower, of which she hath a cui in vita, by that acceptance she shall be barred of the residue. New. Nat. Br. 430. If the husband and wife lose by default the wife's lands, after the death of her husband, she shall have a cui in vita to recover those lands so lost by default. F. N. B. 187. By stat. 13 Ed. 1. c. 3. cui in vita is given to the wife where the deceased husband lost her lands by default in fend her right during his life, if she come in in case of pluralities of livings, or where a before judgment. Likewise if tenant in dower, by the curtesy, or for life, do make default, &c., the heirs and they to whom the reversion belongeth shall be admitted to their answer, if they come before judgment; and if on default judgment happen to be given, such heirs, &c. shall have a writ of entry for recovery of the same after the death of such tenants. See Booth on Real Actions, and F. N. B.—Now abolished.

CULAGIUM." The laying up of a ship in the dock to be repaired. MS. Arth. Trevor. Arm. de Plac. Edw. 3.

CULM. See Coal.

CULPRIT. A prisoner accused for trial. The word arose originally from the reply of the proper officer in behalf of the king, affirming a criminal to be guilty, after he hath pleaded Not Guilty, without which the issue to be tried is not joined: it is compounded of two words, viz. cul. and prit; the one an abbreviation of culpabilis, and the other derived from the French word prest, i. e. ready; and it is as much as to say that he is ready to prove the offender guilty. See 4 Comm. 339.

CULREACH. A caution given by a lord of regality, to punish a malefactor, whom he replevied from the sheriff .- Scotch Dict.

CULTURA. A parcel of arable land.

Blount.

CULVERTAGE. culvertagium.] Is said by some persons to be derived from culum and vertere, to turn tail: and in this sense, sub nomine culvertagii, was taken to be on pain of cowardice, or being accounted cowards. And in this sense Spelman in voc. Niderling derives it from culver, a dove. But in the opinion of others, it rather signifies some base slavery, or the confiscation of an estate; being a feudal term for the lands of the vassal forfeited and escheating to the lord: and sub nomine culvertagii in this signification, was under pain of confiscation. Mat. Paris, anno 1212.

CULWARD and CULVERD. A coward, Chart. Temp. Ed. 1. See the or cowardice.

preceding word.

CUMBERLAND. The stat. 14 H. 6. c. 3. directs that the sessions and gaol delivery for this county be holden in time of peace and of truce in the city of Carlisle, and in none other place in this county.

CUNA-CERVISIÆ. A tub of ale. Domes-

But this word is truly cuva.

CUNEUS. A mint or place to coin money. Coneum monetum signifies the king's stamp for coinage, and from the word cune is derived coin. Sec coin.

CUNTEY-CUNTEY. A kind of trial, as appears by Bracton; Bract. lib. 4. tract. 3. c. 18; where it seems to intend the ordinary jury

CURAGULUS. One who taketh care of

Mon. Angl. tom. 2.

CURATE, curator.] He who represents the incumbent of a church, parson, or vicar, and takes care of divine service in his stead: 1813, and in case only of the non-residence of

clergyman is old and infirm, it is requisite there should be a curate to perform the cure of the church. He is to be licensed and admitted by the bishop of the diocese, or by an ordinary having episcopal jurisdiction; and when a curate hath the approbation of the bishop, he usually appoints the salary too; and in such case, if he be not paid, the curate hath a proper remedy in the Ecclesiastical Court, by a sequestration of the profits of the benefice; but if he hath no licence from the bishop, he is put to his remedy at common law, where he must prove the agreement, &c. Right Clerg. 127.
By stat. 28 H. 8. c. 11. such as serve a

church during its vacancy shall be paid such stipend as the ordinary thinks reasonable out of the profits of the vacancy; or, if that be not sufficient, by the successor, within fourteen days after he takes possession.

By stat. 12 Anne, c. 12. where curates are licensed by the bishop, they are to be appointed by him at a stipend not exceeding 50l. per. ann. nor less than 201. a year, according to the value of the livings, to be paid by the rector or vicar; and the same may be done on any complaint made.

By stat. 36 G. 3. c. 83. § 1. the bishop or ordinary may appoint a stipend to curates of 751. per ann. with the use of the parsonage house, or allowance for it where the rector or

vicar does not personally reside.

Churches augmented by Queen Anne's bounty shall be deemed benefices presentive, and the officiating curate may have a like stipend. Id. § 3, 4.

Bishop or ordinary may apportion the stipend to officiating curates of perpetual cu-

racies not augmented. Id. § 5.

Ordinary may license curates employed, though no nomination shall have been made to him by the incumbent, and may revoke any licence subject to appeal to the archbishop of the province. Id. § 6.

§ 3. and 4. of this act, 36 G. 3. c. 83. were by the 47 G. 3. st. 2. c. 25. suspended (so far as related to the avoidance of benefices by the acceptance of augmented curacies). But this act of suspension was repealed by stat.

48 G. 3. c. 5.

Certain provisions were made by stat. 53. G. 3. c. 149. for the support &c. of stipendiary curates. These were repealed, and more effectual regulations made by 57 G. 3. c. 99. § 1. 48. &c. Under this latter act, the bishops are empowered to license curates and to assign them salaries, in no case less than 80l. a year, and increasing up to 150l. according to the population of the parish, &c. The occupation of the parsonage house may in certain cases be assigned to the curate, who is not to quit his curacy without three months' notice to the incumbent and the bishop. These regulations are to operate on persons having become incumbents after 20th July, the incumbent on his living for more than being resident on his benefice, and disthree months in the year. See farther Parson, Residence.

One person cannot be curate in two churches, unless such may satisfy the law by reading both morning and evening prayers at each place; nor can he serve one cure on one Sunday and another cure on the next; for he must not neglect to read morning and evening prayer in his church every Lord's Day; if he doth he is liable to punishment. Comp. Incumb. 572. But it is otherwise where a church or chapel is a member of the parish church, and where one church is not able to maintain a curate. Can. 48. See now stat. 57 G. 3, c. 99.

A curate having no fixed estate in his curacy, not being instituted and inducted, may be removed at pleasure by the bishop or incumbent. Noy. But there are perpetual curates, as well as temporary, who are appointed where tithes are impropriate, and no vicarage endowed; these are not removeable; and the improprietors are obliged to find them, some whereof have certain portions of the tithes settled on them. Stat. 29 Car. 2. c. 8. See tit. Parson.

It was provided in 1603 by Can. 33, that if a bishop ordains any person not provided with some ecclesiastical preferment, except a fellow or chaplain of a college, or a master of arts of five years' standing, who lives in the university at his own expence, the bishop shall support him till he prefer him to a living. 3 Burn. Eccl. L. 28. The bishops, before they confer orders, require either proof of such a title as is described by the canon, or a certificate from some rector or vicar, promising to employ the candidate for orders bona fide as a curate, and to grant him a certain allowance till he obtains some ecclesiastical preferment, or shall be removed for some fault. In a case where the rector of St. Anne, Westminster, gave such a title, and afterwards dismissed his curate without assigning any cause, the curate recovered in an action of assumpsit the same salary for the time after his dismission which he had received be-Cowp. 437. When the rector had vacated St. Anne's by accepting the living of Rochdale, the curate brought another action to recover his salary after the rector left St. Anne's: but the Court of K. B. held that that action could not be maintained, as these titles are only binding upon those who give them, while they continue incumbents in the church for which such curate is appointed. Doug.

No curate (or minister) ought to perform , the duties of any church before he has obtained a licence from the bishop. 2 Burn. 58.

The bishop cannot increase the salary of the curate, where there is a specific agreement between the incumbent and the curate. Freem. 70. Nor can a curate have the benefit of a proceeding by monition for the recovery of a salary assigned by the bishop with- or open shed covered with boards gave it this out the consent of the incumbent, the incum- denomination. Blount.

charging the duties generally, but desirous of the assistance of a curate. 3 B. & C. 47. Sec 1 and 2 W. 4. c. 45. for certain provisions as to the augmentation of small vicarages

CUR

Every clergyman that officiates in a church (whether incumbent or substitute) is in our liturgy called a curate. Curates must subscribe the declaration, according to the Act of Uniformity, or are liable to imprisonment, &c. See tits. Clergyman, Parson, Advowson, Chap-

CURFEU, Fr. couvrir, to cover; feu, fire.] bell which rang at eight o'clock in the evening, in the time of William the Conqueror; by which every person was commanded to rake up or cover over his fire, and put out his light; and in many places of England at this day, where a bell is customarily rung towards bed-time, it is said to ring curfew. Stowe's Annals.

In the Welch language, curfa signifies a

beating; also a stroke. Richards's Antiquæ Linguæ Britannicæ Thesaurus. CURIA, court.] Applied to all courts of justice, &c. It is sometimes taken for the persons, as feudatory and other customary tenants, who did their suit and service at the court of the lord. Kennet's Paroch. Antiq. 139. And it was usual for the kings of England, in ancient times, to assemble the bishops, peers, and great men of the kingdom to some particular place, at the chief festivals in the year; and this assembly is called by our historians curia. And it was called solemnis curia, augustalis curia, curia publica, &c. See tits. Court. Wittenagemote.

CURIA ADVISARE VULT. Is a deliberation which a court of judicature sometimes takes, where there is any point of difficulty, before they give judgment in a cause. New Book, Entr. And when judgment is stayed, upon motion to arrest it, then it is entered by the judges curia advisare vult. Shep. Epit. 682. And this entry is made when the court, after the argument of a case, take time to consider their judgment.

CURIA CURSUS AQUE. A court held by the lord of the manor of Gravesend for the the passage on the river Thames from thence to London, and plying at Gravesend bridge, &c. mentioned in stat. 2 G. 2. c. 26.

CURIA CLAUDENDA. A writ to compel another to make a fence or wall, which he ought to make between his land and the plaintiff's, on his refusing or deferring to do the same.

CURIA DOMINI. The lord's house, hall, or court, where all the tenants attend at the time of keeping courts.

CURIA PENTICIARUM. Is a court held by the sheriff of Chester, in a place there called the Pendice or Pentice: and it is probable its being originally kept under a pent-house,

CURRENCY. The stat. 6 G. 4. c. 79. enacts that the currency of Great Britain shall become and be the currency of the United Kingdom. All receipts, payments, contracts, and dealings shall be made according to such currency, and shall be held to be so made, unless the contrary be proved. § 1. All contracts, debts, &c. in Irish currency, made or contracted previous to January 5, 1826, shall be carried into effect, and satisfied by payment in British currency of 12-13ths of the amount according to Irish currency. § 2. All duties and public revenues, and all funds and public debts, shall be estimated in British currency, and the accounts thereof kept accordingly. § 3. But not to affect the real value in gold or silver coin of the public revenues, or of any sums in any act of parliament, or any franchise, &c., resulting from lands of any specified value. § 4. To provide for the payment of fractions of a penny, British currency, resulting from the conversion of Irish currency into British. § 5.—and for payment, in British copper coin, of sums under 12d. Irish currency. § 5-13. On converting Irish stock into British, all pence and fractions of 1d. of the principal sum shall be paid with the dividends at the Bank of Ireland. § 6, 7. Where annual sums charged on consolidated fund in Irish currency are converted into British, the Treasury may add sufficient to prevent fractions of a penny. § 8. Contracts may be made according to any foreign currency. § 9. Debts, &c. by implication of law, declared within the meaning of the act. § 10. On proclamation, British silver and gold coins shall be current in Ireland at the same rate of pence as in Great Britain, and not according to the rate of Irish copper coin. § 11. And Irish copper coin shall be brought to the bank of Ireland, and exchanged for British copper coin, at the rate of 12d. British for 13d. Irish, and the Irish copper coin shall cease to circulate. § 12. Publication of act, and explanation thereof, and tables of currency may be distributed by order of the Treasury. § 16.

CURRICULUS. The year or course of a Actum est hoc annorum Dominica incarnationis quatuor quinquagenis et quinquies, quinis lustris, et tribus curriculis. This is the year 1028: for four times 50 make 200, and five times 200 make 1000. Then five lustra are twenty-five years, and three curriculi three years, making in all the

very year. Blount.

CURRIERS. See Tanners. CURSING. See Swearing.

CURSITORS, clerici de cursu.] Clerks belonging to the Chancery, who make out original writs, and are called clerks of course, in their oath appointed, 18 Ed. 3. st. 5. There are of these clerks twenty-four in number, which makes a corporation of themselves: and to each clerk is allotted a division of

CURNOCK, a measure containing four certain counties in which they exercise their bushels, or half a quarter. Fleta, lib. 2. c. 12. functions. 2 Inst. 670. See tit. Process. CURSONES TERRÆ. Ridges of land.

CURTESY OF ENGLAND, jus carialitatis Angliæ.] Is where a man taketh a wife seised in fee-simple, or fee-tail general, or as heiress in special tail, and hath issue by her, male or female born alive, which by any possibility may inherit, and the wife dies, the husband holds the lands during his life, and is called Tenens per legem Angliæ, or tenant by the curtesy of England. See tit. Tenares, III. 9. Though this is called the curtery of England, it appears to have been the established law of Scotland, where it was called curialitas. It is likewise used in Ireland, by virtue of an ordinance of Henry III. So that probably the word curtesy is in this sense understood rather to signify an attendance upon the lord's courts, than to denote any peculiar favour. See 2 Com. 126.

Four things are requisite to give an estate by the curtesy, viz., marriage, seisin of the wife, issue, and death of the wife. Co. Lit. If the land descend to the wife after the husband hath issue by her, or if the issue be dead at the time of her death, being born alive, the husband shall be tenant by the cur-Also if a child is born alive, it is not material whether it is baptized, or ever heard to cry, to make the husband tenant by the curtesy: for if it is born alive, it is enough.

Dy. 25: 8 Rep. 34.

The words in the general editions of Littleton, 1 Inst. 29. are oyes ou vife, but in Lettou and Michlinia's edition, they are neez vif, and are translated by Lord Coke, born

But the child must be such as by possibility may inherit: and therefore if land be given to a woman, and the heirs male of her body, and she takes husband, and hath issue a daughter, and dies, as this issue cannot possibly inherit, the husband shall not be tenant by the curtesy. Terms de la Ley.

If the child is ripped forth of the mother's belly, after her death, though it be alive, it will not cause tenancy by the curtesy; for this ought to begin by the issue, and be consummate by the death of the wife, and the estate of tenant by the curtesy should aroid the immediate descent. Ibid. A man shall not be tenant by the curtesy of a bare right, title, use, reversion, &c., expectant upon an estate of freehold, unless the particular estate is determined during the coverture; nor of a seisin in law: but if a wife dies before a rent becomes due, or in the case of an advowson, before the church becomes void, the husband shall be tenant by the curtesy, though the wife had only a seisin in law; for in this case no other seisin could be attained. F. N. B. 149: Co. Int. 29, 30. 40.

Though in strictness of law there cannot be curtesy of trusts, yet since Lord Coke's time, our courts of equity have allowed curtesy, both of trusts and other interests, which, though in law mere rights and titles, are 4 Ed. 1. c. 1: 35 H. 8. c. 4: 6 Rep. 64: and deemed estates in equity; and made to conform to many of the rules and consequences incident to estates in law. See in 1 Atk. 603. the case of Cashbourn v. English, in which Hardwicke, C. decreed curtery of an equity of redemption. See S. C. more fully reported in Vin. tit. Curtesy, (E.) pl. 23. However a wife may in point of benefit have a trust of inheritance, which may be so declared as to prevent curtesy; as by directing the profits, during the wife's life, to be paid for her separate use; for in such case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3 Atk. 715. It is also proper to remark, that though curtesy out of a trust is allowed. yet dower has been refused, a distinction not easily reconcileable with reason, however settled by the current of authorities. See 1 Inst. 29. a.: n. 6.

As to curtesy in titles and offices of honour, see 1 Inst. 29. b. and Mr. Hargrave's learned notes there, by which it seems that no such curtesy can take place, though the question appears not to be settled, a decision having been repeatedly avoided thereon.

There is no tenancy by the curtesy of copy-

hold lands, except there be a special custom But in gavelkind lands, a husband may be tenant by the curtesy without having issue. 1 Inst. 30. But it is only of a moiety of the wife's land, and ceases if the husband marries again. Robins. Gavelk. l. 2. c. 1. Where a husband is entitled to this tenancy, if after the wife is an idiot, and her estate in the land found; when she dies he shall not be tenant by the curtesy, for the king's title by relation prevents it. *Plowd*. 263. If the wife be seised in fee of lands, and attaint of felony, but have issue by her husband, and she is hanged, &c., it is said the husband shall be a tenant by the curtesy, but yet the land will be forfeited, according to Kitch. 159. 21 Ed. 3. c. 49.

A woman seised of land had two daughters, and covenanted to stand seised to the use of E., her eldest daughter in tail, on condition that she should pay to her other daughter within a certain time 300l. And if E. made default, or died without issue before such payment, then the land to go to the second daughter; the mother dying, E. took a husband, and had issue, and died afterwards without any issue living, before the day of payment: it was here held that her husband should be tenant by the curtesy. 1 Leon. ca. See Kitch. 159.

CURTEYN, curtana.] The name of King Edward the Confessor's sword: which is the first sword carried before the kings of England at their coronation: and it is said the point of it is broken as an emblem of mercy.

Mat. Paris in Hen. III.

CURTILAGE, curtilagium, from the Fr. cour, court. and Sax. leagh, locus. A courtyard, back-side, or piece of ground lying near and belonging to a dwelling-house. See stats. power of a law; and if it is universal, then

Spelm .: 7 and 8 G. 4. c. 29. § 13; by which latter act it is declared that no building, although within the same curtilage as the dwelling-house, and occupied therewith, shall be deemed part of the dwelling-house, for the purposes of burglary, &c., unless there is a communication immediate, or by a covered-in way with the house. And though it is said to be a yard, or garden, belonging to a house, it seems to differ from a garden; for we find, cum quodam gardino et curtilagio. 15 Ed. 1.

n. 34. See tits. Burglary, Building. CURTILES TERRÆ. Court Lands. is recorded that among our Saxon ancestors, the Thanes or nobles who possessed bockland, or hereditary lands, divided them into inland and outland: the inland was that which lay most convenient for the lord's mansion house, and therefore the lords kept that part in their own hands, for the support of their families. and for hospitality: afterwards the Normans mains, demesnes, or lord's lands: the Germans termed them terras indominicatus, lands in the lord's own use: and the Feudists, terras curtiles, lands appropriate to the court or house of the lord. Spelm. of Feuds, c. 5.

CUSTANTIA, custagium.] Costs. CUSTODE ADMITTENDO, CUSTODE AMOVENDO. Writs for the admitting or removing of guardians. Reg. Orig

CUSTODES LIBERTATIS ANGLIÆ AUTHORITATE PARLIAMENTI. The style in which writs and all judicial processes were made out during the grand rebellion; from the murder of King Charles I. till the usurper Oliver was declared Protector, &c.; mentioned and declared traitorous by stat. 12

CUSTODIAM or CUSTODIAM LEASE. A lease from the crown, under the seal of the Exchequer, by which the custody of lands, &c. seized into the king's hands, is demised or committed to some person as custodee or lessee thereof. See 4 Inst. c. 11. f. 111: Howard on the Irish Revenue.

These custodians take place (chiefly in Ireland) either in the case of debts due to the crown, and of grants by the crown, of lands, rectories, tithes, &c.; or upon outlawries in civil suits between party and party; when lands and tenements of the party outlawed (after an inquisition taken upon a special capias utlagatum and returned into the Exchequer) are committed (during pleasure) to the custody of the plaintiff for satisfying his debt, under a nominal rent of 5s. in cases of debt, and 10s. in cases of trespass, payable to the crown. See Conroy's Custodiam Reports (Dublin, 1795), and this Dict. tit. Outlawry.

CUSTOM, consuctudo.] Is a law not written, established by long usage, and the consent of our ancestors. No law can oblige a free people without their consent; so wherever they consent and use a certain rule or method as a law, such rule, &c. gives it the

CUSTOM. 492

it is common law: if particular to this or that, first put in his, is unreasonable, and therefore place, then it is custom. 3 Salk. 112. As to the rise of customs, when a reasonable act once done was found to be good and beneficial to the people, then they did use it often, and, by frequent repetition of the act, it became a custom; which being continued without interruption time out of mind, it obtained the force of a law, to bind the particular places, persons, and things concerned therein. Thus a custom had beginning, and grew to perfection.

To make a particular custom good, the fol-

lowing are necessary requisites.

1. Antiquity.—That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, within legal memory, that is within any time since the first year of Richard I., it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist. Co. Lit. 113. Therefore a custom that every pound of butter sold in a certain market, should weigh eighteen ounces, is bad; not left to the option of every man, whether being directly contrary to stat. 13 and 14 Car. he will use them or no. Therefore a custom 2. c. 26., which directs it to contain sixteen

ounces. 3 Term Rep. 271.

2. It must have been continued. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and there-upon the custom will be void. But this must be understood with regard to an interruption of the right; for an interruption of the possession only for ten or twenty years will not destroy the custom. Co. Lit. 114. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the right be any how discontinued for a day, the custom is quite at

3. It must have been peaceable, and acquiesced in; not subject to contention and dispute. Co. Lit. 114. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be reasonable (Lit. § 212.). or rather, taken negatively, they must not be unréasonable. Which is not always, as Sir Edward Coke says (1 Inst. 62.), to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall succeed to those lands alone. Co. Lit. shall be put in till the lord of the manor has 15. See tit. King.

bad; for peradventure the lord will never put in his; and then the tenants will lose all their

profits. Co. Copyh. § 33.

5. Customs ought to be certain. A custom, that lands shall descend to the most worthy of the owner's blood, is void: for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. 1 Rol. Abr. 565. A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes threepence, as the occupier of the land pleases, is bad, for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain; for the value may be ascertained at any time; and the maxim of law is, id certum est quod certum reddi potest .-A custom that poor housekeepers shall carry too vague. 2 Term Rep. 758.

6. Customs, though established by consent, must be (when established) compulsory; and that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure is idle and absurd;

and indeed no custom at all.

7. Lastly, customs must be consistent with each other: one custom cannot be set up in opposition to another. For if both are really both established by mutual consent; which to say of contradictory customs is absurd. Therefore if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. former custom. 9 Rep. 58. See Dong, 190.

As to the allowance of special customs. Customs in derogation of the common law must be construed strictly. This rule is founded upon the consideration that a variety of customs in different places upon the same subject is a general inconvenience: the courts therefore will not admit such customs, but upon the clearest proofs. 1 Term Rep. 466. Thus by the custom of gavelkind, an infant of fifteen years may by one species of conveyance (called a deed of fooffment) convey away his lands in fee-simple. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years, for the custom must be strictly pursued. C. Cap. § 33. All special customs must yield to the king's prerogative. Therefore if the king purchases land of the nature of gavelkind, where all the sons inherit equally; yet on the king's demise, his eldest son

But though customs are to be construed fore void: and where custom is amongst strictly, yet, says Lord Coke, they are not to be confined to literal interpretation; for if there be a custom within any manor that copyhold lands may be granted in fee-simple, under that custom they may be granted to one and the heirs of his body, or for life or years or any estate whatever; on the maxim cui licet quod majus non debet quod minus est non by a jury. Doct. & Stud. c. 7. 10:1 Inst. 110. licere. So under a custom that copyhold lands. may be granted for life, by the same custom ton, lib. 3. c. 3. And custom is said to be they may be granted during widowhood, but not é converso, because an estate during widowhood is less than an estate for life. Co. Cop. § 33.

A custom contrary to the public good, or injurious to a multitude, and beneficial only to some particular persons, is repugnant to the law of reason, and consequently void. Danv. 424. 427. Customs ought to be beneficial to all, but may be good where against the interest of a particular person if for the public good. Dyer, 60. A custom is not unreasonable for being injurious to private persons or interests, so as it tends to the general advantage of the people. 3 Salk. 112.

By custom the ordinary meaning of a word may be altered; e. g. parol evidence is admissible to show that the word thousand in a lease means, by the custom of the country, twelve hundred. 3. Barn. & Adol. 728.

A custom alleged by churchwardens of a parish to set up monuments, &c., in a church, without the consent either of the rector or ordinary, declared to be illegal. Beckwith v. Harding, 1 Barn. & A. 508.

An immemorial custom to have no churchwardens, and for the duties of the office to be performed by overseers of the poor, is bad, for overseers have not existed immemorially, and there must have been always duties for churchwardens to perform. 2 Barn. & Adol. 197. A custom that there shall be a select vestry of an indefinite number of persons continued by election of new members made by itself, and not by parishoners, is valid in law. Barn. & C. 765.

A custom may be good in some cases where a prescription is not: but customs that are good for the substance and matter of them, may yet be bad for the manner: if they are uncertain, or mixed with any other custom that is unreasonable, &c. 2 Bulst. 166: 2 Brownl. 198.

Custom is, and must always be, alleged to be in many persons; and so it may be claimed by copyholders, or the inhabitants of a place, and when it is claimed it must be as within such a county, hundred, city, borough, manor, tion of marriage, see tit. Executor, V. 9. As parish, hamlet, &c. Co. Lit. 110. 113: 4 Rep. to the custom of Foreign Attachment, see tit. 31. A good custom or prescription hath the force of a grant; as where one and his an- feme covert being a sole trader, see tits. Baron cestors have had a rent time out of mind, and & Feme, Bankrupt .-- And farther in more parused to distrain, &c. But a custom that be- ticular detail, as to the general and local cusgins by extortion of lords of manors, is judged toms of London, see this Dict. under tit. Lonwanting a lawful commencement, and there- don.

many, and they are all dead but one, the custom is gone. Plowd. 322: Dyer, 199.

General customs which are used throughout England, and are the common law, are to be determined by the judges: but particular customs, such as are used in some certain town, borough, city, &c. shall be determined Consuetudo pro lege servatur, &c. saith Bracaltera lex: but the judges of the court of B. R. or C. B. can over-rule a custom though it be one of the customs of London, if it be against natural reason, &c. 1 Mod. 212.

The law takes particular notice of the custom of Gavelkind and Borough English (Co. Lit. 175.); and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded (Lit. § 265.); and as well the existence of the custom must be shown, as that the thing in dispute is within the custom alleged. The trial in both cases is by a jury of twelve men, and not by the judges, except the same particular custom has before been tried, determined and recorded in the same court. Doct. & Stud. 1. 10: 1 Comm. 76.

See the recent act shortening the time requisite to support customary and prescriptive rights. Prescriptive, III.

See farther title Prescription, and as to particular customs relative to Inheritance, Dower, &c., see tits. Copyhold, Gavelkind, &c.

THE CUSTOMS OF LONDON differ from all others in point of trial; for if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate of the lord mayor and aldermen, by the mouth of the recorder. Cro. Car. 516. Unless it be such a custom as the corporation itself is interested in; as a right of taking toll, &c.; for then the law permits them not to certify in their own behalf. Hob. 85. And when a custom has once been certified by the recorder, the judges will take notice of it, and will not suffer it to be certified a second time. Dougl. 365. As to the form in which the recorder shall certify a custom, see 1 Burr. 248. and title Certificate.

These customs of London relate to divers particulars, with regard to trade, apprentices, widows, orphans, &c. As to the custom relative to the distribution of a freeman's estate, and which now, in consequence of stat. 11 G. 2. c. 18. § 17. extends only to cases of intestacy, or express agreements made in considera-Attachment Foreign. As to the custom of a

Vol. I. 63

494 CUSTOM.

Westminster of course take notice of the customs of London, but not of any other place. chants from pirates. Dyer, 165. Some have But this is only where they have been certi-imagined they were called with us customs. fied. See ante tit. Custom.

which, however different from the rules of confessed by stat. 25. Ed. 1. c. 7. wherein the the common law, is yet ingrafted into it, and king promises to take no customs from mermade part of it: being allowed for the bene-chants without the common assent of the fit of trade, to be of the utmost validity in all realin, "saving, to us and our heirs, the cuscommercial transactions; for it is a maxim toms on word, skins, and leather, formerly

only so far considered as law, that it affords exportation only of the three said commodities. the rule of construction in cases of contracts, and of none other; which were styled the agreements, &c., and other transactions in stuple commodities of the kingdom, because trade and commerce. Mr. Christian, in his they were obliged to be brought to those ports note on the above passage of the Comment, where the king's staple was established, in ortaries, truly remarks, that the lex mercatoria, | der to be there first rated and then exported. like the lex et consuctudo parliamenti, de- Dane. 9. They were denominated in the scribes only a great division of the law of barbarous Latin of our ancient records, cus-England. The laws relating to bills of exchange, insurance, and all mercantile contracts, are as much the general law of the land, as the laws relating to marriage or murder. And the opinion of Mr. Justice Foster is, that the Custom of Merchants is the general law of the kingdom, and therefore ought not to be left to a jury after it has been settled by judicial determination. 2 Burr. 1226.

The Custom of Merchants is likewise understood to comprehend the Usage of Merchants, which generally governs mercantile questions, where no positive law points out the rule for decision: and therefore the courts at Westminster have frequently granted a new trial where the vergict of a jury has militated against the custom or usage of merchants. Rex v. Miller 6 Term Rep. 268. And the courts have frequently received evidence of this usage of merchants. See the of wool by stat. 11 Ed. 3. c. 1. See Bac. Ab. cases collected, Bac. Ab. vol. 5. 383. (7th ed.)

by Gwillim & Dodd.)

feet and influence of this Custom of Mer. prisage or butlerage of wines; which is conchants, under Bankrupt, Bill of Exchange, Factor, Insurance, Partnership, and other titles in this Dict.

Customs on Merchandise. These are enumerated, (1 Comm. 313.) among the perpetual taxes; and are there explained to be the dn_{-1} importing into England twenty tons or more; ties, toll, tribute, or tariff, payable upon merchandise exported and imported.

The considerations, says the Commentator, upon which this revenue, or the more ancient | chant-strangers, and called butlerage, because part of it which arose only from exports, was paid to the king's butler. Dav. 8: 2 Bulst. invested in the king, were said to be two .- 1. 254: Com. Journ. 27 Apr. 1689. The duty Because he gave the subject leave to depart of prisage and butlerage was granted to Lord the kingdom, and to carry his goods along | George Fitzroy and his heirs male by Charles with him.-2. Because the king was bound of II., and in 1806 was vested in the Duke of

It is said, 1 Ro. Rep. 106, that the courts at common right to maintain and keep up the because they were the inheritance of the The customs of London are confirmed by king, by immemorial usage, and the common act of parliament. 8 Rep. 126: Cro. Car. law, and not granted him by any stat. Dy. 43. pl. 24. But Sir Edward Coke, 2 Inst. 58. THE CUSTOM OF MERCHANTS, Lex Mercato- 9. hath clearly shown that the king's first ria.] A particular system of customs used claim to them was by grant of parliament. only among one set of the king's subjects; 3 Ed. 1. And indeed this is in express words In law that cuilibet in arte succeedendum est. granted to us by the commonalty aforesaid."

1 Comm. 75.

These were formerly called the hereditary It seems that this Custom of Merchants is Customs of the Crown, and were due on the tuma; not consuetudines, which is the language of our law, whenever it means merely usages. The duties on wool, sheep skins, or wool-fells, and leather, exported, were called custuma antiqua sive magna: and were payable by every merchant, as well native as stranger; with this difference, that merchantstrangers paid an additional toll, viz. half as much again as was paid by natives. The custuma parra et nora were an impost of 3d. in the pound, due from merchant-strangers only, for all commodities as well imported as exported; which was usually called the aliens' duty, and was granted in 31 Ed. 1. 4 Inst. 29. But these ancient hereditary customs, especially those on wool and wool-fells, came to be of little account, when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation tit. Smuggling (B.), (ed. by Gwillim & Dodd.)

There is also another very ancient heredi-See farther, more particularly as to the et itary duty belonging to the crown, called the siderably older than the customs, being taken notice of in the great roll of the Exchequer, 8 R. 1. still extant. Mudox Hist. Exch. 526. 532. Prisage was a right of taking two tons of wine from every ship (English or Foreign) one before, and one behind, the mast: which by charter of Ed. 1. was exchanged into a duty of 2s. for every ton imported by merCUSTOM.

lished. See Bac. Ab. vol. 7. 337. (7th ed.)

fore mentioned over and above the custuma ported and used in Great Britain, shall pay circumstances and times required.

These distinctions are now in a manner forgotten, except by the officers immediately

denomination of THE CUSTOMS.

By these we understand at present a duty or subsidy paid by the merchant, at the quay, upon imported as well as exported commodities, by authority of parliament; unles where, for particular national reasons, certain rewards, bounties, or drawbacks, are allowed first granted, as the old statutes (and particularly 1 Eliz. 19.) express it, for the defence of the realm, and the keeping and safeguard the same. They were at first usually granted half to the public revenue. only for a stated term of years, as, for two Sixth's time, they were granted him for life by a statute in the thirty-first year of his reign; and again to Edward IV. for the term of his life also: since which time they were life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of Charles the First.

Upon the restoration, this duty was granted in England to King Charles the Second for mer acts relating to the customs, as well of life, and so it was to his two immediate sucthe Irish as British legislature, preparatory to cessors; and by three several stats. 9 Anne, c. the enacting a new system applicable to the 6: 1 G. 1. c. 12: 3 G. 1. c. 7; it was made whole of the United Kingdom. By 6 G. 4 c. perpetual and mortgaged for the debt of the 111. new DUTIES OF CUSTOMS were granted acpublic. The customs thus imposed by parlia- cordingly on goods imported into or exported ment were, till the stat. 27 G. 3. c. 13. con- from, or carried coastwise in any part of Great tained in two books of rates, set forth by par- Britain and Ireland; some of these duties are

liamentary authority.

tutes imposing duties of customs and excise 76: 10 G. 4. c. c. 23. 43. The only articles were repealed with regard to the quantum of exempted from these duties are diamonds, bulthe duty; and the two books of rates above- lion, fresh fish, turbots and lobsters, plants, mentioned were declared to be of no avail for trees or shrubs, alive: salt, medals of gold the future; but all the former duties were or silver, and specimens of natural history. consolidated, and were ordered to be paid ac- The warehousing of goods imported for home cording to a new book of rates annexed to consumption, so as to secure the duties payathat statute.

Grafton, and was purchased by the Treasury Bullion, and some few other commodities, for 6870l.; and by 49 G. 3. c. 79 was abound may be imported duty-free. All the articles enumerated in the tables or book of rates pay Other customs payable upon exports and imports were distinguished into subsidage, tonnage, poundage, and other imposts. Subsides were such as were imposed by parliament upon any of the staple commodities be
merated or described, and permitted to be imantiqua et magna: tonnage was a duty upon upon importation a certain duty ad valorem, all wines imported, over and above the prisage or for every 100l. of the value thereof; but and butlerage aforesaid: poundage was a subject to a drawback upon exportation. duty imposed ad valorem, at the rate of 12d. Very few commodities pay a duty upon exin the pound on all other merchandise what- portation; but where that duty is not specisoever, and the other imposts were such as fied in the tables, and the exportation is not were occasionally laid on by parliament, as prohibited, all articles may be exported with-Danv. out payment of duty, provided they are regularly entered and shipped; but on failure thereof, they are subject to a duty ad valorem. And to prevent frauds in the representation concerned in this department: their produce of the value, in cases either of importation or being in effect all blended together, under one exportation, a very simple and equitable regulation is prescribed, viz. the proprietor shall himself declare the value, and if this should appear not to be a fair and true estimate, the goods may be seized by the proper officer; and four of the commissioners of the customs may direct that the owner shall be paid the price which he himself fixed upon them, with for particular exports or imports. Those of an advance of 10l. per cent., besides all the tonnage and poundage, in particular, were at duty which he may have paid; and they may then order the goods to be publicly sold, and if they raise any sum beyond what was paid to the owner, and the subsequent expenses, of the seas, and for the intercourse of mer- one half of the overplus shall be paid to the chandise safely to come into and pass out of officer who made the seizure, and the other

495

A very great number of acts of parliament years, in 5 R. 2. Dav. 12; but in Henry the were from time to time passed to prevent frauds in this branch of the revenue, as well as in the excise; and, which at one time was more to be wished than hoped, general acts restraining every fraud, and containing every regularly granted to all his successors for regulation, with a precise statement of the punishment for each offence have lately been passed, of which the following is a very abridg-

ed summary.

The stat. 6 G. 4. c. 105. repealed all foraltered or repealed by subsequent acts. 7 G. By stat. 27 G. 3. c. 13. all the former sta- 4. c. c. 48. 53: 8 G. 4. c. 56: 9 G. 4. c. c. 60. ble on importation, without calling for pay

market, is regulated by stat. 6 G. 4. c. 112. ants in those parts acting under the control The Commissioners of the Treasury are emoof the commissioners in England, who are powered to appoint by warrants certain ports themselves subject to the immediate control to be warehousing ports, and therein certain of the Commissioners of the Treasury, warehouses, either of special or ordinary security; the first being intended for more effectual security against the introduction into the English market of prohibited merchandize imported only for re-exportation, the other having merely in view the safe deposit of the goods, and ensuring payment of the daties. To secure these duties a bond is given either by the proprietor of the warehouse, for payment within three years of the full duties of importation, on all goods which shall be warehoused therein, or otherwise for the exportation thereof; or by the importer in respect of the particular goods, which is to be in force for three years and no longer, and which may be superseded by the bond of the purchaser, in case of sale without removal. By 6 G. 4. c. 113. certain Bounties and allowances of customs were granted and made payable on a few articles (sugar [refined] being the most important). Certain specific duties payable on goods imported from places, formerly within the limits of the South Sea Company's trade (under acts 55 G. 3. c. 57. § 5—11. & c. 141.) are expressly continued in force by stat. 7 G. 4. c. 48. § 52. That act also continues in force the act 4 G. 4. c. 47. as amended by 5 G. 4. c. 1. (usually called the Reciprocity Acts), by which the king in council may authorize the importation and exportation of goods in foreign vessels of any country on payment of like duties as are payable in case of goods imported, &c. in British vessels, proof being first given that goods are allowed to be imported into applicable to the whole of that trade; in which the foreigner's country in British ships, on like the East Indian Isle of Mauritius is included reciprocal terms, thus affording relief from the high duties imposed by the general schedule of customs; duties in case of importation into ties on articles imported there, are regulated England, &c. in foreign vessels. The gross by stat. 6 G. 4, c. 115; see also the stats, 6 G. produce of the customs' duties in Great Britain, which in 1792 very little exceeded six 8 G. 4. c. 56. § 3: 9 G. 4 c. 76. § 5. 27, 28: millions, amounted in 1829 to very nearly nineteen millions. The re-payments, drawbacks, and bounties, being only about a mil- G. 3. c. 55. for England, and 52 G. 3. c. 60. for lion and a quarter at each of those periods. The official value of the imports, which in 1792 were seventeen millions, amounted in 1829 to upwards of forty-two millions and a quarter. The exports, which at the former period were about twenty-eight millions and a half (nearly seventeen of which conssisted of British produce and manufactures,) had in 1829 increased to upwards of sixty-six millions; fifty-five millions and a half being of belonging to the Court of Common Pleas, British produce and manufactures.

The Management of the Customs is regulated by stat. 6 G. 4. c. 106. (amended by 7 G. 4. c. 48: 8 G. 4. c. 56: 9 G. 4. c. 76: and 10 G. 4.c. 43.) under the direction of thirteen called the posteas; for they are first brought commissioners for the united kingdom, and in by the clerk of assize of every circuit to four assistant commissioners for Scotland and the prothonotary, who enters the issue in the

ment till the goods are finally taken into the | Ireland; the commissioners and their assist-

The GENERAL REGULATIONS for the Customs are continued in stat 6 G. 4. c. 107. amended by 7 G. 4. c. 48: 8 G. 4. c. 56. 58: 9 G. 4. c. 76. In these acts specific directions are given for the entry, discharging, and shipping of all goods, inwards and outwards; with certain prohibitions and restrictions, as to the importation and exportation of particular goods also for regulating the Cousting Trade, including in that term all trade by sea, from any one part of the United Kingdom to any other

By stat. 6 G. 4. c. 108. (amended by 7 G.4. c. 48: 8 G. 4. c. 58: 10 G. 4. c. 43.) for the prevention of smuggling, a great number of regulations are made as to the size and conduct of vessels and boats likely to be engaged in that illicit traffic, and severe penalties and forfeitures are imposed on all transgressors.

See tit. Smuggling.

By stat. 6 G. 4. c. 109. " for the encouragement of British Shipping and Navigation," (amended by 7 G. 4.c. 48: 8 G. 4.c. 56: 9 G. 4. c. 76.) regulations are made as to the importation and exportation of various articles, from various places in British ships, or in foreign ships, of the country producing the articles, &c.; these are usually termed the Navigation Acts. See that title in this Dict.

By stat. 6 G. 4. c. 114. "to regulate the trade of the British Plantations," (amended by 7 G. 4. c. 48: 8 G. 4. c. 56: and 9 G. 4. c. 76.) duties are imposed and directions given upon the same footing as the West Indies.

The trade to the ISLE OF MAN and the du-4 c. 107, § 17, 52, 67; 7 G. 4 c. 48, § 11, 49; and this Dict. tit. Isle of Man.

As to the superannuation fund, see stat. 51

CUSTOMS AND SERVICES, belonging to the tenure of lands, are such as tenants owe unto their lords: which being withheld from the lord, he may have a writ of customs and services. See tits. Consuetudinibus & Servitiis.

CUSTOMARY FREEHOLD. See tit.

Copyhold.

CUSTOS BREVIUM. A principal clerk whose office is to receive and keep all the writs returnable in that court, and put them upon files, every return by itself; and to receive of the prothonotaries all the records of nisi prius, causes, to enter the judgment: and four days | after the return thereof, the prothonotary enters the verdict and judgment therupon, into the rolls of the court; whereupon he afterwards delivers them over to the custos brevium, who binds them into a bundle. He makes entry likewise of all writs of covenant, and the concord upon every fine, and maketh forth exemplifications, and copies of all writs and records in his office, and of all fines levied.

The fines after they are engrossed are divided between the custos brevium and the chirographer; the chirographer always keeps the writ of covenant and the note, and the custos brevium the concord and the foot of the fine; upon which foot of the fine the chirographer causeth the proclamations to be indorsed, when they are proclaimed. This officer is made by the king's letters patent, which were first granted by Charles II. in the twentyninth year of his reign, to trustees for the Earl and Countess of Litchfield, and for the issue of the Countess in tail. The persons at present entitled to the office acquired it by inheritance. By 6 G. 4. c. 89. the Treasury is authorised to contract with the persons beneficially entitled to the fees and profits of the office for the purchase of their rights for such annuity, charged on the consolidated fund, as the Treasury shall think fit, and after the confirmation of the agreement by parliament, the rights of the parties shall cease, and the annuity shall be paid to such person or persons as would be entitled to the fees, &c., if the act had not been made. See 1 W. 4. c. 58. In the Court of King's Bench there is also a custus brevium et rotulorum, who fileth such writs as are in that court filed, and all warrants of attorney, &c., and whose business it is to make out the records of nisi prius, &c. See tits. Chirographer, Common Pleas.

CUSTOS PLACITORUM CORONÆ. An officer which seems to be the same with him we now covered. call custos rotulorum. Bract lib. 2. c. 5.

records of the county. The officer who hath though since made a distinction of degrees, the custody of the rolls or records of the ses- so called, because it came originally from Dalsions of the peace, and also of the commission matia. of the peace itself. He is always a justice of the peace of the quorum in the county where measure of land. Et totam Dailiam marisci appointed, and usually some person of quality; tam de rossa, quam de prato, Ac. Mon. Aug. but he is rather termed an officer or minister tom. 2. p. 211. In some places it is taken for than a judge. Lamb. Eiren. lib. 4. c. 3. p. 373. a ditch or vale, whence comes dale. The By stat 37 H. 8 c. 1. (altered by stat. 3 and 4 dali prati have been esteemed such narrow Ed. 6. c. 1. but restored by 1 W. 4 M. c. 21.) slips of pasture as are left between the ploughthe custos rotulorum in every county is appointed by a writing signed by the king's parts of Eigland are called doles; the prehand, which shall be a warrant to the lord sent Welsh use this word for low meastow by chancellor to put him in commission; and he the river side. And return of Deal in Next. may execute his office by deputy, and hath ginal name and nature of Deal, in Kent, power to appoint the clerk of the peace, &c. where Casar landed, and fought the Britons: See tit. Clerk of the Peace. The custos rotu. Casar ad Dolam bellum pugnavit. Cowel. lorum, two justices of the peace, and the clerk of the peace, are to enroll deeds of bargain and sale of lands of papists, &c. by 3 G. 1. c. 18. See tit. Papists.

CUSTOS OF THE SPIRITUALITIES / See Guar-CUSTOS OF THE TEMPORALITIES (

CUT-PURSE. If any person clam et secrete, and without the knowledge of another. cut his purse or pick his pocket, and steal from thence to the value of 12d., it is felony without benefit of clergy, by stat. 8 Eliz. c. 4; but the capital part of the offence is now repealed. See tit. Felony.

CUTTS. Flat-bottomed boats, built low and commodiously, used in the channel for transporting of horses. Stow. Annal. p. 412.

CUTTER OF THE TALLIES. ficer in the exchequer to whom it belonged to provide wood for the tallies, and to cut the sum paid upon them, &c. See tit. Exche-

CUVE, Fr.] A keeve, from whence comes keever, a tub or vat for brewing. Cowel.

CYCLAS. A long garment close upwards, and open or large below. See Matt. Paris. Anno 1236.

CYDER. Is one of the many articles liable to Excise duties. Sec tit. Excise.

CYNEBOTE. A mulct anciently paid by one who killed another, to the kindred of the deceased. Spelman. Blount.
CYRICBRYCE, Sax.] Irruptio in eccle-

siam. Leg. Eccl. Canuti Regis. See tit. Sacrilege.

D.

DA, Fr.] A word affirmative for yes. Law French Dict.

DAG. A gun: un dagg, a small gun, or hand gun. See Haque.

DAGUS or DAIS. The chief or upper

table in a monastery; from a cloth called dais, with which the tables of kings were

DALMATICA. A garment with large Custos Rotulorum, keeper of the rolls or open sleeves, at first worn only by bishops,

DALUS, DAILUS, DAILIA. A certain

DAMAGES.

DAMNA.] This term signifies generally any hurt or hindrance that a man receives in his

estate; but particularly a part of what the such damages. Therefore where the trustees jurors are to inquire of and bring in, when an of a turnpike road, empowered to make waaction passeth for the plaintiff; for, after ver- ter courses to prevent the road from being dict given on the principal cause, the jury are overflowed, directed their surveyor to present asked touching costs and damages, which a plan for carrying off the water of an adjacomprehend a recompense for what the plain- cent brook, and on his recommendation ortiff hath suffered, by means of the wrong dered him to make a wide channel from the done him by the defendant. Co. Lit. 257. The word damage is taken in law in two se- water into the ordinary sluice ditches of the veral significations, the one properly and generally, the other relatively; properly, as it is discharge it, and his land was consequently in cases wherein damages are founded upon overflowed, it was held by the Court of C. P. the statutes where costs are included within that no action lay against the chairman of the the word damages, and taken as damages.

But when the plaintiff declares for the wrong done to him to the damage of such a sum, this is to be taken relatively for the wrong which passed before the writ brought, and is assessed by reason of the foregoing trespass, and cannot extend to costs of suit, which are future, and of another nature. 10

Rep. 116, 117. See tit. Costs.

I. In what Actions Damages may be recovered, and against whom.

II. How Damages are to be assessed, increased, and mitigated.

III. Compensation to be made by hundreds. &c. for damage riotously done in certain cases.

I. In what Actions Damages may be recovered, and against whom.—In personal and mixed actions, damages were recovered at common law; but in real actions no damages were recoverable, because none were demanded by the count or writ. Whereas in actions personal the plaintiff counts ad damp-num for the injury, and if he recovers no damages he hath no costs. 10 Rep. 111.117. In a personal action, the plaintiff shall recover damages only for the tort done before the action brought, and therein he counts for his damages; in a real action he recovers his damages pending the writ, and therefore In debt, which appears certain to the court never counts for his damages. 10 Rep. 117. By the stat. of Gloucester, 6 Ed. 1. c. 1. da | are small, in fact only nominal, as one shilmages are given in real actions, assizes of ling; and the master in B. R. taxeth the costs, novel disseisin, mort d'ancestor, &c., and shall which are added thereto, and called damages. be recovered against the alience a disseisor, as well as against the disseisor himself; and the demandant shall have of the tenant likewise costs of suit, but not expenses for trouble and loss of time. 2 Inst. 288. See far-10: 2 Inst. 284. 286; 2 Danv. Abr. 448.

No damages could be recovered at the common law, but against the wrong doer, and by him to whom the wrong was done. 2 Inst. 284.

lic function void of emolument (which he is 587. But in that case the damages ought not compellable to execute, acting without no- to be weighed in a nice balance, but ought to tice, and according to his best skill and dili- be such as appear at first blush to be outragence, with the best information he can ob- geous, and indicate passion or partiality in tain,) does an act which occasions consequen- the jury; and when a new trial is granted on tial damages, is not liable to an action for this ground, the former verdict stands as a se-

road, gradually narrowing, and conducting plaintiff's land, which were insufficient to trustees who signed the order for cutting the trench. Sutton v. Clarke, 6 Taunton, 29. And see 1 East, 555.

Damages shall be recovered in writ of admeasurement of dower; but not in a writ of admeasurement of pasture. 2 Danv. 457. In writ of partition, by one coparcener against another, it is said no damages shall be had. In a formedon, no damages shall be recovered; so in a nuper obiit, writ of account, writ of execution, &c. Ibid. 455, 456. Damages and costs are due in a writ of annuity; and if the jury find for the plaintiff, and do not assess damages, it will be error; though he may after verdict release the damages, and take judgment for the annuity. 11 Rep. 56: Dyer,

In battery, imprisonment, and taking of goods, against three persons; one commits the battery, another the imprisonment, the third takes the goods, all at one time, all are guilty of the whole, and to be charged in damages. 3 Lev. 324. See 10 Rep. 66. 69.

II. How Damages are to be assessed, increased, and mitigated.—In real actions damages are assessed by writ of inquiry; when the jury find the issue for the plaintiff, they are to assess the damages. And in actions upon the case, &c., where damages are uncertain, it is left to the jury to inquire of them. what it is, the damages assessed by the jury ling; and the master in B. R. taxeth the costs, 1 Lill. 390. When judgment is given by default, in action of debt, the court is to assess the damages, and not the jury; so if judgment by nil dicit, in action of debt.

Where excessive damages have been given, ther the said stat. 6 Ed. 1. c. 1: st. 3 H. 7. c. or there hath been any misdemeanor in executing a writ of inquiry, the court hath sometimes relieved the defendant by a new writ of inquiry. 2 Danv. 464. And where damages are excessive, on motion the defendant may Any person, who, in the exercise of a pub- have a new trial. Style, 465: 1 Nels. Abr. curity for the damages to be given. See the ! cases on this subject collected, Tidd's Prac. 909. (9th ed.) In trespass against two, one comes and pleads not guilty, and it is found against him; and afterwards another comes and pleads the like, and is found guilty by another inquest; in this case, the first jury shall assess all the damages for the trespass. New. Nat. Br. 256. Trespass against divers defendants, they plead not guilty severally, and the jury finds them all guilty; the jury must assess the damages jointly, for it is but one entire trespass, and made joint by the declaration. 11 Rep. 5.

If action is brought for two several causes of action, one of which is not actionable, if entire damages are given the verdict is void; contra if the damages are severed. And where damages are entirely assessed, and they ought not to be given for some part, no judgment can be given on the verdict. 10 Rep. 130. But if the damages can be apportioned by reference to the judge's notes, so that he can say what damages are given for the good cause of action, the plaintiff may abandon the rest, and the objection is cured. Tidd's Prac. 919. Where damages are awarded for delay of execution, and being kept out of the money, they are usually assessed by allowing the party what lawful interesthe might have. 1 Salk. 208.

For money lent, interest shall be given from the time the money was payable to the time of liquidating the debt, by the court's giving judgment. 2 Burr. 1081. 6. So, on a bill of exchange, it is usual to calculate the interest up to the time when judgment may be entered up. And it is now settled, as a general rule, that where a new action may be brought, and a new satisfaction obtained on that, for duties or demands arisen since the commencement of the depending suit, these shall not be included in the judgment on the former action. But where the interest is an accessory to the principal, and the plaintiff cannot bring a new action for interest grown due between the commencement of the action and judgment, it shall be included. Id. 1086, As to interest from the time of the original judgment to the affirmance in case of a writ of error, see Doug. 752. in n.: 2 Term Rep. 57. 59. 78: and the stat. 3 H. 7. c. 10. A jury may, and now frequently do, give interest on book-debts in the name of damages. See Doug. 676. It is now settled that interest is only recoverable in four cases. 1st. Where there is a contract in writing for payment of money on a day certain, as on bills and notes, &c. 2d. Where there has been an express promise to pay interest. 3d. Where, from the course of dealing between the par-4th. Where it can be proved that interest has actually been made of the money. 1 Camp. 116. 50: Id. 52; 2 Esp. Ca. 704: 5 East. 22: 4 Taunt. 298: 3 Camp. 467: Bac. Ab. vol. 2. 868. (7th ed.)

In what case the plaintiff shall have no more costs than damages, unless the jury finds more than 40s., see tit. Costs.

In action upon the case, the jury may find less damages than the plaintiff lays in his declaration, but ought not to find more, though costs may be increased beyond the sum mentioned in the declaration for damages. The plaintiff may release part of the damages upon entering up his judgment. 10 Rep. 115. If he does not, but takes judgment for damages (exclusive of costs) to a larger amount than laid in the declaration, it is error, and not within any of the statutes of amendment or jeofails. In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, viz. the sum indorsed on the writ, and the legal fees of execution. 2 Term Rep. 126.

When the damages are liquidated, and fixed by the contract at a certain sum, the jury are bound to give the whole sum so fixed, in an action for breach of the contract. As to the distinction between liquidated damages and a penalty for securing performance of a contract, see 2 Bos. & P. 346: 1 Bing. 302: 6 Bing. 141: 6 Barn. & C. 216: Tidd. 876. (9th ed.)

In actions upon any bond, &c. for non performance of covenants, the jury shall assess damages for those the plaintiff proves broken, and the plaintiff may assign as many breeches as he thinks fit. 8 and 9 W. 3. c. 11. See tits. Bonds, Covenants. In debt for a penalty in articles, the jury ought to assess damages on the breach assigned, under this statute, and shall not find the debt. 2 Wills. 377.

Damages are not to be given for that which is not contained in the plaintiff's declaration, and only for what is materially alleged. Lill. 381.

When damages double or treble are given in an action newly created by statute, if no damages were formerly recoverable, there the demandant or plaintiff shall recover those damages only, and shall not have costs, being a new creation in recompense where there was none before. As upon stat. 1 and 2 P. & M. c. 12, for driving of distresses out of the hundred, &c. whereby damages are given, the plaintiff shall recover no costs, only his damages, because this action is newly given. But in an action upon the stat. 8 H. 6. c. 9. of forcible entry, which giveth treble damages, the plaintiff shall recover his damages and his costs to the treble amount, by reason he was entitled to single damages before by the common law; and the statute, as part of the dam. ages, increases the costs to treble; and when

Double, treble damages, &c. are allowed in several cases by a very great variety of statutes; as for not setting forth tithes, distresses not found by the jury that the plaintiff hath of the county, &c. sustained some damage, in cases where treble damages, &c. are inflicted by law, no damages can be awarded. See the several acts. Where statute gives treble damages, the plaintiff is entitled to three times the full amount of the damages given by the jury. 4 B. & C. 154.

How damages given to a person sued for an act done in the execution of his office are to be assessed and recovered, see Valentine v.

Fawcet, Hard. 138, 139.

Plaintiff may take judgment de melioribus damnis where several damages are given, or enter a remittitur. Sabin v. Long, 1 Wills. par. 1 fo. 30.

The court in their discretion may increase the damages in Mayhem. Brown v. Seymour, Wills. par. 1 fo. 5: and vide 3 Salk. 115: 2

Inst. 200. See Mayhem.

In assumpsit for not delivering goods at a given day, the true measure of damages is the difference between the contract price, and the price which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered. ford v. Carroll, 2 Barn. & Cress. 624. Where a plaintiff has recovered a verdict for a sum of money, composed of several items, some of which he was not in strict law, entitled to recover under the declaration in that action, but which he would be clearly entitled to recover by declaring in a different form, the court will not reduce the damages. 3 Barn. & Cress.

See farther, as to damages in general. Com. Dig., tit. Damages; Bac. Ab. tit. Damages.

(7th ed.)

III. Compensation to be made by hundreds, &c. for damage riotously done in certain cases. The stat. 7 and 8 G. 4 c. 31. "for consolidating and amending the laws in England relative to remedies against the hundred," enacts that the inhabitants of the hundred, wa- ant, and to seize the cattle, and the owner pentake, ward, or other districts in the nature of a hundred, by whatever name it shall be! denominated, shall yield full compensation to persons damnified by the riotous demolishing, to be actually upon the land damage-fea-pulling down, or destroying, wholly or in part, sant at the time of the distress. 1 Inst. of any church or chapel, or any dissenting chapel, or any house, stable, coachhouse, outhouse, warchouse, office, shop, mill, malthouse, hop-oast, barn, or granary, or any building used in any trade or manufacture, or any machinery, steam, or other engine, or any staith, erection, or building, or any bridge, wagon-way, or tunnel, relating to any mine, may distrain them damage-feasant, though not only for the damage so done to any such enumerated subjects, but also for damage done to fixtures, furniture, and goods, in such 3: Keilw. 69. But the owner of the cattle church, house, or other buildings. § 3-7. should have proper notice and reasonable time § 10 and 11 regulates the mode of proceed- allowed for taking away his cattle. ing. By § 8 and 9, when the damage does not Beasts belonging to the plough, or beasts of exceed 30l., two justices in petty sessions may husbandry, sheep, horses joined to a cart,

wrongfully taken, rescous; though if it be order the amount to be paid by the treasurer

Counties of cities and liberties, &c. being out of the hundred, or not contributing to the county rate, liable like the hundred. § 12. 14. 15. See farther, tit. Hundred.

DAMAGE CLEER, damna clericorum.] Was a fee assessed of the tenth part in the Common Pleas, and the twentieth part in the King's Bench and Exchequer, out of all damages exceeding five marks recovered in those courts, in actions upon the case, covenant, trespass, battery, &c. wherein the damages were uncertain; which the plaintiff was obliged to pay to the prothonotary, or the chief officer of the court wherein recovered, before he could have execution for the damages: this was originally a gratuity given to the prothonotaries and their clerks, for drawing special writs and pleadings; but it is taken away by statute, and if any officer in the king's courts take any money in the name of damage cleer, or any thing in lieu thereof, he shall forfeit treble the value. Stat. 17 Car. 2 c. 6.

DAMAGE-FEASANT, or faisant.] Is when a stranger's beasts are found in another person's ground without his leave or license, and without the fault of the possessor of the close (which may happen from his not repairing his fences), and there doing damage, by feeding or otherwise, to the grass, corn, woods, In which case the tenant whom they damage may distrain and impound them, as well by night as in the day, lest the beasts escape before taken; which may not be done for rent, services, &c. only in the day-time. Stat. 51 H. 3. st. 4: 1 Inst. 142. If a man take my cattle, and put them into the land of another, the tenant of the land may take these cattle damage-feasant, though I, who am the owner, was not privy to the cattle's being there damage feasant; and he may keep them against me till satisfaction of the damages. 2 Danv. Ab. 364.

But if one comes to distrain damage-feasdrives them out before they are taken, he cannot distrain them damage-feasant, but is put to his action of trespass; for the cattle ought 61: 9 Rep. 22. He that hath but the possession of, and no title to the land, may justify taking a distress damage-feasant. Ploud. taking a distress damage-feasant. Plowd. 431. If a man puts cattle to pasture at so much a week with another, who after gives notice that he will not have them there any longer; in this case the owner of the ground the cattle be in lawfully at first: so where a lessee holds after his estate is ended. 43 Ed.

may be distrained damage feasant, though ty to plough and sow in time of pannage, or not for rent. 1 Sid. 422. 440. But the owner mast feeding. Manw. For. Laws may tender amends before the cattle are impounded, and then the detainer is unlawful; a domestic officer, like unto our steward of also, if when impounded the pound door is the household, or rather clerk of the kitchen; open, the owner may take them out. 5 Rep. but by degrees it was used for any fiduciary 76. See farther tit. Distress.

ant running after conies in a warren; so a tion made in our ancient records of dapifer man may take a ferret that another has brought regis, which is taken for steward of the king's into his warren, and taken conies with. If a household. Cowel. person bring nets and gins through my warren, I cannot taken them out of his hands. 2 is called a dar. Danv. 633. But if men are rowing upon my water, and endeavouring with nets to catch away in fee or for ever. Glanv. lib. 7. c. 1. fish in my several piscary, I may take their oars and nets, and detain them as damagefeasant, to stop their farther fishing; though dernier, viz. ultimus, the last; in which sense I cannot cut their nets. Cro. Car. 228. See tits. Distress, Trespass.

dam up or dam out, infra damnum suum, size of darrein presentment lies when a man, without the bounds or limits of his own pro- or his ancestors under whom he claims, havperty or jurisdiction. Bract. lib. 2 c. 37.

DAMISELLA. See Pimp Tenure.

man keeps a school in such a place, another turbs him that is real patron; in which case may do so likewise in the same place, though the patron shall have this writ (F. N. B. 31), he draw away the scholars from the other directed to the sheriff to summon an assize or school; and this is damnum obsque injuria, a jury to inquire who was the last patron that loss without an injury; but he must not do presented to the church now vacant, of which any thing to disturb the other school. 3 Salk. the plaintiff complains that he is deforced by

DAN. Anciently the better sort of men in this kingdom had the title of Dan; as the Spaniards Don, from the lat. Dominus.

DANEGELT, or DANE GELD, danegitdum.] Is compounded of the words dane and gelt, money or tribute, and was a tax of 1s., here. Camd. Brit. 83. 142. According to him who presented last and his heirs, unless some accounts this tax was levied for clearing the seas of Danish pirates, which heretofore evicted within six months, or the rightful pagreatly annoyed our coasts; but King Ethel- tron had recovered the advowson in a writ of red, being much distressed by the continual right, which is a title superior to all others. invasions of the Danes, to procure peace was But that statute having given a right to any compelled to charge his people with very heavy payments, called danegelt, which he ver (if his title be good), notwithstanding the paid to the Danes at several times. Hovedon last presentation, by whomsoever made, aspar. post. Annal. 344: Ingulph. 510: Selden's sizes of darrein presentment, now not being Mare Claus. 190. This danegelt was releas- in anywise conclusive, have been totally dised by Edward the Confessor, but levied again used, as indeed they began to be before; a by Will I. and II.; then it was released again quare impedit being a more general, and thereby King Henry I., and finally by King Stephen. In the reign of Hardicanute and others darrein presentment lies only where a man has it was levied by pure prerogative, without an advowson by descent from his ancestors; asking the consent of the nobility or people. The clergy were exempted from it.

when they governed the third part of this kingdom. See farther, tits. Merchenlage, Common Law.

by forest tenants, that they might have liber- was made. 1 Inst. 6. But the ancient deeds

servant, especially the chief steward or head A greyhound may be taken damage-feas- bailiff of an honour or manor. There is men-

DARDUS, i. e. a dart. In Wales an oak

DARE AD REMANENTIAM. To give This seems to be only of a remainder.

DARREIN, is a corruption from the Fr. we use it, as darrein continuance, &c.

s. Distress, Trespass.

DARREIN PRESENTMENT, last preDAM. A boundary, or confinement; as to sentation.] See tit. Advowson, III. An asing presented a clerk to a benefice, who is instituted; afterwards, upon the next avoidance, DAMNUM ABSQUE INJURIA. If one a stranger presents a clerk, and thereby disthe defendant; and, according as the assize determines that question, a writ shall issue to in whose favour the determination is made, and also to give damages in pursuance of stat. Westm. 2. (13 Ed. 2. c. 5.) This question, it is to be observed, was, before the stat. 7 Anne, and afterwards 2s., upon every hide of land c. 18. entirely conclusive, as between the pathrough the realm, laid upon our ancestors the tron or his heirs and a stranger; for till then Saxons by the Danes, when they lorded it the full possession of the advowson was in since that presentation the clerk had been person to bring a quare impedit, and to recofore a more usual, action. For the assize of but the writ of quare impedit is equally remedial, whether a man claims title by descent DANELAGE. The law of the Danes or by purchase. 2 Inst. 355. Darrein Presentment is now abolished. See tit. Quare impedit.

DATE OF A DEED, is the description of the time, viz. the day, month, year of our DANGERIA. A payment in money made Lord, year of the reign, &c. in which the deed

Vol. I.—64

had no dates, only of the month and the year; to signify that they were not made in haste, or in the space of a day, but upon longer and more mature deliberation. Blount. If in the date of a deed the year of our Lord is right, though the year of the king's reign be mistaken, it shall not hurt it. Cro. Jac. 261. A deed was dated 30th March, 1701, without anno Domini and anno Regni; and it was adjudged that both the year of the Lord and of the king were implicitly in the deed. 2 Salk. 658. A deed is good though it hath no date of the day or place, or if the date be mistaken, or though it hath an impossible date, as the 30th of February, &c. But he that doth plead such a deed without any date, or with an impossible date, must set forth the time when it was delivered. 2 Rep. 5: 1 Inst. 46. Sec 2 East, 195. 10th ed. 139. If no date of a deed be set forth, it shall be intended that it had none; and in such case it is good from the delivery, for every deed or writing hath a date in law, and that is the day in which it is delivered; and a deed is no deed till the delivery, and that is the date of it. Mod. Ca. 244: 1 Nels. Abr. 525.

An impossible date of a bond, &c., is no date at all; but the plaintiff must declare on the bond as made at a certain time; and if the express date be insensible, the real date is the delivery. 2 Salk. 463. Where there is none, or an impossible date, the plaintiff may count of any date. 1 Lill. Abr. 293. If there be a mistaken date, or a date be impossible, &c., the plaintiff may surmise a legal date in the declaration, whereupon the defendant is to answer to the deed, and not to the date. Yelv. 194. It'a deed bears date at a place out of the realm, it may be averred that the place mentioned in the deed is in some county in England, and here the place is not traversable; without this the deed cannot be tried. 1 Inst. 261. A deed may be dated at one time, and sealed and delivered at another; but every deed shall be intended to be delivered on the same day it bears date, unless the contrary is proved. 2 Inst. 674. See Styles v. Wardle, 4 Barn. & C.: Steele v. Mart, 4 Barn. & Cres. Though there can be no delivery of a deed before the day of the date, yet after there may. Yelv. 138. So that a deed may be dated back on a time past, but not at a day to come. See tit. Deed.

DATE IN CRIMINAL PROCEEDINGS. The stat. 7 G. . c. 64. § 20. enacts that no judgment upon an indictment on information for felony or misdemeanor, after verdict or outlawry, by confession, default, or otherwise, shall be stayed or reversed for omitting to state the time at which the offence was committed (where time is not of the essence of the offence), nor for stating the offence imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information, or on an signed; but generally in assises the judges impossible day, or on a day that never hap may give a special day at their pleasure, and pened. See farther, tit. Indictment.

DATIVE, or DATIF, dativus. | Signifies that which may be given or disposed of at will and pleasure. Stat. 9 R. 2. c. 4.

DAVATA TERRÆ, DAWACH. A portion of land so called in Scotland. Skene.

DAY, dies.] A certain space of time, containing twenty-four hours; and if a fact he done in the night, you must state it in law proceedings, in the night of the same day. Thus, in burglary, if the offence be done in the night before midnight, the indictment should lay it to be the night of that day, which ended at midnight; and if it happen after midnight, then the night of the day after. Lamb. Eiren. book. 4. cap. 5. p. 465. The reason of which appears to be, that the astronocal day commences at 12 o'clock at noon, but the common or civil day at 12 o'clock at night.

The English, French, Dutch, Germans, Spaniards, Portuguese, and Egyptians, begin their day at midnight; the Jews, with the modern Italians and Chinese, begin it at sunsetting; the ancient Babylonians, Persians, Syrians, and the modern Greeks, at sunrising; and the Arabians, and modern astronomers, begin it at noon. Turner's Introduc-

tion to Arts and Sciences. p. 69. The natural day consists of twenty-four hours, and contains the solar day and the night: and the artificial day begins from the rising of the sun, and ends when it sets. See 1 Inst. 135. Day, in legal understanding, is the day of appearance of the parties, or continuance of the suit where a day is given, &c. And there is a day of appearance in court by the writ and by the roll; by writ, when the sheriff returns the writ; by roll, when he hath a day by the roll, and the sheriff returns not the writ, there the defendant, to save his freehold, and prevent loss of issues, imprisonment, &c., may appear by the day he hath by the roll. Co. Lit. 135.

In real actions there are dies communes, common days; and in all summonses there must be fifteen days after the summons before the appearance; and before the statute of articuli super chartas, in all summons and attachment in plea of land, there should be contained fifteen days. Co. Lit. 134.

As to offences in B. R., if the offence be committed in another county than where the court sits, and the indictment be removed by certiorari, there must be fifteen days between every process and the return thereof; but if it be committed in the same county where the bench sits, they may sit de die in diem; but this they will very rarely do. Ibid. There is a day called dies specialis, as in an assise in the King's Bench or Common Pleas, the attachment need not be fifteen days before the appearance, otherwise it is before justices asare not bound to the common days; and these days they may give as well out of term as special memorandum of some particular day,

There is also a day of grace, dies gratiæ; and generally this is granted by the court at the prayer of the demandant or plaintiff, in whose delay it is; but it is never granted where the king is party, by aid prior of the tenant or defendant; nor where any lord of parliament, or peer of the realm, is tenant or defendant.

And sometimes the day that is quarto die post, is called dies gratiæ, for the very day of return is the day in law, and to that day the judgment hath relation, but no default shall be recorded till the fourth day be past; unless it be in a writ of right, where the law alloweth no day but the day of the return. See tit. Judgment, Term, Time.

Days in Bank are days set down by statute, or order of the court, when writs shall be returned, or when the party shall appear upon the writ served. See stat. 51 H. 3, st. 2 and 3. [or rather of uncertain time]: 32 H. 8. c. 21: 16 Car. 1. c. 6: and 24 G. 2. c. 48. And by the stat. de anno Bissextili, 21 [or 40, or 44,] H. 3. the day increasing in the leap year and the day next going before are to be accounted but one day.

It is commonly said that the day of nisi prius, and the day in bank, is all one day; but this is to be understood as to pleading, not to other purposes. 1 Inst. 135. But after issue found for the plaintiff at the nisi prius, if a day be given in bank, and the defendant makes default, judgment shall be given against him. 2 Danv. Abr. 447: and vide Ibid.

To be dismissed without day, is to be finally dismissed the court; and when the justices before whom causes were depending do not come on the day to which they were continued, whether such absence be occasioned by death or otherwise, they are said to be put without day; but may be revived, or re-continued, by re-summons, re-attachment, &c. See stat. I Ed. 6. c. 7. Also, by the common law, all proceedings upon any indictment, &c. whereon no judgment had been given, were determined by the demise of the king, and nothing remained but the indictment, original writ, &c. which were put without day, till recontinued by re-attachment to bring in the defendants to plead de novo; though this is remedied by stats. 4 and 5 W. 3. c. 18; 1 Anne, c. 8; by which such process, &c. are to continue in the same force after the king's demise as they would have done if he had lived. See tits. Discontinuance, Process, King.

declaration be either before or after the actual the vacation. Per Pemberton, C. J. This is day on which the trespass is committed, it is a habeas out of Chancery, which they may send not material, if a trespass be proved. Co. Lit. at any time, and by virtue of the king's writ 283. a. But N. B. The day laid must be the party was brought out of the prison-house, before the first day of that term in which the and that is justifiable. Then all the day, so

(if by bill,) or of some general return day (if in C. P. or B. R. by original writ), subsequent to the day whereon the trespass was committed: and so as to other actions, where the cause of action arises within the term. See tits. Declaration, Pleading.

By 7 G. 4 c. 64. § 20. no indictment or information for felony or misdemeanor after verdict shall be stayed or recovered, for stating the time imperfectly, nor for stating the offence to have been committed on an impossible day or a day that never happened. See tits. Date, Indictment.

DAY-LIGHT. See tits. Burglary, Rob-

DAY-RULE. See Day-Writ.

DAYWERE OF LAND, diurnalis diurturna.] As much arable land as could be ploughed up in one day's work; or one journey, as the farmer's still call it.

DAY-WRIT, or RULE. A rule or order of court, permitting a prisoner in custody in the King's Bench prison, &c., to go without the bounds of his prison for one day. By a rule of the Court of K. B. Easter 30 G. 3. a prisoner shall not have day-rules above three days in each term; and shall return to prison before nine in the evening.

But by a rule of that court in Michaelmas 37 G. 3., if any person state, by affidavit, any special cause, to the satisfaction of the court, for having an additional day-rule, it may be

granted accordingly.

However, by rule of Hil. 45 G. 3. it was ordered that the rules of East. 30 G. 3. and Michaelmas, 37 G. 3. should both be repealed, except as to the regulation that every prisoner, having a day-rule, should return within before nine in the evening. See Debtors.

The king may grant writ of warrantia diei to any person which shall save his default for one day, be it in plea of land or other action, and be the cause true, or not; and this by his prerogative, quod nota.

It is against law to grant liberty to debtors in execution by other writs than day-writs (or

rules). Chan. Rep. 67.

No prisoner committed by B. R. cught to have the benefit of the day-rule of going abroad in term time; for their imprisonment is their punishment for their contempt or misbeha-

viour. 2 Show. 88. pl. 80.

One in execution had a habeas corpus from the lord keeper, (which they call a day-writ) returnable three or four days after its teste. By virtue of this writ he went to the winelicence office, but never to any inn of court or In action of trespass, if the day laid in the Chancery, or to the lord keepers, and this in declaration is intituled, or if the trespass be long as there was a keeper with him, he was in committed within the term, there must be a custody still, and returning to prison at night,

thing to B. R. 2 Show. 298.

fore the sitting of the court the same day, shall be discharged, if his name was entered with the clerk the night before; but not if it was entered the same morning only. 8 Mod.

DAYERIA, dairy, from day, dieie, Sax. dag.] Was at first the daily yield of milch cows, or profit made of them. In Lorrain and Champaign they use the word dayer, for the meeting of the day-labouring people to give an account of their daily work, and receive the wages of it. A dairy in the north is called milkness, as the dairy-maid is in all parts a milk-maid; she is termed androchia by Fleta, lib. 2. c. 87. and see Paroch. Antiq.

DAYS.MAN. In the north of England, an arbitrator, or elected judge, is usually termed a dies-man, or days-man; and Dr. Hammond says, that the word day in all idi-

oms signifies judgment.

DEĀD ANIMALS. An indictment for Idiot, Lunatic. stealing should so state the fact, because, upon a general statement that a party stole committed felony, and was arraigned, and the animal, it is presumed to be alive, unless therefore was commanded to prison. Br. Cothe contrary be stated. R. & R. Cro. Cas. 497.

DEAD BODIES. It is an indictable of 6. lib. 1. c. 7. and this Dict. tit. Mute. fence to take up dead bodies, even for the purpose of dissection. Leach, 561: 2 T. R.

And so it is to bury a dead body before, or without sending for the coroner; 1 Salk, 377; and to conspire together to prevent the burial of a corpse. 2 Chitty, ch. 36-38. But there can be no property in a dead body; 2 T. R. 734; and consequently no larceny of it; 12 Co. 113; East, P. C. 632; but the shroud, coffin, &c. may be the subject of larceny, and, if stolen, may be described as the property of the executors or of persons unknown. Eagl. P. C. 652: 1 Hale, H. 515: 4 Bl. Com. 236.

It is a misdemeanor to arrest a dead body, and thereby prevent a burial in due time. 4

E. R. 465.

If goods be stolen from a dead body cast on shore (or under other circumstances where there is not even a constructive legal possession in any one except the ordinary), and the party died intestate, and no administration had been granted, the property of the goods may be laid to be in the ordinary. East, P. C. 731.

And it has also been laid down that an indictment against a party that he found a dead body, and stole from it certain property,

As to the interment of dead bodies cast on

shore, see 48 G. 3. c. 75.

DEADLY FEUD is a profession of irreconcilable hatred, till a person is revenged signs that she understood what she was about

it is well enough and no escape; though Chan- even by the death of his enemy. It is mencery may examine the contempt, that is not tioned in stat. 43 Eliz. 2. c. 13. which is now repealed by 7 and 8 G. 4. c. 27. And such A prisoner taken on an escape-warrant be- enmity and revenge were allowed by the old Saxon law; for where any man was killed, if a pecuniary satisfaction was not made to the kindred of the slain, it was lawful for them to take up arms against the murderer, and revenge themselves on him; and this is called deadly feud, which it is conjectured was the original of an appeal. Blount. See this Dict. tits. Malicious Mischief, Felony.

DEAD PLEDGE, mortuum vadium.] A pledge of lands or goods. See Mortgage.

DEAD'S PART. The remainder of the defunct's moveables, beside what is due to the wife and children. Scotch Dict. See tit.

DEAF, DUMB, and BLIND. A man who is born deaf, dumb, and blind, is looked upon by the law in the same state as an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas. 1 Comm. 304: see F. N. B. 233. See tits.

A man who could neither speak nor hear rone, pl. 216. cites 26 Ed. 3. See Thel. Dig.

One who had made his will, and became ill, and (as it seems) had lost his speech; the same will was delivered into his hands, and it was said to him, that he should deliver it to the vicar, if it should be his last will, otherwise he should retain it; and he delivered it to the vicar, and this was held a good will. Thel. Dig. 6. lib. 1. c. 7. § 8. cites 44 Ass. 36. See tit. Will.

It appearing, by oath, that the defendant was both senseless and dumb, and therefore could not instruct his counsel to draw his answer, it was ordered that no attachment, or other process of contempt, should be awarded against the defendant for not answering, without special order of the court. Cary's Rep. 132. cites 22 Eliz. Altham v. Smith.

One that is deaf, and wholly deprived of his hearing, cannot give; and so one that is dumb, and cannot speak. Yet (according to the opinion of some) they may consent by signs; but it is generally held, that he that is dumb cannot make a gift, because he can-

not consent to it. 1 Inst. 107.

If, however, a man blind his understanding, he may deliver a deed sealed by him. Jenk. 222. pl. 75.

The lord shall have the custody of a copyis good, without calling them the goods and holder that is deaf and dumb; for else he chattels of any one. 2 Hale, 181: Bac. Ab. shall be prejudiced in his rents and services, Indictment, G. 2: 1 Chitty, C. L. 212. and adjudged for the grantee of the lord against the prochein amy of the copyholder. Cro. Jac. 105.

One born deaf and dumb, who signified by

to do, was allowed to levy a fine of lands. deaneries is in the respective bishops, they be-Cart. 53. And in like manner such a person, ing neither elective by the chapter, nor donaif capable of conversing by signs, and having tive in the crown. 1 Inst. 95. a. n. 4. the proper sense of the obligation of an oath, may be admitted as witness, and examined by the assistance of an interpreter. 1 Phill.

Evid. 18: 1 Leach, 408. So such a person appearing to have the use of his understand-chapters, are known to our law; and several ing, may be tried for a criminal offence, and divisions seem necessary to distinguish them suffer judgment and execution. 1 Hale 34: 1 Leach, 102. 451.

ED, deafforestatus.] Discharged from being Chapters, who are either of cathedral or colforest, or freed and exempted from the forest legiate churches; though the members of laws. 17 Car. 1. c. 16. There is likewise churches of the latter sort may more properly dewarrenata, as well as deafforestata, which is be denominated colleges than chapters. See

and laid in common.

capitulum, the chapter. are exalted to their dignity much like bishops; firming him, and giving his mandate to instal and to enforce discipline.

installed by a shorter course, by virtue of the sor, there being canons as well as a dean, it king's letters-patent, without either election is something more than a mere chapel, and, or confirmation; and are visitable only by the except in name, resembles a collegiate church. lord chancellor, or by special commission 6. Deans of Provinces, or, as they are some-from the king; but the letters-patent are pre-times called, Deans of Bishops. Thus the sented to the bishop for institution, and a Bishop of London is dean of the Province of mandate for instalment goes forth. 1 Inst. 95: Canterbury: and to him, as such, the arch-

bishoprics are eight viz. Canterbury, Norwich, to be assembled, which may perhaps account Winchester, Durham, Ely, Rochester, Worfor calling him Dean of the Bishops; what cester, and Carlisle. The new deaneries the other parts of his office are, the books do and chapters to new bishoprics are five, Peter- not explain, nor do they mention whether

ford. 1 Inst. 95. a. n. 3.

Of the four Welsh cathedrals, two are without deans, or rather the dignities of bishop and nature of their office, is into deans of spiritual dean unite in the same person, the bishop be- promotions and deans of lay promotions. Of ing deemed quasi decanus, and having, it is the former kind are deans of peculiars, with said, both an episcopal throne and a decanal cure of souls, deans of the royal chapels, and stall allotted to him in the choir. Of this kind deans of chapters; though as to these last, a are the cathedrals of St. David's and Llandaff. contrary opinion formerly prevailed. Per-St. Asaph and Bangor, the two other Welsh haps, too, rural deans might be added to the cathedrals, have the dignity of dean distinct number. Of the latter kind are deans of pefrom that of bishop, but the patronage of both culiars, without cure of souls, who therefore

properly.

Considered in respect of the difference of DEAFFORESTED, or DISAFFOREST. office, deans are of six kinds. 1. Deans of when a warren is diswarrened or broke up tit. Chapters. 2. Deans of Peculiars, who d laid in common.

DEAN, decanus, from the greek Δε΄κα, souls, as the Dean of Battel, in Sussex; and decem.] An ecclesiastical governor or digni- sometimes jurisdiction only, as the Dean of tary, so called, as he presides over ten canons the Arches in London (see tit. Arches Court), or prebendaries at the least. And we call him and the Deans of Bocking, in Essex, and of a dean, that is, next under the bishop, and Croydon, in Surrey. 3. Rural Deans, who chief of the chapter, ordinarily in a cathedral had first jurisdiction over deaneries, as every church, the rest of the society being called diocese is divided into archdeaconries and As there are two deaneries; but afterwards their power was foundations of cathedral churches in England, diminished, and they were only the bishops' the old and the new (the new erected by King substitutes to grant letters of administration, Henry VIII.) so there are two means of cre-ating these deans; for those of the old foun-wholly extinguished, for the archdeacons and dation, as the Dean of St. Paul's, York, &c. chancellors of bishops execute the authority which rural deans had through all the dioceses the king first sending out his congé d'elire to of England. 1 Nels. Abr. 596, 597. And see the chapter to choose such dean, and the 1 Comm. 383. 4. Deans in the Colleges of chapter then choosing, the king afterwards our Universities, who are officers appointed to yielding his royal assent, and the bishop consuperintend the behaviour of the members, 5. Honorary Deans, as the dean of the Chapel Royal of St. Those of the new foundation, whose deane- James's, who is styled on account of the digries were translated from priories and con- nity of the person over whose chapel he prevents to deans and chapters, are donative, and sides. As to the chapel of St. George, Windbishop sends his mandate for summoning the The new deaneries and chapters to old bishops of his province when a convocation is borough, Chester, Gloucester, Bristol, and Ox- there is a dean for the province of York. See Lyndw. Gibs. 1 Inst. 95. (a.) in n.

Another division of deans, arising from the

holy orders.

In respect of the manner of appointment, deans are, 1. Elective, as deans of chapters of the old foundation; though they are only so (like bishops) nominally, and in form, the king being, in fact, the real patron. 2. Donative, as those deans of chapters of the new foundation who are appointed by the king's letters patent, and are installed under his command to the chapter, without resorting to the bishop either for admission or for a mandate of instalment; if that mode of promoting still prevails in respect to any of the new deaneries. Deans of the royal chapels are also donative, the king appointing to them in the same way. So, too, may deans of peculiars, without cure of souls, be called; as the Dean of Arches, who is appointed by commission from the Archbishop of Canterbury; but this must be understood in a large sense of the word donative, it being most usually restrained to spiritual promotions. 3. Presentative, as some deans of peculiars with cure of souls, and the deans of some chapters of the new foundation, if not all. Thus the Dean of Battel is presented by the patron to the Bishop of Chichester, and from him receives institution. This deanery was founded by William the Conqueror. He hath ecclesiastical jurisdiction within the liberty of Battel, and is presentable by the Duke of Montague; and, though instituted and inducted by the Bishop of Chicester, is not subject to his visitation. 1 Nels. Abr. Thus, too, the Dean of Gloucester is presented by the king to the bishop, with a mandate to admit him, and to give orders for his instalment. 4. By virtue of another office; as the Bishop of London is dean of the province of Canterbury, and the Bishop of St. David's is dean of his own chapter.

As to farther particulars relative to the manner of coming to the possession of deaneries, see a long and learned historical account in 1 Inst. 95. (a.) n. 4. from which it appears that the right to appoint deans of cathedral and collegiate churches, and the mode of appointing them, must generally depend almost wholly upon charters, usage, or acts of parliament; and if a case should, by bare possibility, arise, where neither of those rules could be had recourse to, foundership seems the only true criterion of patronage.

In respect of the manner of holding, deans are either absolute or in commendam; but this applies only to spiritual deaneries. It is said there are also deputy deans. A commendatory dean may, with the chapter, choose a bishop; and if a dean be elected bishop, and before consecration doth obtain dispensation to hold his deanery in commendam, such dean may well confirm, &c., for his old title remains, and therefore confirmations, and other acts done by him as dean, are good in law. Latch. 237. 250: Palm. Rep. 460.

may be, and frequently are, persons not in | cil, to assist him in the affairs of religion, &c., to consult in deciding difficult controversies. and consent to every grant which the bishop shall make to bind his successors, &c.

A dean that is solely seized of a distinct possession, hath an absolute fee in him as well as a bishop. 1 Inst. 125. A deanery is a spiritual promotion, and not a temporal one, though the dean be appointed by the king; and the dean and chapter may be in part secular, and in part regular. Dyer, 10: Palm. 500. As a deanery is a spiritual dignity, a man cannot be dean and prebendary in the same church. Dyer, 273.

DEATH OF PERSONS. There is a natural death of a man, and a civil death: na.

tural where nature itself expires, and extinguishes; and civil is where a man is not actually dead, but is adjudged so by law; as where he enters into religion, &c. By stat. 19 Car. 2. c. 6. if any person for whose life any estate hath been granted, remain beyond sea, or is otherwise absent seven years, and no proof made of his being living, such person shall be accounted naturally dead; though if the party be after proved living at the time of the eviction of any person, then the tenant, &c., may re-enter, and recover the profits. And by stat. 6 Anne, c. 18. persons in reversion or remainder, after the death of another, upon affidavit that they have cause to believe such other dead, may move the lord chancelfor to order the person to be produced; and if he be not produced, he shall be taken as dead; and those claiming may enter, &c. In general, where the issue, is as to the life or death of a person, the person alleging his death is to prove it; but if a person has not been heard of for seven years, the presumption of life ceases, and he must then be shown to be alive. 4 Barn. & Ald. 433: and see 6 East, 85. See farther tits. Occupancy, Life Estate, Rever-

A man seized in fee of lands, made a lease in reversion to L. D. for ninety-nine years, to commence after the deaths of J. D. and E. D., who had then a lease in possession for the like term, if they or either of them so long lived: the plaintiff positively proved the death of J. D., but as to the death of E. D. the proof was that he had been reputed dead, and nobody had heard of him for fifteen years past; and the defendant not being able to prove that he was alive at any time within seven years, this case was adjudged within the stat. 19 Car. 2. c. 6. Carthew, 246.

In law proceedings, the death of either party, between the verdict and judgment, shall not be error; so as judgment be entered in two terms. 19 and 17 Car. 2. c. 8. See tits. Amendment, Error.

A corporation never dies. 1 Wils. 184.

The death of a prosecutor will not defeat criminal proceedings, even in the case of a atch. 237. 250: Palm. Rep. 460.

A dean and chapter are the bishop's counture. 1 Wils. 222: 1 Chitt. R. 2. And if a defendant, after removing an indictment for a misdemeanor into K. B. by certiorari, is con- or sick, or going beyond sea, whereby the victed there, but before judgment is pronounced die, the bail will not be discharged from their recognisance until the costs of the prosecution are paid. 6 Term Rep. 409: 1 Chitt. R. 667. And see 5 W. & M. c. 11.

Where the plaintiff dies after a verdict and before the day in bank, though the entry of the judgment be right, yet a scire facias must be sucd out before execution issue. 1 Wils.

302. See tits. Judgment, Execution.

Where, on the death of parties to a suit, the writ, &c., shall abate. See tit. Abatement.
DEATH, SENTENCE OF. The stat. 4

G. 4. c. 48, enables the court before whom any person shall be convicted of any felony, except murder, upon whom a sentence of death may be pronounced, to abstain from pronouncing such sentence, and to cause judgment of death to be recorded.

DEBATING SOCIETIES. By stat. 60 G. 3 c. 6. § 26. &c., all places for giving public lectures or debates for the purpose of raising money, or where money, &c., shall be taken for admission, are declared disorderly, unless licensed by two justices at sessions. Penalty on persons opening such places 100l., and on persons acting as chairmen, &c., or receiving money for admission, 201. Magistrates may demand admission into such places. Penalty on persons refusing such admission, 201. Such places may be yearly licensed by justices at sessions on payment of ls.; and such license may be revoked in the discretion of the justices. Justices may visit such li-censed places at the time of lecture. Lectures in the Universities, Inns of Court, Gresham College, the East India College, &c., and all incorporated societies, and school-masters, are excepted. License may be voided by two justices of the peace, if the place is commonly used for lectures of a seditious, irreligious, or immoral tendency. Prosecutions under the act are limited to six months after the offence; as are also actions against magistrates for any thing done in execution of the act. This statute has recently expired. See farther tits. Holidays, Advertisements.

DE BENE ESSE. To take or to do any thing de bene esse, is to accept or allow it as well done for the present; but when it comes to be more fully examined or tried, to stand or fall according to the merit of the thing in its own nature. As in Chancery, upon motion the person or his real or personal estate, in to have one of the less principal defendants in execution, i. e. the moiety of his real estate, or a cause examined as a witness, the court (not the whole of the personal, if not more than then thoroughly examining the justice of it, sufficient for repayment of the sum recovered or not hearing what may be objected on the and charges. other side) will often order such a defendant. In the legs

Where a complainant's witnesses are aged plaintiff thinks he is in danger of loosing their testimony, the court will order them to be examined de bene esse; so as to be valid, if the plaintiff hath not an opportunity of examining them afterwards; as if they die before answer. or do not return, &c. In either of which cases the depositions may be made use of in the Court of Chancery or at law: but if parties are alive and well, or do return, &c. after answer, these depositions are not to be of force, for the witnesses must be re-examined.

So also at common law, the judges frequently take bail de bene esse, that is, to be allowed or disallowed upon the exception or approbation of the plaintiff's attorney; however, in the interim, they are good, or have a conditional allowance. Cowel. Declarations likewise are sometimes delivered de bene esse. By rule of Trinity Term, 1831, no declaration de bene esse shall be delivered until the expiration of six days from the service of process, where not bailable, or until six days from the arrest, where bailable. See tits. Declaration, Practice, Process, &c.; and see Tidd's Prac. (9th ed.)

DEBENTURE. An instrument in the nature of a bond or bill, to charge government, There are custom-house debentures, &c. the forging of which is single felony by 41 G. 3. (U. K.) c. 75. § 7. And by stat. 7 and 8 G. 4. c. 29. § 5. the stealing any debenture or other security for money, is made felony, and punishable in like manner as the larceny of

any other chattel.

DEBET ET DETINET. See tit. Debt, II. DEBET ET SOLET. If a person sues to recover any right, whereof his ancestor was disseised by the tenant of his ancestor, then he useth the word debet alone in this writ, because his ancester only was disseised, and the estate discontinued: but if he sue for any thing that is now first of all denied him, then he useth debet et solet, by reason his ancestor before him, and he himself, usually enjoyed the thing sued for, until the present refusal of the tenant. Reg. Orig. 140. The writ of secta ad molendinum is a writ of right, in the debet et solet, &c. F. N. B. 98.

Debitum.] In common parlance is a sum of money due from one person to another. And if an action be brought, and the plaintiff recovers judgment, he may by law take either

In the legal sense of the word debt is said to be examined de bene esse, viz. that his de- to be an action which lieth where a man positions shall be taken, and allowed or sup-oweth another a certain sum of money, either pressed at the hearing of the cause, upon the by a debt of record, by specialty, or by simple full debate of the matter, as the court shall contract; as on a judgment, obligation, or barthink fit; but in the interim they have a well- gain for a thing sold, or by contract, &c., and being, or conditional allowance. 3 Cro. 68. the debtor will not pay the debt at the day 508 DEBT.

agreed; then the creditor shall have action of the declaration, see at large Doug. 6. 732. deht against him for the same. See 2 Comm. 464. If a man contract to pay money for a thing which he hath bought; and the seller takes bond for the money, the contract is discharged, so that he shall not have action of it accordingly, the obligee may bring action debt upon the contract, but on the bond. Nat. of debt for it. F. N. B. 120. A man ac-Br. 268.

I. In what cases action of debt will lie; and how and by whom, and against whom it may be brought.

II. Where it shall be brought in the debet and detinet, and where in the detinet

III. How it may be extinguished.

how and by whom, and against whom, it may the first day action of debt lies for 10l., being be brought .- The legal acceptation of debt, is a several duty. 2 Dann. Abr. 501. The naa sum of money due by certain and express ture of the bond, and of the condition (if there agreement: as, by a bond for a determinate is any), must be carefully attended to, to see sum; a bill, or note; a special bargain; or if by non-payment of the first su rent reserved on a lease; where the quantity is forfeited. Vide Co. Lit. 292. b. is fixed and specific, and does not depend upon I any subsequent valuation to settle it. The and so doth action on the case. 1 Lil. 403: non-payment of these is an injury, for which and vide 9 Rep. 87. If goods or money are the proper remedy is by action of debt, (F. N.) B. 11 1.) to compel the performance of the contract, and recover the specific sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a determinate contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action of assumpsit. Actions of debt were formerly seldom brought but upon special contracts under seal; wherein the sum due was clearly and precisely expressed; for in case of such an action upon a simple contract, the plaintiff laboured under two difficulties; first, the defendant had there the same advantage as in an action of detinue, that of waging his law, or purging himself of the debt by oath, if he thought proper. 4 Rep. 94. Secondly, the plaintiff must prove the whole debt he claimed, or recover nothing at all. But now wager of law is out of use, and discouraged by the courts. Sec 2 B. & C. 538. And it is also now settled that the plaint if may, in an action, he were immediate heir, &c. The heir may of debt, recover less than the sum he declares for, and accordingly the action is now not un-

When the damages can be reduced by the averment to a certainty, debt will lie; as on a covenant to pay so much per load for wood, &c. So if in an action in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring debt for those damages. Bull N. P. (5vo.) 167. And executors of a man seised of a rent-service, as to cases in which, on action of debt, it is rent-charge, &c., in fee simple, or fee-tail, not necessary to prove the exact sum laid in had no remedy for the arrearages incurred in

in n.

If one binds himself in a single obligation. or with condition to pay money at a day; or to deliver corn, or the like, and do not perform knowledges by deed that he hath so much of the money of J. S. due to him in his hands; here debt may be brought: and debt will lie on a tally scaled. F. N. B. 122: 1 H. 6. 55. A. delivers 20l. to B. to buy goods, and B. gives a receipt to A. testifying the delivery and receipt of the 201., but doth not promise to deliver the goods, &c.; A. may maintain debt upon this receipt. Dyer, 20: 2 Bulst. 256. If one binds himself to pay A. I. In what cases action of debt will lie; and B. 10l. at one day, and 10l. at another, after if by non-payment of the first sum the bond

> Action of debt lies upon a parol contract, delivered to a third person for my use, I may have action of debt, or account for them. 2 Dane, 404. Where money is delivered to a person, to be re-delivered again, the property is altered, and debt lies: but where a horse, or any goods, are thus delivered, there detinue lies, because the property is not altered, and the thing is known, whereas money is Owen, 86: 1 Nels. Abr. 603: and sec 4 Barn & A. 269.

> Action of debt lies against the husband, for goods which were delivered or sold to the wife, if they come to the use of the husband. 1 Lil. 400. If one delivers meat, drink, or clothes, to an infant, and he promises to pay for them, action of debt, or on the case, will lie against the infant. Though debt may not be brought on an account stated with an infant: and what is delivered must be averred to be for the necessary use of the infant. 1 Lil. Abr. 401. See tit. Infant. An attorney shall have action of debt against his client for money which he hath paid to any person for the client, for costs of suit, or unto his counsel, &c.

> An heir mediate may be sued in debt as if not bring action of debt for a debt due to his ancestor, though it be by speciality, by which the party is bound to pay it to him and his heirs: the executor shall nevertheless have the action. Dyer, 368: F. N. B. 120. Action of debt lies not against executors, upon a simple contract made with the testator. 9 Rep. 57: and see 5 Taunton, 665.

> Before the stat. 32 H. S. c. 37, the heirs of

the life-time of the owner of such rents: but 366. Debt lieth against a sheriff, for money by that statute, the executors and administra- levied in execution. 1 Lil. Abr. 403. Action tors of tenants in fee-simple, fee-tail, or for of debt lies against a gaoler for permitting a life, of any rent, shall have action of debt for prisoner committed in execution, to escape, all arrearages of rent due in the life-time of because thereupon the law makes the gaoler the testator. 1 Inst. 162: 2 Danv. 492.

which is behind and unpaid, takes husband, mages suffered by the escape. 1 Saund. 218: and the rent is behind again, and then the 1 Lil. Abr. 402. wife dieth, by the said stat. 32 H. 8. c. 37. the A person may have debt upon an arbitrahusband shall have the arrears due before ment: also debt lies for money recovered marriage, and he hath a double remedy for upon a judgment, &c. And upon a recovery the same. 1 Inst. 162.

But by stat. 8 Anne, c. 14. any person having rent in arrear upon any lease for live or lives, may bring action of debt for such rent, cute judgment, must be where the original as where rent is due on a lease for years. Action of debt will lie against a lessee, for rent due after the assignment of the lease; and a writ of error brought in the Exchequer for the personal privity of contract remains, notwithstanding the privity of estate is gone. 3 Rep. 22. But after the death of the lessee, it is then a real contract, and runs with the land. Cro. Eliz. 555. When a lease is ended, the duty in respect of the rent remains, and debt lieth by reason of the privity of contract between lessor and lessee. 2 Cro. 227: 1 Nels. Abr. 604. If debt be brought by an executor for arrears of rent ended, it is local still, and must be laid where the land lies. Hob. 37. Action of debt may be had against the lessee in any place; but if it be brought against an assignee, it must be where the land lieth; and upon the privity of contract, it is to be brought against the lessee where the land is. Latch. 197. 271: 2 Leon. c. 28.

Debt does not lie at the common law, nor by stat. 8 Anne, c. 14. for the arrear of an annuity or yearly rent, payable to A. during the life of B. out of lands devised to B. for life, for it is a freehold rent. Webb v. Jiggs & Ux.; 4 Maule & S. 113: and see Kelly v. Clubbe, 3 Brod. & B. 130:, 4 Moo. 355.

Debt lies for use and occupation generally, without stating the place where the premises lie, or any of the particulars of the demise. King v. Fraser, 6 East's Rep. 348. See also Wilkins v. Wingate, 6 Term Rep. 62: and Stroud v. Rogers, cited ibid.

Debt for rent on a lease against assignee is local. Barker v. Dormer, 1 Show, 191.

In an action of debt for rent, without showing in what parish the lands were situate, and quence of the stat. 25 Ed. 3. c. 17.), but not in a particular of the plaintiff's demand, de-scribing them in a wrong parish, yet the Court of K. B. held that the plaintiff might recover, it not appearing that any misrepresentation was intended, or that defend- ing generally vexatious and oppressive, by ant had held more than one parcel of land of harassing the defendant with the costs of two plaintiff so as to be misled by such inaccuracy. Davies v. Edwards, Maule & S. 380.

though there be no contract betwixt the party that brings the action and him against whom declared on as a matter of record, for it is here brought; for there may be a duty created by but of the nature of a simple contract debt; law for which action will lie. 2 Saund. 343. therefore in such case the judgment is suffi-

debtor; but where the party is not in execu-A feme sole seised of a rent in fee, &c., tion, there action on the case only lies for da-

> in the superior courts at Westminster, the plaintiff must bring the action in Middlesex, the record being there; but a sci. fa. to exewas, and follow it. Nat. Br. 267, 268, &c.

> When judgment is bad in the King's Bench. chamber, or in parliament, yet an action of debt will lie on the judgment: in this case, if the plaintiff levies part of his money, by elegit, he may likewise bring debt for the residue. 1 Sid. 184. 236.

> Whatever the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. And this implied agreement it is that gives the plaintiff a right to institute a second action founded merely on the general contract, in order to recover such damages, or sum of money, as are assessed by the jury, and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment; 1 Rol. Abr. 600, 1; and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay. This method seems to have been invented when real actions were more in use than at present, and damages were permitted to be recovered thereon, in order to have the benefit of a writ of capias, to take the defendant's body in execution for those damages: which process was allowable in an action of debt (in consean action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as beactions instead of one. 3 Comm. 160.

wies v. Edwards, Maule & S. 360.

In some cases action of debt will lie, alcourt, and the plaintiff need not show the ground of the judgment; but it is not to be DEBT.

cient only to establish a demand, and put the defendant to impeach the justice of it, or show the same to have been unduly or irregularly against that act, received a mortal wound by obtained. And as it is but a simple contract, a shot fired by a person on the shore within assumpsit will also lie on it. Walker v. Witthe lath: though the officer afterwards died ter, Doug, 1-6; in which several other cases on the high sea beyond the low water mark.

made for payment of the balance due on a partnership account. Henley v. Soper, 8 Barn. & C. 16. Debt lies for interest on a general count, without stating any special contract.

5 Dow. Rep. 133.

If a man recovers debt or damages in London, on action brought there by the custom of the city, which lies not at common law; when it is become a debt by the judgment, action of debt lies in the courts at Westminster upon

this judgment. 2 Danv. 449.

Action of debt will lie for breach of a by-law; or for amercement in a court-leet, &c. 1 Lil. 400: 5 Rep. 64: Hob. 259. And action of debt is sometimes grounded on an act of parliament; as upon stat. 2 Ed. 6. c. 13. for not setting out tithes. Against physicians in London, for practising without a license, by stat. 14 and 15 H. 8. c. 5.—A college shall have action of debt for commons of any student; adjudged, Pasch. 9 Jac. B. R .- And in general all the cases show that wherever indebitatus assumpsit is maintainable, debt also is. Doug. 6. per Buller, J.

But debt will not lie by surveyor of highways, for composition money assessed in lieu of statute duty, being a claim given by a statute which prescribes a particular remedy by

distress and sale. 1 M. & Y. 450.

For debt to a bishop or parson after his death, his executors shall have the action; but of a dean and chapter, mayor and commonalty, &c., the successors are entitled to the action of debt. F. N. B. 120. Action of debt lies on a recognisance; so upon a statute merchant, it being in nature of a bond or obligation: but it is otherwise in case of statute

staple. 2 Danv. 497.

In bringing this action, it is a general rule, that the party himself, to whom the debt is originally due, whilst he doth live, must bring the action; and after his death, his executors. &c. And the action must be brought against the party himself that doth originally owe the debt, whilst he is living; and after his death it may be brought against the executor, if he make any; or otherwise against the administrator; and if the ordinary appoint none, against the ordinary himself; and if he die possessed of the goods, against his executor, &c. And also against executors of executors in infinitum. Dyer, 24. 471: 3 Rep. 9: 2 Brownl. 207.

Action of debt for 100l. was held to lie on the stat. 19 G. 2, c. 34. § 6. (which is now repealed by 6 G. 4. c. 105. § 93.) against the in-certainly demanded, and no other; and the habitants of a lath in Kent, by the executors demand cannot be of a lesser sum, but it must of a revenue officer, who being in a boat be- be shown how the remainder was satisfied;

on the same point are also cited and reported.

Debt lies on the decree of a colonial court

Executors v. St. Augustine's Lath, Kent, 12 East's Rep. 244.

Action of debt lies by the drawer against the acceptor of a bill of exchange, payable to the drawer or his order, for value received in

goods. 1 B. & C. 674.

Debt does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration that grantor had a freehold in the premises, out of which the annuity was payable: as it must be inferred that he had such an interest where nothing appears to the contrary. 3 B. & B. 130: S. C. 6 Moore, 355.

Debt will not lie for an annuity granted by the defendant to the plaintiff in consideration of faithful services for life. 2 Wils. 221.

II. Where it shall be brought in the debet and definet, and where in the definet only.-The form of the writ of debt is sometimes in the debet and detinet, and sometimes in the detinet only; that is, the writ states, either that the defendant owes, and unjustly detains the debt or thing in question, or only that he unjustly detains it. It is brought in the debt, as well as detinet, where sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obligor, the landlord against the tenant, &c. But, if it be brought by, or against, an executor for a debt due to or from the testator, this, not being his own debt, shall be sued for in the detinet only. F. N. B. 119. So also if the action be for goods, for corn, or an horse, the writ shall be in the detinet only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my debt. And indeed a writ of debt in the detinet only, for goods and chattels, is neither more nor less than a mere writ of detinue; and is followed by the very same judgment. Rast. Entr. 174: 3 Comm. 156.

In debt, if it be demanded by original, the process is summons, attachment, and distress; and upon a default of sufficiency, on a nihil returned, process to the outlawry, &c. And the judgment in debt, where the demand is in the debet and detinet, is to recover the debt, damages, and costs, of suit; and the defendant in misericordia. 1 Shep. Abr. 523. Where the plaintiff in debt declares on some specialty, or contract for a sum of money, it must be but in an action upon a statute, that gives a. In an action against an executor for rent, certain sum for the penalty, though less be incurred in the life of the testator, the writ recovered than the plaintiff lays, it will be shall be in the detinet only. 11 H. 6.36: 1 good. Cro. Jac. 498. If action for debt is Rol. Abr. 603. brought on a specialty, bill, bond, lease, &c., the several writings must be well considered cutor for the arrearages of a rent, reserved by which the plaintiff warrants his action, upon a lease for years, and incurred after the and the sum due is to be rightly set forth; death of the testator, the writ shall be in the and if it be debt for rent, the time of com- debet and detinet, because the executor is mencement, and ending, &c. In debt on sin- charged of his own possession. 1 Rol. Abr. gle bill or upon judgment, the defendant may 603: Cro. Eliz. 711: Moor, 566: 1 Brownt. plead payment (before the action brought) in 56: Cro. Jac. 411. And the declaration is bar; and pending an action on bond, &c., the against him as assignee, not as executor. defendant may bring in principal, interest, and costs; and the court shall give judgment to discharge the desendant. Stat. 4 and 5 Anne, c. 16. See tit. Bond.

If the action be brought for money, it must be in the debet and detinet; but if goods or chattels, it must be in the detinet only. 50 Ed. 3. 16: 1 Rol. Abr. If an executor brings debt for any thing in right of his testator, it | 5 Co. 36: 3 Leon. 206. S. C. must be in the detinet only. Moor, 566: 1

Rol. Abr. 602, 603.

If an executor brings an action upon an obligation made to the testator, where the day of payment accrued after the death of the testator, yet the writ shall be in the definet only, for he brings the action as executor. Lane, 80: S. P. 20 H. 6. 5: 1 Rol. Abr. 602 S. C.

So if a man binds himself to the testator to pay him 100l, when such a thing shall happen; if it happens after the death of the testator, yet the writ of the executor shall be in the definet only. 20 H. 6. 6: 1 Rol. Abr. 602.

It' in an account an executor recovers a debt due to his testator, in action for the arrearages thereupon, the writ shall be in the definet only; for though the action is converted into a debt by the account, yet it is the same thing which was received in the life of the testator. Cro. Eliz. 326: Cro. Jac. 545: 5 Co. 31.

If the executor sells the goods of the testator for a certain sum, he shall have action for this in the debet and definet. 1 Rol. Abr. 602.

If an executor having lands by an extent upon a statute made to the testator, and naming himself executor, by deed leases them for three years, rendering rent, & c.; if an action is afterwards brought by him for his rent, it must be in the debet and detinet, because it is 2 Inst. 651: Hard. 332. founded upon his own contract. Lane, 80: Cro. Jac. 6-5: Brown, 205: 1 Mod. 1-5.

So an executor, being lessee for years of a rectory in the right of a testator, may have action upon 2 Ed. 6 c. 13. for not setting out tithes in the debet and definet, because founded upon a wrong in his own time, and by the statute it is given to the party grieved. ('ro.

Also action against an executor shall be in the detinet only, for he is chargeable no farther than he has assets. 11 H. 4. 16: 1 Rol. Abr. 603.

But if an action be brought against an exe-

If an action is brought against baron and feme, upon an obligation entered into by the ieme before marriage, it shall be in the debet and detinet; for by the marriage all the personal goods and power of disposing of the real estate are by law given the husband, which he has to his own use, and not as executors, who have them only to the use of another.

So if an action is brought upon a bond against the heir of the obliger, it shall be in the debet and definet, because he hath the assets in his own right. 5 Co. 36.

Debt lies by the assignees of a replevinbond against one of the surcties in the definet Wilson v. Hobday, 4 Maule & S. 120.

III. How it may be extinguished.—If a man accepts an obligation for a deat due by simple contract, this extinguishes the contract, but the acceptance of an obligation, for a debt due by another obligation, is no bar of the first obligation. 13 H. 4. c. 1: 1 Rol. Abr. 604.i. c. if between the same parties. See tit. Bond, V., Acceptance, Payment.

In debt upon an obligation, the defendant cannot plead nil debet, but must deny the deed by pleading non est factum; for the seal of the party continuing, it must be dissolved co ligamine quo ligatum est. Hard. 332.

But if the debt be due by simple contract, then he may plead nil debet, for it does not appear that there is any debt continued. Hob. 218.

In debt for rent, if it be by deed, the proper plea is non est factum; but if it be without deed, the defendant may plead non demisit, nothing in arrear, or that he never entered.

In debt for the arrears of an annuity granted for life nil debet is no good plea, for the action is merely tounded upon the deed, for without it no action can be maintained; and though by the death of the grantee the nature of the action is changed, the annuity being determined; yet this proves not but that the action is founded upon the deed.

But in debt for the arrears of a rent-charge, by will devised to the plaintiff's wife for life; against the administrator or the occupier of the land, nil detinet is a good plea, for the will

is no deed, nor wants any delivery; adjudged, . G. 3. c. 35. regulating the sale of extended and said the action was not so much grounded upon the will itself as upon the statute, by which men are enabled by will to dispose of their lands and rents issuing out thereof. Hard. 332.

In debt upon stat. 2 and 3 Ed. 6 c. 13, for not setting forth titnes, not guilty, or not debet are good issues; 2 Inst. 651: Cro. E cz. 621. S. P.; because by the action the defendant is charged with a tort, and if he is not guilty of the tort, he does not owe the debt.

In an action of debt the defendant cannot give the statute of limitations in evidence on nil debet, but must plead it specially. Bac. repeatedly interfered for the relief of honest. Ab. Limitation of Action. (F.) (7th ed.)

A plea of nul tiel record to an action of debt on an Irish judgment must conclude to the county, for the record of the judgment is only provable by an examined copy on oath, the veracity of which must be tried by a jury. 5 East, 475. And such a judgment is not a record, and assumpsit lies on it. 4 Barn. & C. 411. See farther Com. Dig. tit. Debt: Bac. Ab. tit. Debt: and this Dict. tits. Action, Assumpsit Information, &c. And as to setting off mutual debts, see tit. Set Off.

The general issue in debt is now abolished.

See Nil Debet.

law is abolished.

And by § 14. an action of debt or simple contract shall be maintainable in any court against executors or administrators.

For the time within which actions of debt

Limitation of Actions.

The king's debt is to DEBT TO THE KING. be satisfied before that of a subject, and until ! his debt be paid, he may protect the debtor from the arrest of others. By the common law, the king for his debt had execution of the body, lands, and goods, of the dehter. By Magna Charta, 9 H. 3 c. 8. the king's debt shall not be levied on lands, where the goods and chattels of the debtor is sufficient to levy the debt. 1 Also pledges shall not be distrained, when the the acts 7 G. 4. c. 57: 1 W. 4. c. 38. which principal is sufficient. Shern's having received the king's debt, upon their next account | 44: and this Diet, tit. Insulvents. are to discharge the debtors, on pain to forfeit treble value; and the sheriffs are to give tallies to the king's debtors on payment. Stat. 3 Ed. 1 c. 19. By stat. 33 H. 3. c. 39. all obligations made to the king shall have the same force as a statute-staple. 1 Inst. 130. But by stat. 25 Ed. 3. st. 5. c. 19. notwithstanding the king's protection, creditors may; proceed to judgment against their dehtors, with a cesset executio tell the king's debts be paid. Lands, &c. of the king's debtor and that lies for one that receives injury or damage accountant, may be sold as well after his from him that doth any thing deceitfully in death, as in his live-time : but if the accountant or debtor to the king had a quietus during

estates, on motion to the Court Exchequer, by the attorney-general. See farther, tits. Extent. Execution, King, Prerogative, and Com. Dig. tit. Debt, ad fin.

DEBTEE-EXECUTOR. Sectit. Executor. DEBTORS. A work of the nature of this dictionary is by no means adapted to political disquisitions on the propriety of imprisonment for debt-nor to historical details of the proceedings of foreign nations on the subject. The legislature, who are the proper, and indeed the only legal judges, of what regulations on the subject are necessary, have unfortunate debtors (too generally a small part of the number confined) by insolvent acts; and the liberty of the subject in this particular, has in the present reign been much favoured by the laws relative to Arrest. See

tits. Arrest, Prisoners, Executions, Insolvent. By stat. 25 G. 3. c. 45. for the courts of conscience in London, Middlesex, and Southwark, the provisions of which are extended by stat. 26 G. 3 c. 38. nearly totidem verbis, to ALL courts for the recovery of small debts;no debtor committed to gaol by such court for a debt not exceeding 20s, shall be kept in custody on any pretence whatsoever, more than By the 3 and 4 W. 4, c. 42, § 13, wager of twenty days—nor for a debt between that and 40s. more than forty days—then to be discharged without payment of fees, on forteiture by the gaoler of 51.—In case only of fraudulent concealment of money or goods by the debtor, the time of confinement may be enmust now be brought upon specialities, see | larged, in the first instance to thirty days, and in the latter to sixty.

By a temporary act, 41 G. 3. (U. K.) c. 64. 5 1. creditors were allowed to discharge debtors without losing the benefit of the judgment upon which the execution issued, except that the debtor should not be again liable to be arrested for the same debt, nor the bill be proceeded against.

As to the general relief of the persons of insolvent debtors surrendering their effects, see are continued till 1835, by 2 and 3 W. 4. c.

DEBTS, PRIORITY OF. See tits. Assets, Executor, Mortgage.

DECEIT, deceptio.] A subtle trick or devise, whereunto may be referred all manner of craft and collusion, used to deceive and defraud another, by any means whatsoever, which hath no other or more proper name than deceit to extinguish the offence. West. Symb. § 68.

There is a writ called the WRIT OF DECEIT the name of another person; by which he is deceived or injured; which writ is either orihis life, his heir shall be discharged of the ginal or judicial. Reg. Orig. 112: Old Nat. debt. Stat. 27 Eliz. c. 3. See also stat 25. Br. 50. But an action on the case is now the usual remedy for injuries arising from deceit | forth the writ of capias, &c. And if a person of another. See Bac. Ab. (7th ed.) tit. Action on the Case.

Deceit is an offence at common law, and by statute: and all practices of defrauding or endeavouring to defraud another of his right, are punishable by fine and imprisonment; and if for cheating in some cases by transportation. See tit. Cheats, Fraud, False Pretences, Indictment, IV. Serjeants, counsellors, attorneys, and others, doing any manner of deceit, are to be imprisoned a year and a day; also pleaders by deceit shall be expelled the court. Stat. 3 Ed. 1. c. 29.

If a fine be levied by deceit, or if one recover land by deceit, the fine and the recovery shall be void. 3 Rep. 77. And if a man be attorney for another in a real action against the demandant, and afterwards by covin between such attorney and demandant, the attorney makes default, by which the land is lost, the tenant who has lost the land shall have a writ of deceit against the attorney. F. N. B. 96. So writ of deceit lies to set aside a fine and recovery in C. B. of lands in ancient

demesne. 2 Wils. 17.

In a præcipe quod reddat, if the sheriff return the tenant summoned, where he was not summoned, by which the defendant loseth his land by default at the grand cape returned; the tenant shall have a writ of deceit against him who recovered, and against the sheriff for his false return; and by that writ the tenant shall be restored unto his land again; and the sheriff shall be punished for his falsity. N. B. 97. If a man bring a writ of deceit against him that recovers in the first action, and the sheriff return him summoned, upon which for non-summons in that action on finding the same the recovery is reversed; in this case the defendant shall not have writ of deceit to recover the land again, if he were not summoned; but he shall have his remedy against the sheriff. Rol. Abr. 621. And where debt was brought, and the defendant pleaded in abatement, and the plea was overruled, the attorney on both sides by deceit between them, to the end the plaintiff might recover his debt, entered another judgment, when it should have been a respondeas ouster; and it was held that the writ of deceit would not lie to reverse the record, but only to recover dama-Ibid. 622.

If in a suit or action, another person shall come into court and pretend he is a party to the suit, and so let judgment be had, or some other damage done to the party himself; or if one have cause to have an action, and another brings it in his name, and lets judgment go by nonsuit, or the like, the injured party may have this writ of deceit. F. N. B. 96:

March, 48.

If any one forge a statute, &c. in my name, and sueth a capias thereupon, for which I am arrested; I shall have a writ of deceit against cennaries the whole neighbourhood or tithing him that forged it, and against him who sued of freemen were mutually pledges for each

procure another to sue an action against me to trouble me, I shall have a writ of deceit. F. N. B. 96.

There are many frauds and deceits provided against by statute, relating to artificers, bakers, brewers, victuallers, false weights and measures, &c., which are liable to penalties and punishment in proportion to the offences committed. And writ of deceit lies in various cases; for not performing a bargain, or not selling good commodities, &c.

On almost all occasions, where a person is deceived or injured, and where anciently remedy was sought by the writ of deceit, an action on the case for damages, in nature of a writ of deceit, is now more usually brought; and, indeed, it is the only remedy for a lord of a manor, in or out of ancient demesne, to reverse a fine or recovery had in the king's court of lands lying within his jurisdiction, which would otherwise be thereby turned into frank-fee. And this may be brought by the lord against the parties, and cestui que use of such fine and recovery; and thereby he shall obtain judgment not only for damages (which are usually remitted,) but also to recover his court and jurisdiction over the lands, and to annul the former proceedings. 3 Lev. 415. 419 : Lutw. 711. 749.

A count for a deceit, averring that the defendant represented to the plaintiff that his lessor required 150l. premium for a lease, whereas he required only 100l., whereby defendant fraudulently obtained from plaintiff and converted to his own use 50l., is sufficient. Pewtris v. Austin, 6 Taunton, 552.

In case in nature of a deceit to reverse a recovery of lands in an ancient demesne, all the parties to the recovery must be before the court. 2 W. Blackst. 1170.

To support an action against a party for improperly recommending an agent, no more is necessary than to show that the statement was false, and known by the party recommending to be so. It is not necessary to prove a malicious or interested motive. Fos-

ter v. Charles, 6 Bing. 396.

The plaintiffs, being about to furnish defendant's son with goods on credit, inquired of defendant by letter if his son had, as he represented, 300l. capital of his own property. Defendant answered he had, when the fact was, that defendant had only lent him 300l. on his promissory note, payable with interest, and he received interest. This was held a deceitful and actionable misrepresentation. Corbett v. Brown, 8 Bingh. 33.

DECENNARY. A town or tithing, consisting (originally) of ten families of freeholders. Ten tithings composed an hundred. The institution of decennaries (or frank pledges) is imputed to Alfred. In these deother's good behaviour. 1 Comm. 114. See | defendant by a wrong name, and he appears Deciners.

DECEM TALES. When a full jury doth not appear at a trial at bar, then a writ goes to the sheriff apponere decem tales, &c., whereby a supply is made of jurymen to proceed in the trial. See tits. Jury, Tales.

DECIES TANTUM. A writ under stat. 38 Ed. 3. c. 12, which lay against a juror, who had taken money of either party for giving his verdict, to recover ten times as much as the sum taken. See tit. Jury. This writ also lay against embraceors that procure such an inquest, who shall be farther punished by imprisonment for a year. Reg. Orig. 188: F. N. B. 171; repealed by 6 Geo. 4 c. 50. § 62.

DECIMATION, decimatio.] The punishing every tenth soldier by lot was termed decimatio legionis; it likewise signifies tithing, or paying a tenth part. There was a decimation during the time of the Usurper,

DECINERS, DECENNIERS, or DOZI-NERS, decennarii.] In our ancient law, such as were wont to have the oversight of the friburghs, or views of frank-pledge, for the maintenance of the king's peace; and the limits or compass of their jurisdiction was called decenna, because it commonly consisted of ten households; as every person, bound for himself and his neighbours to keep the peace, was stiled decennier. Bract. lib. 3. tract. 2. c. 15.

These seem to have had large authority in the time of the Saxons, taking knowledge of causes within their circuits, and redressing wrongs by way of judgment, and compelling men thereunto, as appears in the laws of King Edward the Confessor. Lambard, Numb. 32. But of late decennier is not used for the chief man of a dizein, or dozein; but he that is sworn to the king's peace, and by oath of loyalty to the prince, is settled in the society of a dozein.

A dozein seemed to extend so far as a leet extendeth, because in leets the oath of loyalty is administered by the steward, and taken by all such as are twelve years old, and upwards, dwelling within the precinct of the leet where they are sworn. F. N. B. 161. There are now no other dozeins but leets; and there is a great diversity between ancient and modern times, in this point of law and government. 2 Inst. 73. See 1 Comm. 114: 4 Comm. 252: and ante, Decennary.

DECLARATION.

Declaratio, narratio.] A legal specification, on record, of the cause of action, by a plaintiff against a defendant.

The declaration should correspond with the process in the names and descriptions of the parties; for if there be a material variance, the court will set aside the proceedings, unless where the process is taken out against the not to repeat more of the deed than is neces-

by his right name; there the plaintiff may declare against him by the name in which he appears, stating that he was arrested by the other name; for by appearing the defendant admits himself to be the person sued, and so the variance is immaterial. 3 Term Rep. 611.

The substantial rules of pleading, according to which declarations are to be drawn, are founded in strong sense and the soundest and closest logic, and so appear when well understood and explained, though by being misunderstood and misapplied they are often made use of as instruments of chicane. 1

Rules respecting the form of the declaration. The parties, plaintiff or demandant, defendant or tenant, ought to be well named. The time of a matter charged in the declaration ought to be certainly alleged; and therefore in assumpsit, the day being omitted on which the promise is made, it is bad. Yel. 94: Pl. Com. 24. But the precise day need not be stated, unless it is setting forth an instrument in which, if the day is wrongly stated, it is fatal. A certain place ought to be alleged where every fact material and traversable was done. Kitch. 226. But the place stated may be the common venue. The gist, and every thing that is of the essence of the plaintiff's action, must be set forth in the declaration. That seems properly to be the essence of the action, without which the court could have no sufficient grounds to give judgment. Doct. Pt. 85. If the declaration be not sufficient on which to found a judgment, this may be moved in arrest of judgment after verdict. Ibid. The declaration must show a title in the plaintiff. See Cro. Eliz. 325: Moor, 598. In all cases where an interest or estate commences upon condition, the plaintiff ought to show it in his declaration, and aver the performance of it; but when the interest of the estate passes presently, and vests in the grantee, and is to be defeated by condition; there the plaintiff may count generally, and the condition shall be pleaded by him who is to take advantage of it. 7 Co. 10: Lil. Reg.

The declaration must contain such certain affirmation that it may be traversed; for if there be no certain affirmation to make the declaration itself traversable, it will not be cured after a verdict, because it is a defect in substance. Co. Lit. 30: Cro. Jac. 361: 2 Bulst. 214: Cro. Eliz. 33, 441: 2 Saund. 319. If a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for so much as is well alleged, especially if it be not of an entire demand. 10 Co. 115: Rol. Abr. 784, 5: 2 Show. 103: 1 Salk. 133. Vide. 3 Burr. 1235.

For preventing unnecessary length of declarations, it has been specially ordered, that in actions of covenant the declaration is

sary for the assignment of the breach, and de bene esse, till common bail or appearance not to repeat the covenant in the conclusion. entered, or till special bail be filed, notice that forborne, and no more inducement than what in writing. Impey, K. B. is necessary for the maintenance of the action, but when it requires a special inducement or colloquium. In actions upon general statutes, the declaration not to repeat the statute, but to conclude 'against the form of the statute in such case made and provided.'-In actions of debt upon judgment had in the courts at Westminster, to recite only the judgment; but if on a judgment had by or against an executor or administrator, then the action of debt upon that judgment to repeat the declaration and judgment. R. M. 1654. § 13. In a declaration on action founded on a deed, the plaintiff need not set forth more than that part which is necessary to entitle him to recover. Cowp. 665. And it will be sufficient to state the substance and legal effect even of such part; which is shorter, and not liable to mis-recitals and literal mistakes. The distinction is between that which may be rejected as surplusage (which might have been struck out on motion,) and what cannot; where the declaration contains impertinent matter foreign to the cause, and which the master on a reference to him would strike out (irrelevant covenants, for instance,) that will be rejected by the court, and need not be proved. But if the very ground of the action is mis-stated, as where the plaintiff under-takes to recite that part of a deed on which the action is founded, and it is mis-recited, that will be fatal; for then the case declared on is different from that which is proved, and he must recover secundum allegata et probata. Doug. 665. Bristow v. Wright and another; and the notes there.

In a declaration on a promissory note, the words "the defendant's proper hand being thereunto subscribed," may be rejected as surplusage, and need not be proved. Moo. & tiff's neglect, the plaintiff may still deliver a Malk. 182. In covenant on an indenture of declaration within the year. 2 Term Rep. 112: lease, the plaintiff well assigned a breach that 3 Term Rep. 123. And a plaintiff shall be the defendant had not yielded the monthly deemed out of court unless he declare within rent, &c. &c., and then alleged that before one year after the process is returnable. the exhibiting the bill, &c., to wit, on the 1st Rule H. T. 1832. Nov. 1797, 900l. of the rent reserved was in arrear. This date being before the commencement of the lease, and therefore impossible, may be rejected as surplusage, the compulsion to declare before the essoign day breach being sufficient without it. Buckley of the next term; and therefore the defendant v. Kenyon, 10 East, 139.

Of declarations in chief, de bene esse, and Yates, 6 Taunton 261. by-the-bye. There are two ways in which the plaintiff may declare, the one on the return- to amend, by stating particularly that which day of the writ, which is called de bene esse, conditionally, until special or common bail be add new counts, though more than two terms filed; the other after the day for filing com- have elapsed from the commencement of the mon bail, or when the defendant has justified suit, if they contain no new cause of action. his bail, which is called in chief. If to speed Brown v. Crump, 6 Taunton, 300. the cause, the former is the best way of proceeding; and a rule to plead may be given on less he enter his appearance within the term

In actions of slander, long preambles to be it is so filed must be given to the defendant

By rule of Trinity Term, 1831, no declaration de bene esse shall be delivered until the expiration of six days from the service of the process, where not bailable, or six days from the arrest where bailable.

The plaintiff cannot declare in chief, unless common bail be filed by the defendant, or plaintiff has done it for him. Smith v. Painter, 2 Term Rep. 719: 1 Term Rep. 635. Cook v. Raven. And it must be filed the term the writ is returnable. Tidd's Pract. (9th ed.)

When the defendant has filed common or special bail for himself, any person may deliver or file a declaration against him bythe-bye, at any time during the term wherein the process against the defendant is returnable, sedente curid; and the practice hath been, that the plaintiff, at whose suit the process is, might declare against the defendant in as many actions as he thinks fit, before the end of the next term, after the return of the pro-

cess. Impey, K. B. 177. See 4 Burr. 2180.
Of the time of declaring.—The plaintiff must declare before the end of the term next after the return of the process; or the defendant may sign a non-pros (except in replevin) without entering any rule to declare, and the defendant shall have costs taxed as usual. Stat. 18 Car. 2. c. 2. § 5. And a rule to declare is not necessary except on removals from inferior courts.

By the general rules of law a plaintiff must declare against a defendant within twelve months after the return of the writ. But by the rules of the court, if he do not deliver his declaration within two terms, the defendant may sign judgment of non-pros. Though, unless he takes such advantage of the plain-

Where a writ is returnable on the last return-day of one term, the plaintiff, who is not bound to declare de bene esse, is under no is not entitled to an imparlance. Kent v.

Where the court on demurrer gives leave before was stated too generally, plaintiff may

The defendant cannot sign a non-pros, unthe same day. When a declaration is filed in which the writ is returnable. Hardw. pros being signed, the plaintiff may get a side-bar rule, if the defendant is not in custody, the last day of the second term, for time to declare, until the first day of the next term; and he may have as many rules as he likes, from term to term, but there must be two in a term, viz. one from the first day of the term to the last day, and the other from the last day to the first day of the next term. with the writ by evidence of the time when But the defendant may, if he thinks proper, the declaration was filed, and stating the writ move the court that the last rule may be per-Impey, K. B.

The delivery of a declaration against a prisoner, though within two terms, is a nullity if there were no bill filed before, and he is entitled to his discharge under rule of court.

Nowell v. Bingham, 4 East's Rep. 16.

In all notices of declarations, care is to be taken that the cause be properly named, as well as the court in which the suit is instituted; and in notices of declaration, the nature of the action is to be expressed, and at whose suit prosecuted, and the time limited to plead to such declaration. R. T. 1 G. 2. But it is not necessary to express the amount of rial; and it is sufficient to state any place in damages. Rule H. T. 1832.

Serving notice of a declaration filed together with the writ at the same time is irregular. Steward v. Lund, 12 East's Rep.

116.

Of entitling, and laying the day and place in declaration .- Many niceties formerly occurred as to entitling the declaration generally (which had reference to the first day of term), or specially of some particular day after the cause of action arose; but now, by Rule of Michaelmas Term, 2 and 3 W. 4. every declaration shall be entitled in the proper court, and of the day of the month and year on which it shall be filed or delivered; and any cause of action may in general be given in evidence of the nature specified in the declaration, which occurs before the day of the

If the plaintiff declares on a note, the day is material, and an essential part of the agreement, from which he cannot vary; so on a bond or other writing; but in the case of a common assumpsit, the day is alleged only for form, and therefore the defendant cannot confine the plaintiff to the day alleged in the declaration. Str. 21. Vide Co. Lit. 283: Plowd. Com. 24. a.

In other cases, as in trespass, assault, battery, &c., the day is immaterial, but is in general laid after the cause of action accrued, and before the time of which the declaration

is entitled.

In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c., affecting land, the plaintiff must lay his declaration, or declare his injury to have happened in the very county and place where it really did happen; but in ceedings are in paper the amendment is at transitory actions, for injuries that might common law, and not within any of the sta-

138: 2 Term. Rep. 719. To prevent a non- have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid. 3 Comm. 294. See tits. Action, Venue.

In a qui-tam action, if the declaration do not on the record appear to be filed within a year of the writ, it is necessary to connect it with the writ by evidence of the time when to be continued on the roll down to that time. In C. P. the placitum being always intituled of the term in or after which the trial takes place, it furnishes no evidence of the date of the declaration. Thistlewood v. Cracruft, 6 Taunton, 141.

In action of debt upon a bond, the plaintiff in his declaration must formerly allege a place where the bond was made, because the jury should come from that place; and if this be omitted, the declaration was ill. Dyer, 15, 39:1 Nels. Abr. 619. But as the jury are no longer required to come from the neighbourhood, the precise place is not matethe county as a venue, or even to state the bond as made in the county generally.

It is good to lay large and sufficient damages in declarations: and damages shall not be given for that which is not contained in the declaration, and only for what is materially alleged. 10 Rep. 115: 1 Lil. Abr. 381.

Of joinder of counts .- A declaration in assumpsit, containing counts against the husband, and wife as administratrix, upon promises by the intestate; and a count upon promises by the husband, and wife as administratrix, for use and occupation after the death of the intestate, held bad on general demurrer for misjoinder. 3. B. & A. 101. See on this subject, 1 Chitty on Pleading.

A declaration otherwise in the form of debt, but with counts for work and labour, stating defendant to be indebted to plaintiff, and that being indebted, he undertook and promised to pay upon request, whereby an action, &c., is bad on demurrer for misjoinder of debt and

assumpsit. 3 B. & A. 208.

Defective declaration.—Where a declaration is defective, it is aided by the statutes of amendments and jeofails when on record; but this was heretofore allowed only in matters of form, not of substance, unless the justice of the case required it. 2 Barnard, K. B. 153: 2 Str. 1162. 1202: 1 Wils. 173: Say. Rep. 150. 294: 2 Burr. 1098. But by the liberality of modern practice, amendments have been allowed even in matters of substunce, not only while the proceedings were on paper, but even in some cases when on record. See 7 T. R. 132. 447. (d.) 698: 2 Str. 890: Fitzgb. 193: 1 Barnard, 408. 418: 2 Saund. 402: 1 East, 372. Whilst the protutes of amendments which relate only to proceedings on record. 1 Salk. 47: 3 Salk. 31. And there is no difference as to the doctrine of amending at common law, between civil and criminal cases. 1 Salk. 51: 2 Lord Raym. 1068: 6 Mod. 285. S. C.: nor between penal and other actions. 1 Stra. 137: 2 Str. 1227: 1 Wils. 256: 1 Burr. 402: 2 Burr. 1098, 9: 5 Burr. 2833, 4: 6 T. R. 173, 543: and 7 T. R. 55. See tits. Amendment, Practice.

Variance.-A party after setting out a deed on over, and demurring, cannot avail himself of a variance in an immaterial part. 1 B. & C. 358. See as to variances, Bac. Ab. tit Pleas.

(7th ed.)

On filing declarations, copies thereof are served on the defendants or their attorney, &c. And by an order of all the judges (12 W. 3.) the plaintiff's attorney is not obliged to deliver the defendant's attorney the original declaration; but instead of it is to deliver a true copy of the declaration; upon delivery or tender whereof, the defendant's attorney shall pay for such copy after the rate of 4d. per sheet, &c.; and if any person refuse to pay for the copy tendered, the said copy is to be left in the office, with the clerk that keeps the files of declarations, and thereupon the plaintiff's attorney giving rule to plead, may, for want of a plea, sign judgment; and before any plea shall be received, the defendant's attorney is to pay for the copy of the declaration.

If the declaration be filed, and notice thereof given to the defendant or his attorney, it is deemed to be a good declaration from the time of such notice only; and therefore a rule to plead in such case, given before notice of declaration, is irregular; yet, where the declaration in the King's Bench was filed on the last day of the second term after the return of the writ, but the notice was not given till a little before the essoin day of the following term, this was holden to be well enough, the master certifying it to be the practice. The defendant must formerly have received and paid for a copy of the declaration, whether it was delivered or left in the office, before he could have been admitted to plead; and if he neglected to do so, the plaintiff's attorney might have refused to accept his plea, and sign judgment. But now, though a copy of the declaration must be paid for, on taking it out of the office when filed, yet the defendant's attorney, we have seen, is not bound to pay for it when delivered to him.

Most of the recent alterations in pleading applicable to declarations will be found under

Pleading.

DECLARATOR, is an action, whereby we pray something to be declared in our favour.

DECLARATOR OF PROPERTY, is when the complainer, narrating his right to lands, desires he should be declared sole proprietor, and all others discharged to molest him tit. Decree. any way. Scotch Dict.

Vol. I.-66

DECLARATOR OF REDEMPTION, is when, after a process before the lords against the wadsetter, who refuses to renounce after the order of redemption is used, the lords force him to renounce, and by a decreet declare the lands redeemed. Scotch Dict.

DECLARATORY ACTIONS, are those wherein the right of the pursuer is craved to be declared: but nothing claimed to be done by

the defender. Scotch Dict.

DECREE. The judgment of a court of equity on any bill preferred. See tit. Chan-

A decree in Chancery is of the like nature with a judgment at common law. Chan. Rep.

Several questions and disputes were here. tofore warmly agitated, as to the authority of the master of the rolls to hear and determine causes; and as to his general power in the Court of Chancery: to quict which, it was declared by stat. 3 G. 2.c. 30. that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or allowed by the lord chancellor, and so as they shall not be enrolled till the same are signed by his lordship.

If either party to the suit thinks himself aggrieved by a decree, he may petition the chancellor for a re-hearing, whether it was heard before the chancellor himself, or any of the judges sitting for him, or before the master of the rolls. For in all cases it is the chancellor's decree, and must be signed by him before it is enrolled; which is done of course, unless a re-hearing be desired. Every petition for a re-hearing must be signed by two counsel, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be re-heard. And upon the re-hearing, all the evidence taken in the cause, whether read before or not, is then admitted to be read, because it is the decree of the chancellor himself, who only sits to hear reasons why it should not be enrolled and perfected, at which time all omissions of either evidence or argument may be supplied. Gilb. Rep. 151, 2.—But after the decree is once signed and enrolled, it cannot be re-heard or rectified but by bill of review, or by appeal to the House of Lords.

A bill of review may be had upon apparent error in judgment appearing upon the face of the decree; or by special leave of the court, upon oath made, of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree pass-But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review. 3 Comm. 454. See farther this Dict. tit. Chancery; and Vin.

DECREET COGNITIONIS CAUSA, is

when the apparent heir is called to hear the a judge, or some court: and it is granted most debt constitute, it not being already clearly constitute by writ; and the appearing heir renounces, being charged to enter heir. Scotch court, is so weak that he cannot travel: as Dict.

DECREET COGNITIONIS CAUSA, against executors, is when the nearest of kin are pursued by the executor creditor, who hath no writ to instruct his debt to hear the debt constitute. Scotch Dict.

DECREET OF COMPRISING, is when at the day appointed in the letters, the debitor being called, the messenger offers him his lands for the money; which if he have not ready, the inquest declares the lands to belong to the creditor for his payment. Scotch Dict.

DECREET OF EXONERATION, is a decreet of the commissars against the creditors, or nearest of kin; wherein it is proven, that the executor hath executed the whole testament, and that all is exhausted by lawful

sentences. Scotch Dict.

DECREET OF LOCALITY, is a decrect modifying a stipend for a minister, dividing and proportioning the same among the here-Scotch Dict.

DECREET OF MODIFICATION, is that which modifies a stipend to a minister, but doth not divide and proportion it among

Scotch Dict. the heretors.

DECREET OF VALUATION, is a sentence of the lords (who are now in the place of the commission) determining the extent and value of teinds. Scotch Dict.

DECRETALS, decretales. A volume of the cannon law, so called as containing the decrees of sundry popes; or a digest of the canons of all the councils that pertained to one matter under one head. See tit. Canon Law.

DECURIARE. To bring into order. Mon. Ang. tom. p. 243.

DEDBANA, ded-bane, Sax.] An actual

to a warranty in law, as if it be said in a deed from its materials; but most usually, when or conveyance, that A. B. hath given, &c. to applied to the transaction of private subjects, C. D., it is a warranty to him and his heirs, it is called a deed, in Latin factum, because Co. Lit. 304. Also dedi imports a power of it is the most solemn and authentic act that giving any thing. Hob. 12. See tits. Convey.

ance, Deed.

rather the feast of dedication of churches, or or not permitted to aver or prove any tining in rather the feast day of the saint and patron of contradiction to what he has once so solemnly a church, which was celebrated not only by and deliberately avowed. Ploved. 434. If a the inhabitants of the place, but by those of deed be made by more parties than one, there all the neighbouring villages, who usually ought to be regularly as many copies of it as came thither; and such assemblies were allowed as lawful: it was usual for the people to feast and drink on those days; and in many tium, like the teeth of a saw, but at present parts of England they still meet every year in a waving line) on the top or sides to tally, willages for this purpose which days are called an correspond with each others, which deed villages for this purpose, which days are called or correspond with each other; which deed feasts or wakes. Cowel.

commonly upon suggestion, that the party who is to do something before a judge, or in where a person lives in the country, to take an answer in Chancery, to examine witnesses in a cause depending in that court, to levy a fine in the Common Pleas, &c. On renewing the commission of the peace, there cometh a writ of dedimus potestatem out of Chancery, directed to some ancient justice to take the oath of him, which is newly inserted. See tit. Justices of Peace.

DEED, L

DEDIMUS POTESTATEM DE ATTORNATO FACI-ENDO. As the words of writs do command the defendant to appear, &c., anciently the judges would not suffer the parties to make attornies in any action or suit without the king's writ of dedimus potestatem, to receive their attornies; but now, by statutes, the plaintiff or defendant may make attornies in suits without such writs. Nat. Br. 55, 56. See tit. Attor-

FACTUM.] An instrument in parchment, or paper, but chiefly in parchment, comprehending a contract or bargain between party and party; or an agreement of the parties thereto, for the matters therein contained: and it consists of three principal points, writing, sealing, and delivery; writing, to express the contents; sealing, to testify the consent of the parties; and delivery, to make it binding and perfect. Terms de la Ley.

I. What a Deed is.

II. The Requisites to make a good Deed.

III. How a Deed may be avoided.

IV. Of the inrolling, exposition, and pleading of Deeds.

I. What a Deed is .- A deed is a writing homicide, or manslaughter. Leg. H. 1. c. 85. sealed and delivered by the parties. 1 Inst. DEDI [I have given]. This word amounts 171. It is sometimes called a charter, charta, the disposal of his property; and therefore a DEDICATION-DAY, Festum Dedication man shall always be estopped by his own deed, is.] The feast of dedication of churches, or or not permitted to aver or prove any thing in so made is called an indenture. Formerly DEDIMUS POTESTATEM. A writ or commission given to one or more private persons, for the speeding some act appertaining to same piece of parchment, beginning at the middle, and continuing to the contrary ends, with some word or letters of the alphabet written between them, through which the parchment was cut either in a straight or indented with, for the purposes intended by the deed; line, in such a manner as to leave half the word on one part, and half on the other. Deeds thus made were denominated syngrapha by the sufficient names. Co. Lit. 35. So as in every canonists, and with us chirographa, or hand grant, there must be a grantor, a grantee, and writings; Mirror, c. 2. § 27; the word cirogra- a thing granted; in every lease, a lessor, a lesphum or cyrographum being usually that see, and a thing demised which is divided in making the indentures of Some persons are disc a fine. See tit. Chirograph. But at length common law, and some by statute; some abindenting only has come into use, without solutely, and some secundum quid only, as in coming through any letters at all; and it case of infants, feme coverts, idiots, persons seems at present to serve for little other purpose than to give name to the species of the clesiastical persons, and others; some of which deed. See farther, 1 Inst. 229. (a.) in n. may not make any deeds or estates by them When the several parts of an indenture are at all, others but so and so limited and qualiinterchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and amongst persons of non-sane memory, infants, the rest are counterparts; though of late it is aliens, women who have husbands, men who most frequent for all the parties to execute have wives, &c., persons born deaf and dumb, every part, which renders them all originals. A deed made by one party only is not indented, but polled or shaved quite even, and therefore called a deed poll, or a single deed. § 371, 2.

A deed-poll is said to be a deed testifying that only one of the parties to the agreement hath put his seal to the same, where such party is the principal or only person, whose con-sent or act is necessary to the deed: and it is therefore a plain deed, without indenting, and is used when the vendor, for example, only seals, and there is no need of the vendee's sealing a counterpart, because the nature of the contract is such as to require no covenant him and his wife, and his heirs, may make from the vendee, &c. Co. Lit. 55.

The several parts of deeds by indenture are belonging to the feoffor, grantor, or lessor, who have one; the feoffee, grantee, or lessee, who have another; and some other persons, as trustees, a third, &c.; and the deed-poll, which is single, and of but one part, is delivered to

the feoffee, or grantee, &c.

All the parts of a deed indented, in judgment of law, make but one entire deed; but every part is of as great force as all the parts together, and they are esteemed the mutual acts of either party, who may be bound by either part of the same, and the words of the indenture are the words of either party, &c. But a deed-poll is the sole deed of him that makes it, and the words thereof shall be said to be his words, and bind him only. Plowd. 134. 421: Lit. § 370.

A letter, or power of attorney, for the transferring government stocks, containing the usual covenants, to confirm with the Bank, whatever should be done by the attorney after \ \ 36. the decease of the party giving it, is a deed within the stat. 2. G. 2. c. 25. making it a mistaken, as John for Thomas, &c. this is capital offence to forge a deed. R. v. Faun- dangerous. Moor, 407. 897. And see 2 tleroy, 2 Bing. 413: 1 R. & M. 52: 1 Carr & Bulst. 70: Perk. § 39. P. 421.

Some persons are disabled to contract by non compos mentis, aliens, tenants in tail, ecfied. Stat. 32 H. S. c. 28. See tit. Leases.

Disabilities to make deeds, &c., are chiefly persons attaint of treason or felony, or, in a præmunire, clerks convict, tenant in tail, ecclesiastical persons, as bishops, parsons, and Litt. the like, with respect to lands, &c., which they hold as such, joint-tenants, tenants in common, coparceners, disseisors, disseisces, &c. See these several tits.

He who has only an estate for his own or another's life, or a lease for years of land, may give, grant, or charge it at his pleasure, for so long as his estate lasts; and it will be good to all purposes, and against all persons for that

And a man who has an estate in land to what estate he will of it, and this will be good against all but his wife, and that for her life only. 7 Co. 12: Co. Lit. 42: Perk. § 182.

The king, for the greatness of his person, is disabled to take by deed, in pais, and, therefore, if a feoffment be made to him there, and livery of seisin be made upon it, this will be void; but he is to take by matter of record, which is of an higher nature than a deed. Fitz. Fait. and Feofment, 21.

Leases made to the king by colleges, deans, and chapters, or any other having a spiritual or ecclesiastical living, against the stat. 13 Eliz. c. 10. are restrained by the same act, as well as leases made to common persons. Co. 14.

The names of the parties to deeds serve to distinguish persons, and to make the person intended certain; yet mistakes in this, unless they be very gross, will not hurt; nihil facit error nominis cum de corpore constat. Bulst. 21, 22: 2 Bulst. 302, 303: Co. Lit. 3: Perk.

But if the name of baptism or surname be

It is also prudent to add the addition of

each party, as the place of residence, with his for it may be in any character or any lanor her degree, profession, or mystery.

and grantees; as (1.) Proper names of bap- linen, leather, or the like, it is no deed. Co. tism and surnames, and the names of corpo- Lit. 229: F. N. B. 122. rations, or bodies politic or corporate. (2.) Names of dignities, office, and the like. And these (of both sorts) will admit a description made good by reputation. And so land will pass to one, by the name of a son, who is a bastard; so as to one by the name of a wife, who is not a wife; 27 Ed. 3. 85. Bulst. 3; if they be reputed or known by that name. Hob. 32.

There must be such a person in esse at the time of the deed made as is named, and the parties must be able to give, and capable to receive, that which is given or granted by the Plowd. 345: Co. Lit. 2, 3: Perk. deed.

43. 52.

And therefore if an annuity be granted to the right heirs of J. S., he being then living, this is void; for there is none such, nor can be whilst he lives. Perk. § 52. See Cro. Car. 22.

If a man gets another name by common esteem than his right name, and he is known by his other name, his deed made by this other name may be good. 6 Co. 36: Co. Lit. 3: Perk. § 41.

The mistake is less dangerous where any other part of the deed, or some other addition, shall make the person intended certain. 6 Co. 36: Co. Lit. 3: Perk. § 40. If a party enter into a bond by a wrong Christian name, he should be sued by that name. 3 Taunt.

504. And see 5 Barn. & A. 682.

2. The deed must be founded upon good and sufficient consideration. Not upon an usurious contract (stat. 13 Eliz. c. 8.); nor upon fraud or collusion, either to deceive purchasers bonâ fide (stat. 27 Eliz. c. 4.); or just and lawful creditors, (stat. 13 Eliz. c. 5.); see 3 B. & Adol. 498; any of which bad considerations will vacate the deed, and subject such persons as put the same in use to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to enure, or to be effectual only to the use of the grantor himself. Perk. § 533. The consideration may be either a good or a valuable one. See farther tit. Consideration, and post,

In deeds, the consideration is a principal thing to give them effect; and the foundation of deeds ought always to be honest. That a deed was executed upon a corrupt agreement, dehors the deed, may be averred in pleading. See Collins v. Blantern, 2 Wils. 341. Or on an illegal consideration. Greville v. Atkins, 9 Barn. & C. 462. But a party cannot allege his own fraud to avoid a deed. 2 Barn. & A. 367.

3. The deed must be written or (as is the case at present with many instruments, such as bonds, policies of insurance,, &c.) printed,

guage, but it must be upon paper or parch-There are many descriptions of grantors ment; for if it be written on stone, board,

> All the matter and form of a deed must be written before the sealing and delivery of it: for if a man seals and delivers an empty piece of parchment or paper, although he therewithal gives commandment that an obligation or other matter shall be written in it, which is done accordingly, yet this will not make it a good deed. Co. Lit. 171: Perk. § 118, 119. See Moor, 28: Hetley, 136, 137.

A deed may be written in any hand, as in text, court, or Roman hand; or in any language, as in Latin or French, and is as good as a deed written in English, and in a secretary hand. 2 Co. 3. It has been decided that a promissory note may be indersed in pencil; 5 Barn. & C. 234; and it would seem a deed

might be so written.

It may be written either in a piece of loose paper or parchment, or in a paper or parchment sewed in a book. Bro. Oblig. 67: Co. Lit. 137. 139.

A deed must also have the regular stamps imposed on it by the several statutes, for the increase of the public revenue; else it cannot be given in evidence. See post, 7.

Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the stat. 29 Car. 2 c. 3. enacts that no lease, estate, or interest, in lands, tenements, or hereditaments, made by livery of seisin, or by parol only (except leases not exceeding three years from the making, and whereupon the reserved rent is at least twothirds of the real value) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid, unless in both cases the same be put in writing, and signed by the party granting, or his agent, lawfully authorised in writing. See tit. Frauds.

4. The matter written must be legally and orderly set forth; that is, there must be words sufficient to specify the agreement, and bind the parties; which sufficiency must be left to the courts of law to determine. Co. Lit. 225. For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; therefore they shall be recapitulated in their usual order. See 1 Inst. 6.

It may in the first place be generally ob-

served with regard to the words requisite in a | premises, " to him and his heirs," habendum deed, that they depend upon the estate intended to be conveyed. If a man would purchase lands or tenements in fee-simple, it behoves him to have these words in his purchase, To have and to hold to him and to his heirs; for these words, his heirs (only), make the estate of inheritance, in all feoffments and grants. But this is to be understood of natural bodies: for it lands be given to a sole body politic or corporate (as to a bishop, parson, vicar, master of an hospital, &c.) there, to give him an estate of inheritance in his politic or corporate capacity, he must use these words, To have and to hold to him and his successors. Co. Lit. 8. 800

If an estate tail is intended to be created, the words must be, To have and to hold to him and to the heirs of his body. See tit. Fee.

The insertion of the word heirs or successors, as the case requires, is therefore absolutely necessary in conveyances of estates of inheritance; for if a man purchase lands by these words, To have and to hold to him for ever, he has but an estate for term of life. See Co. Lit. 8. b. &c.

A deed or conveyance cannot operate as an exchange without the word " exchange." Eton Coll. v. Wickliffe, Bp. 3 Wils. 458. 485.

The words "equally to be divided," in a deed of uses, make a tenancy in common. 1 Wils.

A deed of release, containing the words "all lands, &c. used, occupied, and enjoyed, or deemed, taken, or accepted, as part thereof," will pass leasehold lands, which answer that description as well as freehold, especially against the releasor. 1 H. Black. 25.

We may now proceed more particularly to observe on the formal and orderly parts of a

The premises are used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted. See tit. Premises.

Next come the Habendum and Tenendum. The office of the habendum is properly to determine what estate or interest is granted by the deed, though this may be performed, and sometimes is performed, in the premises; in which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to the estate granted in the premises. As if a grant be "to A. and the heirs of his body" in the premises, habendum "to him and his heirs for ever," or vice versa, the value of what should be evicted. See here A. has an estate tail, and a fee-simple ex- farther, title Warranty. pectant thereon. Co. Lit. 21: 2 Roll. Rep. 19. 23: Cro. Jac. 476. But, had it been in the or conventions; which are clauses of agree-

"to him for life," the habendum would be utterly void; 2 Rep. 23: 8 Rep. 56; for an estate of inheritance is vested in him before the habendum comes, and shall not afterwards be taken away, or devested, by it. See tit. Habendum. The tenendum, " and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden, viz. " tenendum per servitium militare, in burgagio, in libero socagio," But, all these things being now reduced to free and common socage, the tenure is never specified. Before the stat. of quia emptores, 18 Ed. 1st. 1. it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold not of the immediate grantor, but of the chief lord of the fee. this use of the tenendum hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden, de capitalibus dominis feodi, but as this expressed nothing more than the statute had already provided for, it gradually grew out of use. Tenure.

Next follow the terms of stipulation, if any, upon which the grant is made: the first of which is the reddendum, or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted. As " rendering therefore yearly the sum of ten shillings, or a peppercorn, or two days ploughing, or the like." Under the pure feodal system, this render, reditus, return, or rent, consisted in chivalry, principally of military services; in villenage, of the most slavish offices; and in socage it usually consists of money, though it may still consist of services, or of any other certain profit. To make a reddendum good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some. or one of them, and not to any stranger to the deed. Plowd. 13: 8 Rep. 71. But if it be of ancient services, or the like, annexed to the land, then the reservation may be to the lord of the fee. See Reddendum.

Another of the terms upon which a grant may be made is a Condition; as to which sec fully title Condition.

Next may follow the clause of warranty. This was anciently inserted in deeds to secure the estate to the grantee and his heirs, &c., and was a covenant real, annexed to the land granted, by which the grantor and his heirs were bound to warrant the same to the grantee and his heirs, and that they should quietly hold and enjoy it; or upon voucher, &c. the grantor should yield other lands to

After warranty usually follow Covenants,

ment contained in a deed, whereby either sign of the cross; which custom our illiterate party may stipulate for the truth of certain vulgar do, for the most part, to this day keep facts, or may bind himself to perform, or give, up, by signing a cross for their mark, when something to the other. Thus the grantor unable to write their names. In like manner, may covenant that he hath a right to convey; the Normans, at their first settlement in or for the grantee's quiet enjoyment; or the France, used the practice of sealing only, like; the grantee may covenant to pay his without writing their names: which custom rent, or keep the premises in repair, &c. If continued when learning made its way among the covenantor covenants for himself and his them, though the reason for doing it had heirs, it is then a covenant real, and descends ceased; and hence the charter of Edward the upon the heirs, who are bound to perform it, Confessor to Westminster Abbey, himself provided they have assets by descent, but not being brought up in Normandy, was witotherwise; if he covenants also for his execu- nessed only by his seal, and is generally tors and administrators, his personal assets, as thought to be the oldest sealed charter of any well as his real, are likewise pledged for the authenticity in England. Lamb. Archeion, performance of the covenant; which makes 51. such covenant a better security than any war-ranty. It is also in some respects a less security, and therefore more beneficial to the grantor; who usually covenants only for the acts of himself, and his ancestors, whereas a general warranty extended to all mankind. For which reasons the covenant has in modern practice totally superseded the other. See fully this Dict. tits. Assets, Covenant, Assignment, Heir.

Lastly, comes the Conclusion, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day or year before-mentioned. Not but a deed is good, although it mention no date; or hath a false date, or even if it hath an impossible date, as the 30th of February, provided the real day of its being dated or given, that is, delivered, can be proved. Co. Lit. 46: Dyer, 28.-See

farther, title Date.

When there is a sensible date to a deed, the word date means the day of the date and not of the delivery; but if there be no date, or an insensible one, the word date may be con-

strued delivery. 4 B. & C. 908.

5. A fifth requisite for making a good deed is the reading of it. This is necessary wherever any of the parties desire it, and if it be not done on his request, the deed is void as to him. If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited; unless it be agreed by collusion, that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party. 2 Rep. 3. 9: 11 Rep. 27.

6. It is requisite that the party or parties whose deed it is, should seal, and now in most cases should sign it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient, thenticate a deed; and hence the common We read of it among the Jews and Persians form of attesting deeds, "sealed and deliverin the earliest and most sacred records of his ed," notwithstanding the stat. 29 Car. 2. c. 3. tory. But in the times of our Saxon ances-before mentioned, revives the Saxon custom, tors, they were not much in use in England. and expressly directs the signing, in all grants The method of the Saxons was for such as of lands, and many other species of deeds: in could write to subscribe their names, and, which therefore signing seems to be now as whether they could write or not, to affix the necessary as scaling, though it hath been

51. At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English methods of writing their names, and signing with the sign of the cross. Ingulph. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals. Stat. Exon. 14 Ed. 1. Coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard I., who brought them from the Croisade in the Holy Land.

The signing is of great use, for the subscribing witnesses to the deed may be dead; when proving their death, and the handwriting of the party executing the deed, will be sufficient to establish the same. If a writing is not sealed, it cannot be a deed. 3 Inst. 169: 5 Rep. 23. See farther, 2 Rep. 3: 2 Rol. Abr. 28: 12 Rep. 90: Hob. 96.

An award, though under seal, is not a deed, unless the arbitrator delivers it as such, and therefore if only delivered as an award it does not require a deed stamp. 4 East, 584.

If two make a deed, and one of them seals it at one time, and the other at another time; this is as good as if they sealed it together.

If A. executes a deed for himself and his partner, by the authority of his partner, and in his presence, it is a good execution though only sealed once. 1 Term. Rep. 313.

A person executing a deed for his princi-pal under a power of attorney, should sign in the name of the principal. 6 Term Rep. 176. See 2 East Rep. 142. Ry. & Moo.

The neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and hence the common sometimes held that the one includes the other. | as a deed may be delivered by words without 3 Lev. 1: Stra. 764.

By stat. 54 G. 3. c. 168. to amend the laws respecting the attestation of instruments of appointment and revocation made in exercise of certain powers in deeds or wills, after reciting that powers, authorities, and trusts are in many cases required to be executed by deeds signed by or under the hands of the persons executing or consenting thereto, and it has been the ordinary practice in the memorandum of attestation of deeds to express the facts of sealing and delivering only, and that the omission of the word signed in such attestation might affect titles under such deeds, although actually signed by the parties; it is enacted, that any deed or instrument then already made with intent to execute any power, &c., shall if duly signed, &c. be from the date thereof of the like validity as if a memorandum of signature had been subjoined by the attesting witnesses.

Since the passing of this act the practice has been, in cases not only of deeds for execution of powers, but generally of other deeds, to assert in the memorandum of the attestation the words "signed, sealed, and delivered," and this is the safest and properest way.

7. A seventh requisite to a good deed is, that it be delivered by the party himself or his certain attorney: which therefore is also expressed in the attestation, "sealed and delivered." A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time. of it. See Styles v. Wardle, 4 Barn. & Cres. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing; Perk. § 130; and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some condition be performed on the part of the grantee; in which last case it is not delivered as a deed, but as an escrow: that is, as a scrowl or writing, which is not to take effect as a deed, till the condition be performed, and then it is a deed to all intents and purposes. Co. Lit.

If I have sealed my deed, and after I deliver it to him to whom it is made, or to some other by his appointment, and say nothing, this is a good delivery.

So if I take the deed in my hand, and use these, or the like words, here take him; or, this will serve; or, I deliver this as my deed; or, I deliver him you; these are deliveries.

So if I make a deed of land to another, and being upon the land, I deliver the deed to him in the name of seisin of the land; this is a good delivery.

So if the deed be sealed, or lying in a win-

dow, or on a table, and I use these, or the like is a good delivery, and perfects the deed; for, out saying any thing at the time of its execu-

acts, so may it also be delivered by acts without words. 9 Co. 137: Dyer, 167. 192: Co. Lit. 36. 49: 35 Ass. pl. 6. Contra, if the party to whom made takes it without any act done purporting to be a delivery. But where parties have come for the purpose, and done every thing but delivery, it has been adjudged a good delivery. Cro. Eliz. 7: 1 Leon. 140.

Regularly there may not be two deliveries of a deed; for where the first doth take effect, the second is void; unless it be where the deed is delivered to a stranger as an escrow; or, when a deed, good at first, becomes void afterwards; or, a feme covert seals a deed, and after being sole, delivers it again, &c. Perk. sect. 154: Co. Lit. 48: 5 Rep. 119.

The stat. 26 G. 3. c. 60. § 17. avoids a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry. Where parties by mistake misrecited in a bill of sale the certificate of registry, by stating Guernsey as the port which the certificate was granted instead of Weymouth, which mistake was rectified when discovered, by the consent of all parties, and the deed dedelivered de novo, the Court of K. B. held that no new stamp was necessary on such re-delivery or re-execution: the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been. v. Parkin, 12 East's Rep. 471. See 6 G. 4. c. 110. the present Registry Act.

The delivery of a deed may be alleged at any rate after the date; but not before. Dyer, See Styles v. Wardle, 4 Barn. & Cres. A deed may be good without all the orderly and formal parts: but without delivery it is no deed. 1 Inst. 35 1 2 Rep. 5.

Where a party to an instrument seals it and declares in the presence of a witness that he "delivers it as his deed," but keeps it in his own possession (and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except his keeping the deed in his hands,) it is a valid and effectual deed: and delivering to the party who is to take by the deed, or to any person for his use, is not essential. Delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed. renders the deed effectual from the time of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made. Doe, d. Garnons v. Knight, 5 B. & C. 671.

Previous to the execution of a deed of composition for debts to creditors, it was agreed in the presence of the surety for the payment of such composition, that it should be void unless all the creditors executed: the sureties then words, There he is, take it as my deed: this executed the deed in the usual manner withtors in order that he might get it executed by the rest; held that this was a delivery of the deed as an escrow; and as all the creditors had not executed, the surety was not bound thereby, Johnson v. Baker, 4 B. & A. 440.

Deed of trust for the benefit of creditors was declared valid where it was proved that when executed a blank was left for a sum due, which was filled up next day in presence of the party: on the ground that if the execution of the deed in the imperfect state were nugatory, the presumption was justified that it was delivered when the blank was filled; or that it was originally delivered to have operation from the time when it should be filled. Hudson v. Revett, 5 Bingh. 268. (See Bull.

N. P. 267. contra.

8. The last requisite to the validity of the deed is, the attestation, or execution of it in the presence of witnesses: this however, is necessary, rather for preserving the evidence than for constituting the essence of the deed. And as to such attestation so far as relates to eigning and sealing, see ante, II. 6. Our modern deeds are in reality nothing more than improvement or amplification of the brevia testata mentioned by the feodal writers (Feud. l. 1. t. 4.); which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power), but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum, " hiis testibus," &c. This, like all other solemn transactions, was originally done only coram paribus, (Feud. t. 2. t. 32.), and frequently when assembled in the court-baron, hundred, or county-court, which was then expressed in the attestation, teste comitatu, hundredo, &c. Spelm. Gloss. 228: Madox Formul. N. 221. 322. 660. Afterwards the attestation of other witnesses was allowed, the trial in case of a dispute being still reserved to the pares; with whom the witnesses (if more than one) were associated and joined in the verdict; (Co. Lit. 6.) till that also was abrogated by the stat. of York, 12 Ed. 2. st. 1. c. 2. And in this manner, with some such clause of hiis testibus, and to give the witnesses notice of it (this is are all old deeds and charters, particularly Magna Charta, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner. 2 it be in any place material, as in the name of Inst. 77. But in the king's common charters, writs, or letters patent the style is now altered: estate, or the like, and it cannot be proved to for at present the king is his own witness, and attests his letters-patent thus, "witness ourself at Westminster, &c.," a form which was introduced by Richard I., but was commonly used till about the beginning of the fifteenth where an estate cannot have its essence century; nor the clause of his testibus entire- without a deed, there, if the deed is rased in

tion: it was then delivered to one of the credi- | ly discontinued till the reign of Henry VIII.. which was also the æra of discontinuing it, in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attes. tation, either at the bottom, or on the back of the deed. 2 Inst. 78.

> III. How a Deed may be avoided.-From what has been before laid down, it will follow that if a deed wants any of the essential requisites before-mentioned; either, 1. Proper parties, and a proper subject matter.-2. A good and sufficient consideration .- 3. Writing on paper, or parchment, duly stamped.—4. Sufficient and legal words, properly disposed. -5. Reading if desired before the execution. -6. Sealing; and, by the statute in most cases signing also;—or 7. Delivery, it is a void deed ab. initio. It may also be avoided by matter ex post facto, as 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of execution and attestation. 11. Rep. 27: 4 B. & A. 674 .- 2. By breaking off, or defacing the seal. 5 Rep. 23: 1 Barn. & Cres. 682.—3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of a lattice work or cancelli; though the phrase is now used figuratively for any manner of obliteration or defacing it.- 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand; as a husband where a feme covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. -5. By the judgment or decree of a court of judicature. This was anciently the province of the court of Star-chamber, and now of the Chancery: when it appears that the deed was obtained by fraud, force, or other foul practice: or is proved to be an absolute forgery. Toth. 24: 1 Ventr. 348. In any of these cases the deed may be avoided, either in part or totally, according as the cause of avoidance is more or less extensive.

> More particularly.-If there be any alteration, rasure, or interlining made in any part of the deed before the delivery of it, this will

not hurt the deed.

But in such cases it is policy to make a memorandum of it upon the back of the deed, now usually done in the attestation of the deed thus: Sealed and delivered, the wordbeing first interlined, &c.) For otherwise, if

any material part, after the delivery, it makes I ficient as the original deed, by stat. 10 Anne, the estate void: but if the estate may have essence without a deed, then, notwithstanding it is created by deed, and that deed is rased, it shall not destroy the estate, but the deed. 1 Nels. Abr. 625.

When a chose in action is created by deed, the destruction of such deed is the destruction of the duty itself; as in case of a bond, bill, &c., though it is not so, where an estate or interest is created by a deed. 3 Salk. 120.

If a deed be suppressed, on proof made that it came to the party's hands, and of its contents, the person injured will have the same benefit to hold the estate, as if the deed could be produced. 2 Vern. 280. A person committed for burning a deed. See 2 Vern. 561: Abr. Cas. Ep. 169. An indorsement on a deed, at the time of the sealing and delivery, is a part of the same; but if an indorsement omit to make the actual involment of it until be after the delivery it is a new deed. Mod. Cas. 237.

Deeds, if fraudulently made, when got by corrupt agreement, as on usurious contract; and when made by force or duress, &c. are void: so they are for uncertainty, and by reason of infancy, coverture, or other disability

253: 11 Rep. 27.

Although a deed may be avoided on the ground of fraud, yet the objection must come from a person neither party nor privy to it. Where the plaintiff by the production of a deed established a prima facie title, the court would not allow the defendant to go into proof those titles, and also particularly tit. Conveyto invalidate his own deed by his own fraud, ance, and 2 Comm. 295, 310. viz. that it was executed for the fraudulent purpose of giving the plaintiff a colourable qualification to kill game, and to get rid of a pending information. 2 B. & A. 367.

part; or good against one person, and void as cording to the intention of the parties, and not to another: if all the parts of a deed may by otherwise; and the intent of the parties shall law stand together, no one part shall make the whole void. 4 M. & S. 71: 1 B. & P. 42. law. 4. That they are to be consonant to the And if a deed by any construction of law be construed to have legal operation, the law will not make it utterly void, though it may not operate according to the purport of the deed: grantee. They are to be expounded upon also the law will transpose and marshal clauses the whole according to the purport of the deed: grantee. They are to be expounded upon also the law will transpose and marshal clauses the whole according to the purport of the deed: grantee. They are to be expounded upon also the law will transpose and marshal clauses in deeds, to come at their true meaning; but the first, such second part shall be void; but not to confound them. Where the words of if the latter part expounds or explains the a deed may have a double intendment, one former, which it may do, both of them shall standing with law, and the other contrary to stand. Plowd. 160: Raym. 142: 6 Rep. 36: it, the intendment that standeth with law shall 1 Inst. 313:1 Rol. Rep. 375. be taken. 1 Lil. Abr. 421: 1 Inst. 42. 217: 1 Shep. Abr. 540.

the plaintiff is entitled to have it produced, land shall pass by the deed. 5 Taumt. 207. and no lien can protect the defendant from having it produced. 1 Turn. (Ch.) 92.

IV. Of the inrolling, exposition, and plead- against what is contained in the deed. ing of Deeds.—Deeds of bargain and sale are Inst. 45. And where a deed is by indenture to be inrolled, by stat. 27 H. S. c. 16. A copy between parties, none can have an action of a bargain and sale inrolled, shall be as suf- upon that deed but he who is a party to it;

c. 18. § 3. But estates in fee are now generally granted and conveyed by indentures of lease and release. All deeds are to be registered in the counties of York and Middlesex. Stat. 2 and 3 Anne, c. 4: 5 Anne, c. 18: 6 Anne, c. 35: 7 Anne, c. 20: 8 G. 2. c. 6; 25 G. 2. c. 4. A bill is now pending in parliament for a general registration, 1833. See farther, tits. Bargain and Sale, Conveyance, Inrolment. &c.

Although a deed of bargain and sale is not of itself a record, yet the inrolment or certificate of its having been inrolled under the statute is; and the date of the record is itself conclusive of the fact, and the day of it being carried into the office is to be deemed the act of inrolment, though the office clerk may, on account of its not being lodged until office hours,

a future day. 3 Price, 495.

It may here be cursorily observed, that of conveyances by the common law, some may be called original or primary conveyances; which are such by means whereof the benefit or estate is created, or first arises: others are derivative or secondary; whereby the benefit in the makers, &c. 2 Rol. Abr. 28: 1 Inst. or estate, originally created, is enlarged, restrained, transferred, or extinguished.

Original conveyances are,-1. Feoffment; -2. Gift; -3. Grant; -4. Lease; -5. Exchange; -6. Partition; -Derivative, are, -7. Release; -8. Confirmation; -9. Surrender; -10. Assignment;-11. Defeasance;-See

There are four grounds for the exposition of deeds. 1. That they may be beneficial to the taker. 2. That where the words may be employed to some intent, they shall never be A deed may be good in part, and void in void. 3. That the words be construed ac-

If a deed correctly describe land by its quantities and occupiers, though it describe it Where a deed is sought to lie impeached as being in a parish in which it is not, the

The first deed of a person and last will stand in force. In deeds indented, all parties are estopped, or concluded, to say any thing

Vol. I.—67

but where it is a deed poll, one may covenant | 23. the stealing any paper or parchment being with another who is not a party to it, to do certain acts for the non-performance whereof he may bring an action. 2 Lev. 74. See Chitty on Pleading, vol. 1.

Where an interest is the same as that secured by a deed, assumpsit will not lie, but the remedy is upon the deed; 1 Maule & Selw. Rep. 573; by action of covenant or

debt.

Where a man justifies title under a deed, he is to produce the deed: if a deed is alleged in pleading, it must be shown to the court that the court may judge of the validity of it, and whether there are sufficient words to make a good contract; and when it is shown to the court, the deed shall remain in court all the term, in the hands of the custos brevium; but at the end of the term, it shall be delivered to the party. If the deed is denied it must remain in court till the plea is determined. 10 Rep. 88: Wood 235. A deed set forth with a profert in curia, remains in court in judgment of law all that term, and any person may, during that term, have benefit by it, though he hath it not ready to show : the adverse party may take any advantage by the any open or inclosed land, for the destruction deed that it will afford him. 5 Rep. 74: 1 Nels. 625.

if it is lost by time or accident, and this may be pleaded as an excuse for a profert. Reed forest, chase, or purlieu, or in any enclosed

v. Brookman, 3 Term R. 151.

ter-party were supposed to have been inter- and liable to be punished as in the case of changeably executed, and the part, of which simple larceny; and if any person shall unthe master of the chartered vessel had the lawfully and wilfully course, hunt, kill or custody, was lost at sea with the ship, the wound, any deer, in the uninclosed part of Court of C. P. would not compel the charterer, any forest, chase, or purlieu, he shall forfeit being sued thereon, to grant inspection, and and pay such sum, not exceeding fifty pounds, a copy of the other part, for the purpose of as to the justice shall seem meet; and if any the plaintiff's declaring with certainty, person shall offend a second time by commit-Street v. Brown, 6 Taunton, 302. ting any of the offences hereinbefore last enu-Street v. Brown, 6 Taunton, 302.

signed by the parties, but written at the same the same description as the first offence or not, time with the sealing and delivery, is part of shall be deemed felony, and such offender

the deed. 1 Stark. 162.

Deeds are not now actually brought into court, but generally remain in the hands of solidation of the 1st section of the stat. 42 the party's attorney, who gives over and copy of them to the attorney of the other party, if demanded. See tit. Oyer.

As to fraudulent deeds, alienation, and con-

veyance, see tit. Fraud, II.

As to forgery of deeds, see tit. Forgery.

DEEDS, stealing of. At common law, bonds, bills, and notes, which concern mere choses in action, were held not to be such goods whereof larceny might be committed: but by stat. 7 and 8 G. 4. c. 29. § 5. stealing any deed, bond, bill, &c. or other security, for money or as relates to trespassers in the king's forest of payment of money, of this kingdom, or any vert and venison, are repealed. By the foreign state, is felony of the same nature and same stat. the stats. 16 G. 3. c. 30; 42 G. degree, and punishable in the same manner, 3. c. 107; and 51 G. 3. c. 120. are wholly reas the stealing any other chattel of like value, pealed. with the money due on such security. By &

evidence of the title to any real estate, is a misdemeanor punishable by transportation for seven years, or fine and imprisonment. (See § 21, 22, of the Act.) See tits. Felony, Robbery.

DEEMSTERS, from the Sax. dema, a judge or umpire.] Are a kind of judges in the Isle of Man, who, without process, or any charge to the parties, decide all controversies in that island; and they are chosen from among themselves. Cam. Brit.

DEFR FALD. A park, or deer fold; Sax.

deer, fera, and fald, stabulum. Cowel.

DEER HAYES, are engines or great nets made of cords to catch deer; and no person not having a park, &c. shall keep any of these nets, under the penalty of 40s. a month. Stat. 19 H. 7. c. 11. See tit. Game.

DEER-STEALERS. Much of the law relating to these offenders is implicated in the general rules relative to hunting in forests, &c., for which see this Dict. tit. Game, more at large.

For the provisions of stat. 9 G. 4. c. 69. for preventing persons going armed by night in

of game, see this Dict. tit. Game.

By the stat. 7 and 8 G. 4. c. 29. § 26. if any A deed may be pleaded without a profert person shall unlawfully course, hunt, kill, or wound any deer, in the enclosed part of any land wherein deer shall be usually kept, Where two parts of an indenture of char- every such offender shall be guilty of felony, An indorsement on a deed after it has been merated, such second offence, whether it be of shall be liable to be punished as in the case of simple larceny. This is very nearly a con-G. 3. c. 107. and of section 2. of the same stat. as altered by the stat. 51 G. 3. c. 120. (2 Russell on Cri. 1187.) and the 4th section of the stat. 42 G. 3. c. 107.

By the stat. 7 and 8 G. 4. c. 27. so much of the carta de foresta as relates to the taking of the king's venison, and so much of the stat. 3 Ed. 1. as relates to trespassers in parks and ponds (namely, c. 20.), and a stat. made in the 21 Ed. 1. st. 2. intituled de malefactoribus in parcis, and so much of the stat. 1 Ed. 3. st. 1.

By § 29. of the same stat. if any person

shall enter into any forest, chase, or purlieu, | whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, or carry away any deer, it shall be lawful for any person entrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun or engine in his possession, and any dog there brought; and in case such offender shall not immediately deliver up the same, to seize and take the same from him, in any of those respective places, or upon pursuit made in any other place to which he may have escaped therefrom, for the use of the owner of the deer.

By the same section, if any such offender shall unlawfully beat or wound any person entrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, he shall be guilty of felony, and shall be liable to be punished as in the case of simple larceny. This and the preceding are substantially a re-enactment of the 9th section of the stat. 16 G. 3. c. 30. However, that stat. empowered the keepers to seize the guns, &c. but did not in terms make previous demand necessary, and it was objected (Rex v. Amey) that the stat. did not extend to assistant keepers. By the stat 7 and 8 G. 4. c. 27. the stat. 16 G. 3. c. 30. is

wholly repealed. By the stat. 7 and 8 G. 4 c. 29 § 27. if any deer, or the head, skin, or other part thereof, or any snare or engine, shall, by virtue of a search-warrant, be found in the possession of any person, or on the premises of any person with his knowledge, and such person shall not satisfy the justice that he came lawfully by such deer, or the head, &c., or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall forfeit any sum not exceeding 201.; and if any such person shall not, under the provisions aforesaid, be liable to conviction, tual courts, in which courts it ought to have then, for the discovery of the party who actually killed or stole such deer, it shall be matters spiritual, and determinable in the eclawful for the justice, at his discretion, as the evidence is given, and the circumstances of the case shall require, to summon before him every person through whose hands such deer, or the head, &c. shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall be liable to the payment of such sum of money as is hereinbefore mentioned. This enactment is a substitution for the 4th, 5th, and 6th sections of the 16 G. 3. c. 30. which stat. is wholly repealed. By the stat. 7 and 8 G. 4. c. 27. § 28. it is enacted that if any person shall unlawfully and wilfully set or use taken for non-appearance in court at a day asany snare or engine whatever, for the pur- signed, though it extends to any omission of pose of taking or killing deer, in any part of that which we ought to do. Bract. lib. 5. tract.

part be enclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, every such offender being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money not exceeding 201., as to the justice shall seem meet. This is almost a re-enactment of the 7 and 8 & of 16 G. 3. c. 30. which is wholly repealed by the 7 and 8 G. 4. c. 27.

DE ESSENDO QUIETUM DE TOLO-NIO. A writ that lies for those who are by privilege free from the payment of toll, on their being molested therein. F. N. B. 226.

See tits. Corporation, Toll.

DE EXPENSIS MILITUM. commanding the sheriff to levy the expenses of knights of the shire for attendance in parliament [being 4s. per diem]. There is a like writ de expensis civium et burgensium, to levy the expenses of every citizen and burgess of parliament [2s. per diem]. See stats. 12 Rich. 2. c. 12: 23 H. 6. c. 10: 4 Inst. 46;

and farther, tit. Parliament.
DE FACTO, signifies a thing actually done, that is, done in deed. A king de facto (in fact) is one that is in actual possession of a crown, and hath no lawful right to the same; in which sense it is opposed to a king de jure (of right), who hath right to a crown, but is out of possession. 3 Inst. 7. See tit. King. DEFAMATION, defamatio.] Is when a

person speaks scandalous words of another, as of a magistrate, &c., whereby they are injured in their reputation; for which the party offending shall be punished according to the nature and quality of his offence; sometimes by action on the case at common law, sometimes by statute, and sometimes by the ecclesiastical laws.

Defamation is also punishable by the spirithree incidents, viz. First, It is to concern clesiastical courts, as for calling a man heretic, schismatic, adulterer, fornicator, &c. Secondly, That it be a matter spiritual only; for if the defamation concern any thing determinable at the common law, the ecclesiastical judges shall not have conusance thereof.

And, thirdly, Although such defamation be merely spiritual, yet he that is defamed cannot sue for damages in the ecclesiastical courts; but the suit ought to be only for punishment of the fault, by way of penance. Terms de la Ley. See tits. Action, II., Courts-Ecclesiastical, Prohibition, for the law as to slander.

DEFAULT, Fr. defaut.] Is commonly any forest, chase, or purlieu, whether such 3: Co. Lit. 259. If a plaintiff makes default suited; and where a defendant makes default, | capias or exigent the sheriff returns cepi corjudgment shall be had against him by default.

See tits. Judgment, Nonsuit.

Tenant in tail, tenant in dower, by the curtesy or for life, losing their lands by default, in a præcipe quod reddat, brought against them, they are to have remedy by the writ quod ei deforciat, &c. Stat. Westm. 2. c. 4. And in a quod ei deforciat, where the tenant joined issue upon the mere right, and the jury appearing, the defendant made default; it was adjudged that in such case final judgment shall be given; but if the tenant had made default it would be otherwise, for then a petit cape must issue against him, because it may so happen that he may save his default. I Nels. Abr. 627.

By default of a defendant, he is said to be generally out of court to all purposes, but only that judgment may be given against him; and no judgment can be afterwards given for the

defendant. Ibid. 628.

When two are to recover a personal thing, the default of one is the default of the other; contra, where they are to discharge themselves of a personalty; where the default of the one is not the default of the other. 6 Rep. 25: 1 Lil. Abr. 425. In an action against two, if the process be determined against one, and the other appears, he shall be put to answer, notwithstanding the default of his companion. 3 Danv. Abr. 480. Where the baron is to have a corporal punishment for a default, there the default of the wife shall not be the default of the husband; but otherwise it is where the husband is not to have any corporal punishment by the default. Ibid. 472. 474.

Judgment by default is either by non sum informatus, where the defendant's attorney, having appeared, says he is not informed of any answer to be given to the action, or by nil dicit, where the defendant himself appears, but says nothing in bar or preclusion thereof; and the latter judgment, which is the more usual, is either for want of any plea at all, or for want of an issuable plea, after an order for time on the terms of pleading issuably, or when the defendant pleads a plea not adapted | Comm. 327. 342. See 1 Inst. 236, 7: 2 Sand. to the action, or which may be considered as a nullity, or is false and vexatious, or not pleaded in proper time or manner. See Tidd's case of a bond, &c.) be indorsed on the back Prac. 563. (9th ed.)

Suffering judgment to go by default, is an admission of the contract declared on. Stra. 612. After the inquest is taken by default, the defendant can make no suggestion on the roll. Stra. 46. See tits. Amendment, Trial.

DEFAULT IN CRIMINAL CASES. An offender indicted appears at the capias, and pleads to material part thereof; or, in case of indorse-issue, and is let to bail to attend his trial, and ment, refer thereto. 3. It is to be made bethen makes default; here the inquest, in case of felony, shall never be taken by default, but the first deed. 4. It must be made at the a capias shall issue, and if the party is not time, or after the first deed, and not before taken, an exigent; and if he appear on that 5. It ought to be made of a thing defeasible. writ, and then make default, an exigi facias 1 Inst. 236: 3 Lev. 234.

in appearance in a trial at law, he will be non- | de novo may be granted; but where upon the pus, and at the day hath not his body, the sheriff shall be punished, but no new exigent awarded, because in custody of record. 2 Hale's Hist. P. C. 202.

DEFAULT OF JURORS. See tit. Jury.

DEFEASANCE, from the Fr. defaire, to defeat or undo.] Is of two sorts:- I. A collateral deed made at the same time with a feoffment or other conveyance, containing certam conditions, upon the performance of which the estate then created may be defeated or to-In this manner mortgages tally undone. were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as a part of it by the ancient law, and therefore only indulged; no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though when uses were afterwards introduced, a revocation of such uses was permitted by courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents of which no seisin could be had till time of payment, annuities, conditions, warranties, and the like), were always liable to be recalled by defeasances made subsequent to the time of their creation. 2. A defeasance on a bond, recognisance, or judgment recovered, or warrant of attorney, is a condition which, when performed, defeats that in the same manner as the foregoing defeasance of an estate. It differs only from the common condition of a bond in that the one is always inserted in the deed or bond itself, the other is made between the same parties generally by a separate, and frequently by a subsequent, deed. The defeasance to a warrant of attorney is indorsed on it. This, like the condition of a bond when performed, discharges and disincumbers the estate of the obligor. 2

To make a good defeasance it must be, 1. By deed (in the case of indorsement by a deedpoll); for there cannot be a defeasance of a deed without deed; and a writing under hand doth not imply it to be a deed. 2. It must recite the deed it relates to, or at least the most tween the same persons that were parties to

Inheritances executed by livery, such as ficient plea was pleaded, the plaintiff should estates in fee or for life, cannot be subject to recover judgment. Co. Lit. 127. And theredefeasance afterwards, but at the time of fore the book entitled Novæ Narrationes, or making the feoffment, &c., only; but executory the New Tales [ed. 1534.], at the end of alinheritances, such as leases for years, rents, most every count, narratio, or tale, subjoins annuities, conditions, covenants, &c., may be such defence as is proper for the defendant to defeated by defeasance made after the things make. For a general defence or denial was granted. And it is the same of obligations, not prudent in every situation, since thereby recognisances, statutes, judgments, &c. which the propriety of the writ, the competency of are most commonly the subject of defeasance, the plaintiff, and the cognisance of the court, and usually made after the deed whereto they were allowed. By defending the force and have relation. Ploud. 137: 1 Rep. 113.

tits. Conveyance, Deed, Mortgage, Pleading.

which is now its popular signification; but law, if insisted on. 3 Comm. 296-8. merely an opposing or denial [from the French neral assertion that the plaintiff hath no ground a defence is never made. 3 Lev. 182. of action, which assertion is afterwards extended and maintained in the defendant's considered in no other light than as one of plea. For it would be ridiculous to suppose those verbal subtleties by which the science that the defendant comes and defends (or, in of pleading was in many instances anciently the vulgar acceptation, justifies) the force and injury in one line, and pleads that he is not in what solid view much consideration could guilty of the trespass complained of in the be attached to the use of these technical words. next; and therefore in actions of dower, where the demandant does not count of any injury done, but merely demands her endowment (Rastal. Entr. 234.), and in assises of land, where also there is no injury alleged, but merely a question of right stated for the determination of the recognitors or jury the tenant makes no such desence. Booth on Real quisite in a plea. See Pleading, I.1. Actions, 118. In writs of entry, where no injury is stated in the count, but merely the and statutes, signifies to forbid; and there is a right of the demandant and the defective title statute entitled, Statutum de defensione pur-of the tenant, the tenant comes and defends, tandi arma, &c. 7 Ed. 1. In French the verb or denies his right, jus suum, that is (as it defendre is to forbid. In divers parts of Engseems, though with a small grammatical in- land we commonly say God defend, instead accuracy), the right of the demandant, the of God forbid. Blount. In the commenceonly one expressly mentioned in the pleadings; ment of a plea it signifies deny. See tit. Deor else denies his own right to be such as is fence. suggested by the count of the demandant. And in writs of right the tenant always comes sued in a personal action; as tenant is he that and defends the right of the demandant and is sued in an action real. his seisin jus prædicti S. et seisinam ipsius (Co. Entr. 182.), or else the seisin of his ancestor, upon which he counts, as the case may be, and the demandant may reply that the tenant unjustly defends [i. e. denies] his the demandant's right, and the seisin on which he in grants and donations; and hath this force, counts. Nov. Narr, 230. ed. 1534. All which that it binds the donor and his heirs to defend is extremely clear if we understand by de- the donee, if any one go about to lay any infence an opposition or denial, but it is other- cumbrance on the thing given, other than wise inexplicably difficult. The true reason what is contained in the deed of donation. of this, says Booth, unaccountably, I could ne- Bract. lib. 2. c. 16. See tit. Warranty. ver yet find. Booth on Real Actions, 94. 112.

rious with respect to the nature of the desence, ed guilty of selony, see at large under tit. Hoso that if no desence was made, though a suf- micide.

injury, the defendant waived all pleas of mis-Where a proviso goes by way of defeasance nomer; by defending the damages, all excepof a covenant, it must be pleaded on the other tions to the person of the plaintiff; and by deside; otherwise where by way of restriction fending either one or the other when and of the covenant. 2 Salk. 574. See farther, where it should behove him, he acknowledged the jurisdiction of the court. But of late years DEFENCE, in its true legal sense, signi- these niceties have been very deservedly disfies, not a justification, protection, or guard, countenanced, though they still seem to be

DEF

The maxim that a defendant cannot plead defendre] by the defendant of the truth or va- any plea before he hath made a defence, must lidity of the plaintiff's complaint. It is a ge- not be intended absolutely, for in a scire facias

> This formula of defence can perhaps be disgraced. It is, at least, difficult to discover Yet they have been formerly held to be essential, are still constantly used, and cannot in general with safety be omitted. Stephen on Pleading, p. 434.

> See farther, tits. Pleading, Abatement, &c. Real actions, as already stated, are now abolished, and a formal defence is no longer re-

DEFENDANT, defendens.] The party

This appellation is also used to designate the person indicted or otherwise proceeded against, for any crime not amounting to felonv.

DEFENDEMUS. An ordinary word used

DEFENDENDO. In what cases a party kill-The courts were formerly very nice and cu- ing another se defendendo shall not be deemfensor.] A peculiar title belonging to the of any lands or tenement to which another King of England, as Catholic to the King of person hath a right. Co. Lit. 277. So that Spain, and Most Christian to the King of this includes as well an abatement, an intru-France, &c. These titles were given by the sion, a disseisin, or a discontinuance, as any Popes of Rome; and that of Defensor Fidei other species of wrong whatsoever, whereby was first conferred by Pope Leo the Tenth on King Henry the Eighth, for writing against of possession. But, as contradistinguished Martin Luther, and the bull for it bears date from these, it is only such a detainer of the Octob. 1521. Lord Herbert's Hist. Hen. VIII. freehold, from him that hath the right of pro-105. The Pope, on King Henry's suppressing the houses of religion at the time of the Reformation, futilely sentenced him to be deprived of this title, and deposed from his crown. In the thirty-fifth year of his reign this title, &c., was acknowledged by parliament, and hath continued to be used by all succeeding kings to this day. Lex Constitutor devisee; nor is it intrusion, for it vests not tionis, 47, 48.

DEFENDERE SE per Corpus suum. To offer duel or combat as a legal trial and appeal. Bract. lib. 3. c. 26. See tit. Battel. But wager of battle is now abolished by stat.

56 Geo. 3.

DEFENDERE UNICA MANU. Words signifying to wage law, and a denial of the accusation upon oath. See Manus, Wager of Law.

DEFENSA. A park or place fenced in for deer, and defended as a property for that use and service. H. Knighton, sub. ann. 1352.

DEFENSIVA. A lord or earl of the marches, who were the wardens or defenders

of their country. Cowel.

DEFENSO. That part of any open field or place that was allotted for corn and hay, and upon which there was no common or feeding, was anciently said to be in defenso: so of any meadow ground that was laid in for hay only. It was likewise the same of a wood, where part was inclosed and fenced up, to secure the growth of the underwood from the injury of cattle. Mon. Angl. tom. 3. p. 306. Cowel.

DEFENSUM. An inclosure of land, any fenced ground. Mon. Angl. tom. 2. p. 114.

species of injury by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful. 3 Comm. 172.

For that at first the withholding was with force and violence, it was called a deforcement of the lands or tenements: but now it is generally extended to all kind of wrongful withholding of lands or tenements from the right owner .- There is a writ called a quod ei deforciat, which lieth where tenant in tail, or tenant for life, loseth by default; by the stat. Westm. 2. c. 4. he shall have a quod ei deforciat against the recoverer; and yet he cometh in by course of law. 1 Inst. 331. b. See tit. Quod ei deforciat-and as to entries with actual force, tit. Forcible Entry.

DEFENDER OF THE FAITH, fidei de- nomen generalissimum, signifying the holding he that hath right to the freehold is kept out perty, but never had any possession under that right, as falls not within any of those terms. As in case where a lord has a seignory, and lands escheat to him propter defectum sanguinis, but the seisin of the lands is with-held from him; here the injury is not abatement, for the right vests not in the lord as heir in him who hath the remainder or reversion; nor is it disseisin, for the lord was never seised; nor does it at all bear the nature of any species of discontinuance; but being neither of these four, it is therefore a deforcement. F. N. B. 143. If a man marries a woman, and during the coverture is seised of lands, and aliens, and dies; is disseised, and dies; or dies in possession: and the alienee, disseisor, or heir, enters on the tenements, and doth not assign the widow her dower; this is also a deforcement to the widow, by withholding lands to which she hath a right. F. N. B. 147. In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time or death of the cestuy que vie; and the lessee or any stranger, who was at the expiration of the term in possession, holds over, and refuses to deliver the possession to him in remainder, or reversion, this is likewise a deforcement. Finch, L. 263: F. N. B. 201. 5, 6, 7.

Deforcements may also arise upon the breach of condition in law; as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the lands: this is such a fraud on the man's part, DEFORCEMENT, deforciamentum.] A that the law will not allow it to divest the woman's right of possession, though his entry being lawful, it does devest the actual possession, and thereby becomes a deforcement. F. N. B. 205.

Deforcements may also be grounded on the disability of the party deforced: as if an infant do make an alienation of his lands, and the alienee enters and keeps possession; now, as the alienation is voidable, this possession is against the infant (or, in case of his decease, as against his heir) is after avoidance wrongful, and therefore a deforcement. Finch, L. 264: F. N. B. 219. The same happens, when one of non-sane memory aliens his lands or tenements, and the alience enters and takes possession, this may also be a deforcement. Finch, L. 264: F. N. B. 202.

Another species of deforcement is, where Deforcement in its most extensive sense is two persons have the same title to land, and one of them enters and keeps possession | degrading by act of parliament; for by stat. against the other, as where the ancestor dies seised of an estate in fee-simple, which descends to two sisters as co-parceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety; this is also a Deforcement. Finch, L. 293, 4: F. N. B. 197.

Deforcement may also be grounded on the non-performance of a covenant real; as if a man seised of lands, covenants to convey them to another, and neglects or refuses so to do, but continues possession against him; this possession being wrongful, is a deforcement. F. N. B. 146. In levying a fine of lands, the person, against whom the fictitious action is brought, upon a supposed breach of covenant, is called deforciant. And, lastly, by way of analogy, keeping a man by any means out of a freehold office is construed to be a deforcement; though, being an incorporeal hereditament, the deforciant has no corporcal possession. So that whatever injurious withholding the possession of a freehold is not included under abatement, intrusion, disseisin, or discontinuance (see those tits.), is comprised under Deforcement. 3 Comm. 172. 4. See Discontinuance.

DEFORCEOR, deforciator, from the Fr. forceur, expugnator; or Deforciant.] One that overcometh, and casteth out by force. Britton, cap. 53: Old Nat. Brev. fol. 118: Bract. Lib. 4. cap. 1: Stat. 23. Eliz. c. 3. See tit. Deforcement.

DEFORCIATO, is used for a distress, or holding of goods for satisfaction of a debt.

Paroch. Antiq. 239.

DEGRADATION, degradatio.] An ecclesiastical censure, whereby a clergyman is divested of his holy orders. There are two sorts of degrading by the canon law; one summary, by word only; the other solemn, by stripping the party degraded of those ornaments and rights which are the ensigns of his order or degree. Selden's Titles of Hon. 787.

Degradation is otherwise called deposition; and in former times the degrading of a clerk was no more than a displacing or suspension from his office: but the canonists have since distinguished between a deposition and a degradation; the one being now used as a greater punishment than the other, because the bishop takes from the criminal all the badges of his order, and afterwards delivers him to the secular judge, where he cannot purge himself of the offence whereof he is convicted, &c.

There is likewise a degradation of a lord or a knight, &c. at common law; when they are attainted of treason; as in Hil. 18 Ed. 2. Andrew Harcla, Earl of Carlisle, who was also a knight, was degraded, and when judgment of treason was pronounced against him, his sword was broken over his head, and his

13 Car. 2. c. 16. William Lord Monson, Sir Henry Midmay, and others, were degraded trom all titles of honour, dignities, and preeminences, and none of them to bear or use the title of lord, knight, esquire, or gentleman, or any coat of arms, for ever after. See tit. Peers.

DEHORS, Fr. without.] A word used in ancient pleading, when a thing is without the land, &c., or out of the point in question.

Vide Hors de son fee.

DE INJURIA SUA PROPRIA, absque tali causa, are words used in replications, in actions of trespass. 1 Lil. Abr. 427. When one justifies by command or authority derived from another, or if a defendant justifies by authority at common law, as a constable by arrest for breach of the peace; or if he justifiles by act of parliament, &c. the plaintiff may reply, that he did it of his own wrong, without any such cause as the defendant has alleged. Cro. Eliz. 539: 2 Salk. 628. To an avowry justifying a distress for a poor rate as collected, a plea de injuriá suá propriá was held good by Parke and Patteson, Justices, Lord Tenterden, C. J. dissent. Selby v. Bardons, 3 Barn. & Adol. 2. See this Dict. tits. Trespass, Pleading.

DEI JUDICIUM. The old Saxon trial by ordeal was so called, because they thought it an appeal to God, for the justice of the cause, and verily believed that the decision was according to the will and pleasure of Divine

Providence. See tit. Ordeal.

DEIS, or DAIS, The high table of a monas-

tery. See Dagus.
DELATURA, Saxon.] An accusation; and sometimes hath been taken for the reward of an informer. Leges H. 1. c. 46: Leges

Inæ 20. apud Brompton.

DEL CREDERE. In a confined sense a commission del credere is an undertaking by an insurance broker, for an additional premium, to insure his principal against the contingency of the failure of the under-writer. See Grove & al' v. Dubois, 1 Term. Rep. 112: Bize v. Dickason, Id. 285: Morris v. Cleasby, 4 M. & S. 566.

In a more enlarged sense the nature of a commission del credere, appears from the case of Mackenzie & al' v. Scott, Brown's Parl. Cases, 8 vo. vi. 280. to be as follows:-

Del credere is an Italian mercantile phrase signifying the same as the English term guarantee, or warranty, or the Scotch term warrandice: and when applied to the situation of a factor, is understood in the following sense. A factor who has general orders to dispose of goods for his constituent to the best advantage, is, like all factors, liable only to that degree of diligence which a prudent man uses in his own affairs; and consequently a factor is authorised to dispose of the goods according to the best terms which can be attained; and spurs hewn off his heels, &c. And there is a if it shall appear that he has done so, and that

he has sold his goods to persons in reputed | deed, the other in law: in deed as in a pragood circumstances at the time, and to whom cipe quod reddat there is an express demand. he would have given credit in his own affairs, Every entry on land, distress for rent, taking he will not be liable to his constituent although of goods, &c., which may be done without some of these persons should fail; and for such trouble, the factor is generally paid by a per centage upon the goods sold, and in this case the constituent runs the risk of the credit of the person to whom the goods are so sold. Many merchants do not choose to run this risk, and to trust to the prudence and discretion of the factor; and therefore the agreement called del credere was invented, by which the factor, for an additional premium when he sells goods on credit, becomes bound to war-land and rent, so the bringing an action of rant the solvency of the purchasers; and renders himself liable in all events for the pay-mand in law of the debt. 1 Lill. 432: 1 Nels. ment of the price of the goods sold. In the Abr. Debts, claims, &c. are to be demanded case of Mackenzie v. Scott above quoted, where and made in time by the statute of limitaa factor under a commission of del credere tions, 21 Jac. 1. c. 16. and other statutes; or sold goods and took accepted bills from the they will be lost by law. See tit. Limitation purchasers, endorsed those bills to a banker at of Actions.
the place of sale, and received the banker's; Where there is a duty which the law makes the place of sale, and received the banker's; bill payable to the factor's order on a house in payable on demand, no demand need be made; London, which bill the factor endorsed and but if there is no duty till demand, in such transmitted to his principal, who got the same case there must be a demand, to make the accepted, the acceptor and drawer failing, the duty. 1 Lill. 432: Cro. Eliz. 548. See Carfactor was held answerable for the amount of ter v. Ring, 3 Cump. 459. Upon a penalty the bill. See Bac. Ab. tit. Merchant, Princi- the party need not make a demand, as he must pal and Factor, vol. 5. (7th ed.) and 7 Taunt. in the case of a nomine pana; for if a man be 164. It is now settled that an agent with a del credere commission is only a surety, and not the principal debtor to his employer, and without demand. 1 Mod. 89. If a man leases it must be averred and proved in proceeding land by indenture for years, reserving a rent against the agent that the principal debtor has made default. 4 Maule & S. 566: 6 Taunt. 519: 1 Maule & S. 494: and see Mr. Lloyd's note to Paley on Princ. and Agent, p. 3. (3d. ed.) Consequently the del credere commission being a contract merely between the broker and his principal, does not affect the rights of third parties not privy to the contract. Ibid.; and Bac. Ab. tit. Set-off (ed. by Gwillim & Dodd.)

DELEGATES. Commissioners of appeal appointed by the king under the great seal, in cases of appeals from the Ecclesiastical Court, &c. by stat. 25 H. 8. c. 19. The powers, duties, and functions of the Court of Delegates are now transferred to the privy council by the 2 and 3 W. 4 c. 92. See tit. Court-Eccle-

siastical, 6.

delve.] A quarry or mine where stone or coal, &c. are dug. Stat. 31 Eliz. 17.

DELIVERANCE. When a criminal is brought to trial, and the Clerk in court asks him whether he is Guilty or Not guilty, to ed; and an interest shall not be determined, which he replies Not guilty, and puts himself without an actual demand. Hob. 67. 331: 2 on God and his country, the clerk wishes him Mod. 264. But now by the statutes relative a good deliverance. See Trial.

A calling upon a man for any thing due. See stats. 4 G. 2. c. 28. § 2: 11 G. 2. c. 19: There are two manner of demands, the one in § 16. and this Dict. tits. Ejectment, Lease,

words, is a demand in law. 8 Rep. 153.

It is also said there are three sorts of demands; one in writing without speaking, and that is in every pracipe; one without writing, being a verbal demand of the person, who is to do or perform the thing; and another made without either word or writing, which is a demand in law, in cases of entries on lands, &c. As an entry on land and taking a distress, are a demand in law of the

bound to pay 201. on such a day, and in default thereof to pay 40l., the 40l. must be paid payable at certain days, and the lessee covenants to pay the said rent at the days limited; the lessor is entitled to his rent, without demand, for the lessee is obliged to pay it at the days by force of his covenant. 2 Danv. Abr. 101. But if a lessor makes a lease rendering rent, and the lessee covenant to pay the rent, being lawfully demanded, the lessee is not bound to pay the rent without a demand. Ibid. 102. But if it is provided that the landlord may re-enter, although no demand is made, a demand is not necessary. 2 Barn. & Cres. 492.

A person makes a lease for life, or years, reserving a rent upon condition, that if the lessee doth not pay the rent at the day, that then without any demand it shall be lawful for the lessor to re-enter; by this special DELF. From the Sax. delfam, to dig or agreement of the parties, the lessor may enter on non-payment of the rent without any demand. 2 Danv. Abr. 100. A lease for years, with condition to be void, on non-payment of the rent, is not void unless the rent be demandto rents, an ejectment may be maintained DELIVERY OF DEEDS. See tits. Date, without an actual demand if there is a provisio for re-entry, and half a year's rent in ar-DEMAND, Fr. demande, Lat. postulatum.] rear, and no sufficient distress on the premises. Rent. And this although the provise for re-ing or delivering any letter or writing deentry contains the words " being lawfully de- manding with menaces any such money,

manded." 2 Maule & S. 525.

A demand is to be legal, and made in such manner as the law requires: if it be for rent of a messuage and lands, it ought to be made at the messuage, at the fore dore of the house, the most notorious place: where lands and woods are let together, the rent is to be demanded on the land as the most worthy thing, and on the most public part thereof; if wood only be leased, the demand must be made at the gate of the wood, &c. 1 Inst. 201: Poph. Vide Dyer, 51: 1 Leon. 425: Cro. Eliz.

He that would enter for a condition broken, which tends to the destruction of an estate, must-1. Demand the rent.-2. Upon the land, if there is no house.—3. If there is a house, at the fore door; though it is not mano. 4. If the appointment is at any other still reputed to be, in a manner, in the lord's place.—5. The time of the demand is to be certain, that the tenant may be there, if he will, to pay the rent: and the last time of demand of the rent, must be such a convenient time before the sun-setting of the last day of payment, as the money may be numbered. The lessor or his sufficient attorney is to remain upon the land, the last day on which the rent due ought to be paid, until it be so dark that he cannot see to tell the money: and if the money thus demanded is not paid, this is a denial in law, though there are no words of denial; upon which a re-entry may be made, &c. 1 Inst. 201, 202: 4 Rep. 73. See farther tit. Entry. As to demand of lands, see tit. Fine; and as to a demand and refusal of goods, being evidence of a conversion, see tit. Trover.

As a release of suits is more large than of quarrels or actions; so a release of demands is more large and beneficial than either of them. By a release of all demands, all executions, and all freeholds, and inheritances, executory, are released: by a release of demands to the disseisor, the right of entry in the land, and all that is contained therein, is And he that releaseth all demands, excludes himself from all actions, entries, and seizures: but a release of all demands, is no bar in a writ of error to reverse an outlawry. 8 Co. 153, 154. See tit. Release.

DEMANDANT, petens.] All civil actions are prosecuted either by demands or plaints, and the pursuer is called demandant, in actions real: and plaintiff, in personal actions: in a real action, lands, &c. are demanded. Co. Lit. 127.

DEMAND OF MONEY. Chattel or valuable security with menaces or by force, with intent to steal the same, is felony, and the offender liable to be transported for life, or im-signification, as opposite to frank-free: for prisoned and whipped, by stat. 7 and 8 G. 4.c. example, those lands which were in the pos-29, § 6: and by § 8. persons knowingly send-session of King Edward the Confessor are

chattel, &c. are subjected to the like punish-

DEMEASE. Death. Scotch Dict. See Demise.

DEMEINE, DEMAIN, DEMESNE, Fr. -Lat dominicum, domanium; also written domaine, and signifieth patrimonium domini.] Demains according to common speech are the lord's chief manor-place, with the lands thereto belonging; terræ dominicales, which he and his ancestors have from time to time kept in their own manual occupation, for the maintenance of themselves and their families: and all the parts of a manor, except what is in the hands of free holders, are said to be demains. Copyhold lands have been accounted demains, because they that are the tenants hereof are judged in law to have no other esterial whether any person be in the house or tate but at the will of the lord; so that it is place off the land, the demand must be at that hands: but this word is oftentimes used for a distinction between those lands that the lord of the manor hath in his own hands, or in the hands of his lessee demised as a rack-rent, and such other land appertaining to the manor, which belongeth to free or copyholders. Bract. lib. 4. tract. 3. c. 9: Fleta, lib. 5. cap. 5. As demains are lands in the lord's hands manually occupied, some have thought this word derived from de manu; but it is from the Fr. demaine, which is used for an inheritance, and that comes from dominium, because a man has a more absolute dominion over that which he keeps in his hands, than of that which he lets to his tenants. Blount.

Domanium properly signifies the king's lands in France, appertaining to him in property: and in like manner do we in some sort use it here in England; for all lands, it is said, are either mediately or immediately held of the crown; and when a man in pleading would signify his land to be his own he saith, that he is seised thereof in his domain (or rather demesne) as of fee; whereby is meant, that although his land be to him and his heirs, it depends upon a superior lord, and is held by rent or service, &c. Lit. lib. 1. cap. 1. From this it hath been observed, that lands in the hands of a common person cannot be true demesnes: and certain it is, that lands in the possession of a subject are called demains in a different sense from the demain lands of the crown. For demains, or domains, in the hands of a subject, have their derivation d domo, because they are lands in his possession for the maintaining of his house: but the domains of the crown are held of the king, who is absolute lord having proper dominion; and not by any feudal tenure of a superior lord, as of fee. Wood's Inst. 139.

Demain is sometimes taken in a special

Vol. I.-68

called ancient demains, or ancient demesne, lading has undertaken to deliver goods to and all others frunk-free; and the tenants the consignee on payment of freight, cannot which hold any of those lands are called tenants in ancient domain, or ancient demesne, and the others tenants in frank-free, &c. Kitch. 98. See tit. Ancient Demesne.

DEMISE, demissio.] Is applied to an estate either in fee, for term of life, or years, but most commonly the latter: it is used in writs for any estate. 2 Inst. 483. The word demisi, in a lease for years, implies a warranty to the lessee and his assignee; and upon this wordaction of covenant lies against the heir of the lessor, if he ousts the lessee; it binds the executors of the lessor, who has fee-simple, or fee-tail, where any lessee is evicted, and the executor hath assets. Dyer, 257.

The king's death is in law termed the demise of the king, to his royal successor, of his erown and dignity, &c. See King, Lease,

Covenant, Ejectment.

DEMISE AND REDEMISE. The conveyance by demise and redemise is where there are mutual leases made from one to another on each side of the same land, or something out of it; and is proper upon the

grant of a rent-charge, &c.

DEMURRAGE. An allowance made to the master of a ship by his freightors, for staying longer in a place than the time first appointed for his departure. The amount is generally inserted in the charter-party to be paid daily as it becomes due; the days are always limited; so that on the expiration thereof, and protests duly made, the master is at liberty to proceed. See Abbot on Shipping, p. 182. (5th ed.)

The word "Days" used alone in a clause of demurrage for unlading in the river Thames, is to be understood of working or running days only, and not to comprehend Sundays or holidays, by the usage among merchants in London. Cochran v. Retbergh,

3 Espin. N. P. 121.

The payment of demurrage, stipulated to he made while a ship is waiting for convoy, ceases as soon as the convoy is ready to depart; and such payment stipulated to be made called a joinder in demurrer; and then the while a ship is waiting to receive a cargo, parties are at issue in point of law; which isceases when the ship is fully laden, and the sue, as above mentioned, the judges of the necessary clearances are obtained, although court before which the action is brought must the ship may in either case happen to be far- determine. 3 Comm. 314: Finch, L. lib. 4.c. ther detained by adverse winds or tempestuous weather. And if the ship has once set sail and departed, but is afterwards driven since it refers the law arising on the fact to back into port, the claim of demurrage is not the judgment of the court; and therefore the thereby revived. Lannoy v. Werry, IV. Parl. fact is taken to be true on such demurrer, or cases (8vo.) p. 630: Jamieson v. Lawrie, vi. Parl. cases (8vo.) p. 474. See also Marshall v. De la Torre, 1 Espin. N. P. 367.

entered into by deed, the plaintiff cannot declare in debt generally, and give the deed in matters pleaded, though informally. Hob. 233. evidence; but ought to declare upon the deed. See Stephen on Pleading, p. 162. But a spe-Atty v. Parish, 1 Bos. & Pul.: New. Rep. 104. cial demurrer admits only facts well pleaded.

The master of a ship who by the bill of Ibid.

maintain an action against the consignee on the implied contract to pay demurrage. Evans v. Forster, 1 Barn. & Adol. 118.

DEMURRER. From the lat. demorare, Fr. demeurer.] A pause or stop put to any action upon a point of difficulty, which must be determined by the court, before any farther proceedings can be had therein: for in every action the point of controversy consists either in fact or in law; if in fact, that is tried by the jury; but if in law, that is deter-

mined by the court.

A demurrer, therefore, is an issue upon matter of law. It confesses the facts to be true, as stated by the opposite party; but denies that by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a lawful excuse, according to the party which first demurs, (demoratur, moratur in lege,) that is, rests or abides in law upon the point in question. As, if the matter of the declaration be insufficient in law (as by not assigning any sufficient trespass, &c.), then the defendant demurs to the declaration. If on the other hand the defendant's excuse or plea be invalid (as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right), here the plaintiff may demur to the plea: and so in every other part of the proceedings.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient matter alleged. Sometimes demurrers are merely for want of sufficient form in the writ or declaration. But in case of exception to the form or manner of pleading, the party demurring must by stats. 27 Eliz. c. 5; 4 and 5 Anne, c. 16. set forth the causes of his demurrer. See tits. Amendment, Pleading. And upon either a general or such special demurrer, the opposite party must aver it to be sufficient, which is 40: 1 Inst. 71.

A demurrer is admitting the matter of fact, otherwise the court has no foundation on which to make any judgment. Gilb. Hist. of C. P. 55.

As a demurrer at common law did confess If a contract of freight and demurrage be all matters formally pleaded; so now by the tered into by deed, the plaintiff cannot destatutes a general demurrer does confess all

Demurrers are general, without showing | makes a motion for a consilium or day to arany particular causes; or special, where the gue it, which the court grants of course on causes of demurrer are particularly set down: the secondary's reading the record; then the and the judgment of the court is not to be demurrer must be entered by the plaintiff in prayed upon an insufficient declaration or plea, the court-book with the secondary, who, on his otherwise than by a demurrer; when the mat-rule, sets down the day appointed for arguter comes judicially before the court. If in ment, at least four days before the demurrer pleadings, &c., a matter is insufficiently alleged, that the court cannot give certain judg- the proceedings at length, which are afterment upon it, a general demurrer will suffice; wards entered on record, are made and delivand for want of substance, a general demurrer is good; but for want of form, there must be a special demurrer, and the causes special. ly assigned. The practice is now on a special demurrer, to take advantage of any real error, though not expressed, in the causes assigned.

For examples of cases where a special demurrer is considered necessary, and where on the other hand a general demurrer is sufficient, see 10 East, 139. 359: 2 H. Black. 259:

5 Term R. 409.

A man who demurs generally, shall take advantage of all matters which are requisite to show a good right or title in the plaintiff.

Plovod. Comm. 66. a.: Hob. 301.

If a man demurs for form, he must show specially the causes of demurrer. 2 Rol. 330: Stats. 27 Eliz. c. 5: 4, 5. Anne, c. 16: R. M. 1654. § 17. The plaintiff, however, need never demur specially to a plea in abatement.

2 Maule & S. 485.

If there be a general demurrer to the declaration, the plaintiff may apply to a judge for a summons for leave to amend; if not, he may proceed to join in demurrer, and make up the demurrer-book himself, a copy of which he is to deliver to defendant's attorney, and if not paid for on demand, sign judgment. R. Tr. 12 W. 3. (now allowed in costs and need not be paid for on delivery.) In case of a demurrer to a plea, &c., by a plaintiff, the demurrer-book cannot be made up by the defendant, until default made by the plaintiff. R. E. 11 W. 3.

If a defendant pleads to part, and demurs to part; the demurrer should first be determined, and the issue last; because upon the trial of the issue the jury may assess damages as to both. Palm. 517. Where there is a demurrer in part, and issue is joined upon the other part, and the plaintiff hath judgment on the demurrer; here he may enter a non-pros. as to the issue, and proceed to a writ of inquiry upon the demurrer: but otherwise he cannot have such writ of inquiry. 1 Salk. 219. See 1 Stra. 532. 574.

If there be three counts in the declaration, to which there is a general demurrer; if any one of the counts be good, judgment must be for the plaintiff, if such count cannot be joined with the other two. 1 Wils. 252.

A demurrer is to be signed, and argued on both sides by counsel. After a demurrer is joined, the plaintiff having entered it on the

is argued: and paper-books, containing all ered to the judges two days before argument. See Tidd, ch. 29. (9th ed.)

By a rule of court of Hil. 38. G. 3. the points intended to be argued in demurrer, are to be set down in the margin of the paper-book delivered to the judges; which rule, the court has since observed, was not a new rule, but the revival of an old one, made in Ed. 2 Jac. 2. (Vide 2 Tidd's Pract. chap. 29.) 2 East's

Rep. 287. in note (a.)

The demurrant argues first, and the court will hear but two counsel, viz. one of a side: and, if desired on either side (unless the case be very plain), the court will hear farther arguments the next term. Demurrers are now frequently put in for delay. In such cases, the party wishing to avoid the delay makes up four demurrer-books and delivers to the judges two days before the day when judgment is moved for; which is given of course

without argument. When the court gives judgment on demurrer in debt for the plaintiff in the action, the judgment is for the plaintiff to recover his debt, costs, and damages; but if it be in action on the case, a writ of inquiry of damages must be awarded, before the plaintiff can have final judgment; or if the action be on bill of exchange, or promissory note, the plaintiff may obtain a rule to refer the same to the master to assess the damages, compute interest, &c., and after costs are taxed, final judgment is entered, &c., and execution may be sued out. If judgment on the demurrer is for the defendant in the action, the judgment is, that the plaintiff take nothing by his writ, bill, &c., and that the defendant go without

After judgment for plaintiff on demurrer, without argument, and general damages assessed, the Court of C. P. refused to permit the defendant to move in arrest of judgment, on the ground that the damages appeared to be partly given upon a count in the declaration which could not be sustained; for the defendant had the opportunity of excepting to that count on demurrer. Creswell v. Packham, 6 Taunton, 650. (630.)

Wood's Inst. 603.

General demurrer being entered, it cannot be afterwards waived without leave of the court, but a special demurrer generally may, unless the plaintiff hath lost a term, or the assizes by the defendant's demurring. Tidd's Prac. ch. 29.

After demurrer to one count of a declararoll, delivers the roll to the secondary, and tion, plaintiff may enter a nolle prosequi on that count, and proceed to trial on the others, ter of equity therein contained: or where the Bertram v. Gordon, 6 Taunton, 444.

It is a rule that on demurrer the court will consider the whole record, and give judgment for the party, who, on the whole appears to be of any kind, or may convict a man of any entitled to it. Thus on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the equity; and if on demurrer the defendant preplea, they will give judgment, not for the de- vails, the plaintiff's bill shall be dismissed; if fendant, but the plaintiff, provided the decla- the demurrer be over-ruled, the defendant is ration be good; but if the declaration also be bad in substance, then upon the same principle judgment would be given for the defendant. This rule belongs to the general principle stated in the first chapter, that when judgment is to be given, whether the issue be in | causes, and make a multiplicity of suits. law or fact, and whether the cause have proceeded to issue or not, the court is always bound to examine the whole record, and adjudge for the plaintiff or defendant according to the legal right, as it may on the whole appear. It is, however, subject to the following exceptions:-First, if the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondeat ouster, without regard to any defect in the declaration. Secondly, the court will not look back into the record, to adjudge in favour of any apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground; thus, where, on a covenant to perform an award, and not to prevent the arbitrators from making an award, the plaintiff declared in covenant, and assigned as a breach, that the defendant would not pay the sum awarded; and the defendant pleaded that before the award made, he revoked, by deed, the authority of the arbitrators, to which the plaintiff demurred, the court held the plea good, as being a sufficient answer to the breach alleged, and therefore gave judgment for the the time of the argument insist upon any furdefendant; although they also were of opinion, that the matter stated in the plea would have entitled the plaintiff to maintain his action, if he had alleged, by way of breach, that the required, but the party demurring may dedefendant prevented the arbitrators from mand a joinder in demurrer, and the opposite making their award. Lastly, the court, in party shall be bound, within four days after examining the whole record, to adjudge accord- such demand, to deliver the same, otherwise ing to the apparent right, will consider only | judgment. the matter in right of substance, and not in respect of mere form, such as should have a sergeant or other counsel shall be necessabeen the subject of special demurrer. Thus ry, or any be allowed in respect thereof. where the declaration was open to an objection of form, such as should have been brought forward by special demurrer, the plea bad in substance, and the defendant demurred to the replication, the court gave judgment for the plaintiff, in respect to the insufficiency of the plea; without regard to the formal defect in the declaration. See farther 1 Chitty on Plead. 573: Stephen on Plead. 158.

A demurrer in equity is nearly of the same nature with a demurrer in law; being an appeal to the judgment of the court, whether ling; and notice thereof shall be given forththe defendant shall be bound to answer the with by such party to the opposite party. plaintiff's bill: as for want of sufficient mat- | Four clear days before the day appointed

plaintiff upon his own showing appears to have no right; or where the bill seeks a disco. very of a thing which may cause a forfeiture criminal misbehaviour. For any of these causes a defendant may demur to a bill in ordered to answer. 3 Comm. 446.

It is allowed a good cause of demurrer in Chancery, that a bill is brought for part of a matter only, which is proper for one entire account, because the plaintiff shall not split Vern. 29.

If an original bill be brought for matters, part of which are in a former bill and decree. and part new, or by way of supplemental bill, the court will, on a demurrer to so much as was contained in the former decree, send it to a master to see what was, and what was not, in the first bill, and allow the demurrer accordingly. Gilb. E. R. 184. See farther, tit. Chancery.

By the rules of H. T. 4 W. 4. no demurrer nor any pleadings subsequent to the declaration shall in any case be filed with any officer of the court, but the same shall always be

delivered between the parties.

In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea.

Provided that the party demurring may at ther matters of law, of which notice shall have been given to the court in the usual way.

No rule for joinder in demurrer shall be

To a joinder in demurrer, no signature of

The issue or demurrer book shall on all occasions be made up by the suitor, his attorney, or agent, as the case may be, and not, as heretofore, by any officer of the court.

No motion or rule for a concilium shall be required, but demurrers as well as special cases, and special verdicts, shall be set down for argument at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas, upon payment of a fee of one shil-

for argument, the plaintiff shall deliver copies | If the court doth not agree to a demurrer of the demurrer book, special case, or special to evidence in a civil cause, they ought to verdict, to the lord chief justice of the King's seal a bill of exceptions, &c. 9 Rep. 13. See Bench or Common Pleas, or lord chief baron, tit. Bill of Exceptions, and Tidd's Prac. 865. as the case may be, and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and in default thereof by either party, the other party may on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

DEMURRER TO EVIDENCE. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law, to maintain or overthrow the issue, as the case may be. 1 Inst. 72: 5 Rep. 104. This draws the question of law from the cognizance of the jury, to be decided, as it ought. that if the prisoner freely discovers the fact in

3 Comm. 372.

So if the plaintiff brings witnesses to prove a fact, and a matter of law ariseth upon it, if will not record the confession, but admit him the defendant admits their testimony to be afterwards to plead not guilty. 2 Hal. P. C. true, there also the defendant may demur in law: and so may the plaintiff demur upon the to be a case of the same nature, being for the defendant's evidence. And in these cases the counsel for the plaintiff and defendant agree on the matter of fact in dispute; and the jury are discharged; and the matter of law is referred to the judges to determine.

But where evidence is given for the king, in an information or other suit, and the defendant offers to demur upon it, the king's counsel are not obliged to join therein; but cur in indictments, were grounds for arresting the court ought to direct the jury to find the or reversing the judgment after verdict of special matter. And, indeed, because juries guilty. But now by Sir R. Peel's act, 7 G.4. of late usually find a doubtful matter specially, c. 64. § 20. these formal defects, such as the demurrers upon evidence are now seldom used. want of the words "vi et armis," "contra pa-See 5 Rep. 104: 1 Inst. 72: 2 Inst. 426.

the party offering the evidence is not obliged to join in demurrer unless the party demurring will distinctly admit upon the record every fact, and every conclusion, which the the more important that the doubt which exevidence offered conduces to prove. Gibson ists as to the effect of a judgment on demurrer

v. Hunter, 2 H. Blackst. 187.

exchange turns out to be forged, and a ques- demeanors the judgment against the defend. tion arises as to the proof of the identity of indorsor, if evidence is objected to as being insufficient for that purpose, the proper course for taking advantage of the objection is by demurring to the evidence, and not by bill of will look into the whole record to see whether exceptions. 3 D. & R. 625.

(9th ed.)

DEMURRER TO INDICTMENTS. A demurrer is incident to criminal cases as well as civil, when the fact as alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment; by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for, instance, if a man be indicted for feloniously stealing a greyhound, which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass to steal it; in this case the party indicted may demur to the indictment, denying it to be a felony, though he confesses the act of taking it. Some have held (2 Hal. P. C. 257.) that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others; (2 Hawk. P. C. c. 32. § 5, 6.) who hold, that in such cases he shall be directed and received to plead the general issue, Not guilty, after a demurrer determined against him; which appears the more reasonable, because it is clear, by the court out of which the record is sent, court, and refers to the opinion of the court, whether it be felony or no; and upon the fact thus shown, it appears to be felony; the court 225. See Carr. C. Law. 49. And this seems most part a mistake in point of law, and in the conduct of his pleading; and though a man by mis-pleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used; more especially since until a late statute the principal defects of form which occem," and many others, shall no longer be On a demurrer to circumstantial evidence grounds for staying or reversing the judgment. It seems, however, that they still may be objected to by demurrer to the indictment; see Carrington, C. L. 49; and therefore it is against a prisoner charged with felony shall When an indorsement on a foreign bill of be cleared up. See Arch. C. L. 80. In mis. ant on demurrer is final as in civil cases. See 3 Barn. & Cres. 514. especially Lord Tenterden's judgment.

On a demurrer to an indictment, the court

Leach. 525.

DEMY-SANGUE. Half-blood: where a man marries a woman, and hath issue by her a son, and the wife dying he marries another woman, by whom he hath also a son; now these two sons, though they are called brothers, are but brothers of the half-blood, because they had not both one father and one mother: and therefore by law they cannot be heirs to one another; for he that claims freehold as heir to another by descent, must be of the whole blood to him from whom he claimeth. Termes de la Ley. Sec tits. Descent, Executor.

The law excluding the half-blood from inheriting is now altered. See Descent.

DEN. From the Sax. den, i. e. vallis, tocus sylvestris.] The name of places ending in den, as Biddenden, &c., signify the situation to be in a valley, or near woods. Blount.
DEN AND STROND. Is a liberty for

ships or vessels to run or come ashore: and King Edward I. by charter granted this privilege to the barons of the Cinque Ports. Placit. Temp. Ed. 1.

DENA TERRÆ. A hollow place between two hills; it is also used for a little portion of woody ground, commonly called a coppice.

Domesday.

DENARII. A general term for any sort of pecunia numerata, or ready money. Paroch.

Antiq. 320.

DENARII DE CARITATE. Customary oblations made to cathedral churches about the time of Pentecost, when the parish priests, and many of their people, went in procession to visit their mother church: this custom was afterwards changed into a settled due, and usually charged upon the parish priest; though at first it was but a gift of charity, or present, to help to maintain and adorn the bishop's see. Cartular. Abbat. Glaston. MS. f. 15.

DENARIUS. An English penny; it is mentioned in the ancient statute, de compo-sitione mensurarum, &c. Temp. inc.

DENARIUS DEI. God's penny, or earnest money given and received by the parties to contracts, &c. Cart. Ed. 1. The earnest money is called Denarius Dei, or God's penny, because, in former times, the piece of money so given to bind the contract, was given to God, i. e. to the church, or the poor.

DENARIUS S. PETRI. An annual payment of one penny from every family to the pope, during the time that the Roman Catholic religion prevailed in this kingdom, paid on the feast of St. Peter. See Peter Pence.

DENARIUS TERTIUS COMITATUS. Of the fines and other profits of the county courts, originally when those courts had superior jurisdiction before other courts were erected, two parts were reserved to the king, and a third part or penny to the earl of the county; who either received it in specie at the assizes and trials, or had an equivalent composition for it out of the exchequer. Paroch. Antiq. 418.

they are warranted in giving judgment. 1 | DENBER. From the Sax. den, a vale, and berg, a barrow, or hog.] A place for the run. ning and feeding of hogs, wherein they are penned; by some called a swinecomb. Cowel.

DENIZEN. See tit. Alien.

DENSHIRING OF LAND. Is the cast. ing parings of earth, turf, and stubble, into heaps, which when dried are burnt into ashes. for a compost or poor baron land. This method of improvement is used on taking in and enclosing common and waste ground; and in many parts of England is called burn-beating, but in Staffordshire and other counties they term it denshiring of land.

DE NON DECIMANDO, Modus. To be discharged of tithes. See Modus Decimandi,

DE NON RESIDENTIA CLERICI RE-GIS. An ancient writ where a person was employed in the king's service, &c., to excuse and discharge him of non-residence.-2 Inst. 264.

DE NOVO DAMUS. A clause of a charter, which in effect renders it an original

charter. Scotch Dict.

DEODAND, Deo dandum.] By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the king to be applied to pious uses, and distributed in alms by his high almoner, though formerly destined to a more superstitious purpose. 1 H. P. C. 419 : Fleta, lib. 1 c. 25.

It seems to have been originally designed as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to Holy Church, in the same manner as the apparel of a stranger who was found dead was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due, when an infant under the age of discretion is killed by a fall from a cart or horse, or the like, not being in motion; whereas, if an adult person falls from thence, and is killed, the thing is certainly forfeited: 3 Inst. 57: 1 H. P. C. 422; such infant being presumed incapable of actual sin, and therefore not needing a deodand to purchase propitiatory masses. 1 Comm. 300.

Thus stands the law, if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal of his own motion, kill as well an infant, as an adult; or if a cart run over him, they shall in either case be forfeited as deodands; which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner; and therefore he is properly punished by such forfeiture. Bract. l. 3. c. 5.

Where a thing not in motion is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand. 1 H. P. C. 422. But wherever the thing is in motion, not only that part which

immediately gives the wound (as the wheel levy the same on the town, &c. Wherefore which runs over his body,) but all things the inquest ought to find the value of it. 1 which move with it, and help to make the Hawk. P. C. wound more dangerous (as the cart and loading, which increase the pressure of the wheel), are forfeited. 1 Hawk. P. C. c. 26.

It matters not whether the owner of the thing moving to the death of a person were concerned in the killing or not: for if a man kills another with my sword, the sword is forfeited. Dr. & Stud. d. 2. c. 51. And therefore in all indictments for homicide, the instrument of death, and the value are presented and found by the grand jury (as that the stroke was given by a certain penknife, value 6d.), that the king or his grantee may claim the deodand. For it is no deodand unless it be presented as such by a jury of twelve men. 3 Inst. 57: 5 Rep. 110: 1 Inst. 144.

No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law: but if a man falls from a boat or ship in fresh water and is drowned, it hath been said that the vessel and cargo are in strictness of law a deodand. Inst. 58: 1 H. P. C. 423: Moll. de Jur. Marit.

Juries, however, have of late perhaps too frequently taken upon themselves to mitigate these forfeitures by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. But in such cases, although the finding by the jury be hardly warrantable by law, the Court of K. B. hath generally refused to interfere on behalf of the ford of the franchise, to assist so unequitable a claim. Fost. on Homic. 266.

Deodands, as well as other forfeitures in general, wrecks, treasure-trove, &c. may be granted by the king to particular subjects as a royal franchise: and indeed they are for the most part granted out to the lords of manors or other liberties; to the perversion of their original design. 1 Comm. 299. et seq.

If a man riding over a river, is thrown off his horse by the violence of the water, and drowned, his horse is not deodand; for his death was caused per cursum aquæ. 2 Co. 483.

If a person wounded by any accident, as of a cart, horse, &c., die within a year and a day after, what did it is deodand: so that if a horse strikes a man, and afterwards the owner sells the horse, and then the party that was stricken dies of the stroke, the horse, notwithstanding the sale, shall be forfeited as deodand.

Plowd. 260: 5 Rep. 110.

Things fixed in the freehold, as a bell hanging in a steeple, a wheel of a mill, &c., unless severed from the freehold, cannot be deodands. 2 Inst. 281. And there is no forfeiture of a deodand, till the matter is found of record, by the jury that finds the death, who ought also to find and appraise the deodand. 5 Rep. 110: 1 Inst. 144. After the coroner's inquisition, the sheriff is answerable for the value, where the deodand belongs to the king; and he may

Grants of deodands, &c. how to be inrolled. 3 and 4 W. & M. c. 22. § 1. See Franchises. The goods and chattels of felo de se, &c. were likewisely anciently held to be deodands, and are now forfeitable to the crown. See tit. Felo de se : 1 Lil. 443.

DE ONERANDO PRO RATA POR-TIONIS. An ancient writ, where a person was distrained for rent, that ought to be paid by others proportionably with him. F. N. B. 234. If a man hold twenty acres of land, by fealty and twenty shilling's rent, and he aliens one acre to one person, and another acre to another, &c., the lord shall not distrain one alience for the whole rent, but for the rate and value of the land he hath purchased, &c. And if he be distrained for more, he shall have this writ. New Nat. Br. 586.

DEPARTURE. A term of law properly applied to a defendant, who first pleading one thing in bar of an action, and being replied unto, in his rejoinder, quits that and shows another matter contrary to, or not pursuing his first plea, which is called a departure from his plea: also where a plaintiff in his declaration sets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication shows new matter different from his declaration, this is a departure. Plowd. 7, 8: 2 Inst. 147. But if a plaintiff in his replication depart from his count, and the defendant takes issue upon it, if it be found for the plaintiff, the defendant shall take no advantage of that departure, though it would have been otherwise, if he had demurred upon it. Raym. 86: 1 Lil. Abr. 444.

If a man plead a general agreement in bar, and in his rejoinder allege a special one, this is a departure in pleading : and if an action is brought at common law, and the plaintiff by his replication would maintain it by virtue of a custom, &c.. it hath been held a departure. Nels. Abr. 638. Where a matter is omitted at first, it is a departure to plead it afterwards. Ibid. If in covenant the defendant pleads performance, and after rejoins that the plaintiff ousted him, it is a departure from his plea. Raym. 22. In debt upon bond for performance of covenants in a lease, the defendant pleaded performance; and afterwards in his rejoinder set forth that so much was paid in money, and so much in taxes, &c., upon demurrer it was adjudged a departure from the plea, because he had pleaded performance and afterwards set forth other matter of excuse, &c. 1 Salk. 221.

Debt upon bond for performance of an award, made for payment of money, if the defendant plead performance, and the plaintiff having replied and assigned a breach of nonpayment, &c., the defendant rejoins that he is ready to pay the money at the day, &c., this is a departure from his plea, for performance is payment of the money; and payment, and

ready to pay, are different issues. Sid. 10: cery is by depositions of witnesses: and the 4 Leon. 79. In debt upon bond for non-per- copies of such regularly taken and published. formance of an award, the defendant pleads that the award was, that he should release all suits to the plaintiff, which he had done; the plaintiff replies that such an award was made, but that the award was farther, that the defendant should pay to the plaintiff such a sum, &c.; the defendant rejoins that true it is, that by the award he was to pay the plaintiff the said sum, but that the award was also, that the plaintiff should release to the defendant all actions, &c., which he had not done; on demurrer, this was held a departure from the plea, being all new matter. 2 Bulst. 39: Godb. 155: 1 Nels. 637. After nullum fecerunt arbitrium, the defendant cannot plead that the award is void, without being a departure from the former plea; and if where nul tiel agard is pleaded, then the award is set forth, and a joinder that it was not tendered, it is a departure. 1 Lev. 133: Lut. 385.

A departure must be always from something that is material, or it will not be allowed: if in trespass for taking goods, the plaintiff reply, that after the taking, the defendant converted them to his own use, this being an abuse, makes a trespass; and the conversion is either trover or trespass at the plaintiff's election, so that by his replication he may make it trespass, and be no departure, 1 Salk. 221, 222. In circumstances of time, &c., laid as to promises, the plaintiff is not tied to a precise day; for if the defendant by his plea force the plaintiff to vary, it is no departure from his declaration. 1 Nels. 640, 641. And if another place be mentioned in the replication, in action of debt, as this is a personal thing, it is no departure, because he who is indebted to another in one place, is so in every place. Sid. 228.

If new matter which explains or fortifies the bar be rejoined by the defendant, it is not a departure. 1 Wills. 8. 97. 8: Co. Lit. 304. a.

A departure being a denial of what is before admitted, is a saying and unsaying, and for that an issue cannot be joined upon it; it is bad for the uncertainty. 1 Lil. 444. See farther, tits. Pleading, Novel Assignment, Trespass: and see Stephen on Pleading, p. 405. Bac. Ab. Pleas and Pleading, I. (7th ed.)

DEPARTURE IN DESPITE OF THE COURT, and entry of it. See tit. Default.

DEPARTURE OF GOLD AND SILVER. The parting or dividing of those metals from others that are coarser. See stat. 4 Hen. 7. c. 2.

ing and ravaging a country; an offence where the benefit of clergy was denied at common law. 2 Hal. Pl. 333: 12 Rep. 30: 3 Inst. 204. See tit. Clergy, Benefit of

DEPOSITION, depositio.] The testimony of a witness, otherwise called a deponent, put down in writing by way of answer to interrogatories exhibited for that purpose, in Chancery, &c. Proof in the High Court of Chan-

are read as evidence at the hearing. For the purposes of examining witnesses in or near London there is an examiner's office appointed: but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths: and if foreigners, upon the oaths of two skilful interpreters. And it hath been established that the deposition of an heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country may be read in evidence. 1 Atk. 21. The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the Court of Chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of subpæna, as in the courts of common law, to appear and submit to examination. And when their depositions are taken they are transmitted to the court with the same care that the answer of a defendant is sent. 3 Comm. 449.

After a witness is fully examined, the examinations are read over to him, and the witness is at liberty to alter, or amend any thing; after which he signs them, and then and not before, the examinations are complete, and good evidence. 1 P. Wms. 415. The same practice prevails in ecclesiastical causes.

Where a witness was examined in a cause in Chancery, and before signing his examination died, the Master of the Rolls, upon advising with the Master in Chancery then in court, denied the making use of the depositions, as being not perfect. 1 P. Wms. 414.

But where, after an order for publication, defendant examined a witness, and then perceiving the irregularity (it being after publication), the defendant on the usual affidavit by himself, his clerk in court, and solicitor, that they had not seen, nor would not see any of the depositions, got an order to re-examine this witness, but before re-examination the witness died; upon affidavit of this, Lord Ch. J. Parker, ordered that the defendant might make use of the depositions, the re-examination being prevented by the act of God. 1 P. Wms. 415.

Depositions in the Chancery after a cause is DEPOPULATIO AGRORUM. Destroy- determined, may be given in evidence in a trial at bar in B. R. in a suit for the same matter between the same parties, if the party that deposed be dead; but not otherwise, for if he be living he must appear in person in court to be examined, &c. 1 Lil. Abr. 445.

See farther, as to the admission of written depositions in evidence at common law, Bull, N. P. 229. 239-242; and this Dict. tit. Evidence.

Depositions of informers, &c. taken upon

oath before a coroner, upon an inquisition of of the court where the action shall be dependdeath, or before justices of peace on a com- ing, or to order a commission to issue for the mitment or bailment of felony, may be given examination of witnesses on oath, in any in evidence at a trial for the same felony; if place or places out of such jurisdiction, by init be proved on oath that the informer is dead, terrogatories or otherwise. or unable to travel, or kept away by the procurement of the prisoner; and oath must be made that the depositions are the same that were sworn before the coroner or justice, without any alteration. 2 Hawk. P. C.

By stat 13. G. 3. c. 63. § 40. in case of indictments and informations in the King's cited in note to 1 Tyrw. 505. Bench for misdemeanors, or offences committed in India, that court may award writs of taken by virtue of the act, shall be read in mandamus to the judges of the courts in India, to examine witnesses concerning the mat- the party against whom the same may be ofters charged in such indictments and offen- fered, unless it shall appear, to the satisfaction ces, and the depositions so taken are to be al- of the judge, that the examinant or deponent

By § 41. & 42. provision is made for taking the depositions of witnesses on any information or indictment in the King's Bench, against the judges of the Supreme Court of Judicature in India, and in cases of proceedings in parliament for offences committed in

that country.

And by § 44. when any action or suit in law or equity, the cause whereof shall arise in India, is brought in any of the courts at Westminster, such court, on motion, may award a writ in the nature of a mandamus to the judges of the courts in India for the examination of witnesses, and such examination shall be allowed and read at any trial or hearing between the parties in such cause or ac-

But it is enacted by § 45, that no depositions taken by virtue of the act, shall be allowed to be given in evidence in any capital case, other than such as shall be proceeded

against in parliament.

By the I W. 4. c. 22. § 1. the powers and provisions of the 13 G. 3. c. 63. relating to the examination of witnesses in India, are extended to all colonies and places under the dominion of his Majesty, and to the judges of the several courts therein, and to all actions depending in the courts of law at Westminster, in what country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court, to the judges whereof the writ or commission. may be directed, or elsewhere.

By § 4. it shall be lawful for the said courts at Westminster, and also for the Court of Common Pleas of the county palatine of Laneaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories, or otherwise, before the master or prothonotary of the said court, or other person or persons named in such or-

In Ducket v. Williams, 1 Tyrw. 502. the Court of Exchequer under this section granted a commission to examine witnesses in France, in an action pending in that court. A similar commission was granted by the Court of King's Bench, in Reynard v. Cope,

By § 10. no examination or deposition to be evidence at any trial without the consent of lowed and read at any trial for such crimes is beyond the jurisdiction of the court, or or misdemeanors. other permanent infirmity, to attend the trial.

By 7 G. 4. c. 64 § 2. before any person charged with felony, or suspicion thereof, shall be bailed or committed, the justices shall take down the examination in writing of the witnesses and prisoner, and bind over the parties to appear at the trial, and return the deposition and recognisance to the court; and by § 3. the like shall be done in cases of misdemeanor. By § 4. the like duty is imposed on coroners taking inquisitions in murder and manslaughter.

By 7 and 8 G. 4. c. 29. § 21. stealing, or for any fraudulent purpose taking away, or obliterating, injuring, or destroying, any deposition belonging to any court of record or equity, is a misdemeanor, and punishable by trans-

portation, &c.

DEPOSITION is used in the law in another sense, viz. to signify the depriving a person of some dignity. See tits. Degradation, Depri-

Deposition is also taken for death; and dies depositionis, the day of one's death. Litt.

Dict.

DEPRIVATION, deprivatio.] A depriving or taking away; as when a bishop, parson, vicar, &c., is deposed from his preferment. Of deprivations there are two sorts deprivation d beneficio, and ab officio; the deprivation d beneficio is when for some great crime, &c., a minister is wholly deprived of his living: and deprivatio ab officio is where a minister is for ever deprived of his orders, which is also called deposition or degradation, and is commonly for some heinous offence meriting death, and performed by the bishop in a so-lemn manner. Blount. See Degradation.

Deprivatio a beneficio is an act of the Spiritual Court, grounded upon some crime or defect in the person deprived, by which he is discharged from his spiritual promotion or benefice, upon sufficient cause proved against

him. 1 Nels. Abr. 641.

Deprivation may also be by a particular der, of any witnesses within the jurisdiction clause in some act of parliament; the depri-

Vol. I.--69

stat. 39 Eliz. c. 8. And by the king's commission, as he hath the supremacy lodged in him, a bishop may be deprived; for since a bishop is vested with that dignity by commission from the king, it is reasonable he should be deprived, where there is just cause, by the same authority: but the canons direct, that a bishop shall be deprived in a synod of the province; or, if that cannot be assembled, by the archbishop and twelve bishops, at least, not as his assistants, but as judges. It has been adjudged, that an archbishop may deprive a bishop for simony, &c., for he hath power over his suffragans, who may be punished in the archbishop's court for any offence against their duty. I Salk. 134. See tit. Bishop.

The causes of deprivation are many: if a clerk obtain a preferment in the church, by simoniacal contract; if he be an excommunicate, a drunkard, fornicator, adulterer, infidel, schismatic, or heretic; or guilty of murder, although he have not such extra manslaughter, perjury, forgery, &c. If a his patent. 9 Rep. 49.—Cowel. clerk be illiterate and not able to perform the duty of his church; if he be a scandalous person in his life and conversation; or bastardy be objected against him; if one be a mere layman, and not in holy orders; or under age viz. the age of twenty-three years; be disobedient and incorrigible to his ordinary; or a nonconformist to the canons; if a parson refuse to use the Common Prayer, or preach in derogation of it; do not administer the sacraments, or read the articles of religion, &c. See tits. Parson Clergy.

If any parson, vicar, &c., have one benefice with cure of souls, and take plurality, without a faculty or dispensation; or if he commit waste in the houses and lands of the church, called dilapidations; all these have been held good causes for deprivation of priests. Degg's Parson's Counseller, 98, 99, &c.: 3 Inst. 204. See tits. Advowson, II., Chaplain, Cession. And refusing to use the Common Prayers of the church, plurality of livings, &c., are causes of deprivation ipso facto, in which case the church shall be void, without any sentence declaratory: and avoidances by act of parliament need no declaratory sentence; but in other cases there must be a declaratory sentence. Dyer, 275. See tit. Parson.

Where a benefice is only voidable, but not void, before sentence of deprivation, the party must be cited to appear; there is to be a libel against him, and a time assigned to answer it, and also liberty for advocates to plead, and after all a solemn sentence pronounced: though none of these formalities are required, where the living is made ipso facto void. Can. 122. If a deprivation be for a thing merely of ecclesiastical cognizance, no appeal lies; but the party has his remedy by a commission of review, which is granted by the king of mere grace. Moor, 781.

vation of bishops, &c. is declared lawful by | an office, &c., in another man's right; whose forfeiture or misdemeanor shall cause him whose deputy he is to lose his office. The common law takes notice of deputies in many cases, but it never takes notice of under-deputies; for a deputy is generally but a person authorised, who cannot authorise another. 1 Lil. Abr. 446. A man cannot make his deputy in all cases; except the grant of the office justify him in it, and where it is to one to exe. cute by deputy, &c.

And there is a great difference between a deputy and assignee of an office; for an assignee hath an interest in the office itself; and doth all things in his own name; for whom his grantor shall not answer, unless in special cases. But a deputy hath not any interest in the office, but is only the shadow of the officer, in whose name he doth all things. And where an officer hath power to make assigns, he may implicitly make deputies. And a sheriff may make a deputy, or under-sheriff, although he have not such express words in

A deputy cannot make a deputy, because it implies an assignment of his whole power, which it cannot assign over; but he may impower another to do a particular act. 1 Salk. 96: Lit. 379. And a factor cannot delegate his employment to another, so as to raise a privity between that other and the principal. 2 Maule & S. 299. And see 9 Ves. 236: 1

Younge & J. 387.

Judges cannot act by deputy, but are to hold their courts in person; for they may not transfer their power over to others. 2 Hawk. P. C. c. 1. § 9. But it has been adjudged, that recorders may hold their courts by deputy. 1 Lev. 76. The office of Custos Brevium and Chirographer in C. P. cannot be executed by deputy. 1 Nels. Abr. 644. A steward of a court may make a deputy; and acts of an under-steward's deputy have been held good in some cases. Cro. Eliz. 534.

A coroner ought not to execute his office by deputy, it being a judicial office of trust; and judicial offices are annexed to the person. 1 Lil. 446. But the coroner of the Admiralty may appoint a deputy, for the power is conferred by his patent. See Jervis on Coroners, p. 56. If the office of parkership be granted to one, he may not grant this to another; because it is an office of trust and confidence. Terms de la Ley.

A bailiff of a liberty may make deputy. Cro. Jac. 240. And a constable may make a deputy, who may execute the warrant directed to the constable, &c. 2 Danv. 482. See

tit. Constable.

When an office descends to an infant, idiot, &c., such may make a deputy of course. 9 Rep. 47. Where an office is granted to a man and his heirs, he may make an assignce of that office, and by consequence a deputy.

A deputy of an office hath no interest there-DEPUTY, deputatus.] One that exercises in, but doth all things in his master's name, and his master shall be answerable; but an the sense of to prove and approving, by disassignee hath an interest in the office, and doth all things in his own name, for whom his grantor shall not answer, unless in special cases. Terms de la Ley. The clerk of the papers in the King's Bench prison cannot act by deputy, but must himself reside within the rules of the prison. 4 Term R. 716: 5 T. R.

A superior officer must answer for his deputy in civil actions, if he is not sufficient: but in criminal cases it is otherwise, where deputies have to answer for themselves. 2 Inst. 191. 466. Doct. & Stud. c. 42. See tit. observed, when actually going on, though a Officer. As to the validity of a deputy's acts after the death of his principal, see 6 East,

Where the registrars of a diocese, being authorised by their patent of office to appoint a deputy " to be approved and allowed of by the bishop," nominated a person to be deputy re- 261. gistrar, and applied to the bishop to ratify the nomination, who answered that, "for good are liable to duties of customs as if legally imand sufficient reasons," he disapproved of the individual appointed holding the situation, but King's Bench refused a rule nisi for a mandamus to the bishop, to admit the deputy. Lord Tenterden, C. J., said, " the bishop has by law the power of approving or disapproving, and we cannot call upon him to exercise it in one particular way or another." The King v. The Bishop of Gloucester, 2 B. & Adol. 158.

DE QUIBUS SUR DISSEISIN. A writ of entry. See F. N. B. 191. To be abolished.

See tit. Disseisin.

DER, from the Sax. Deor, Fera.] The names of places beginning with this word signify that formerly wild beasts herded there

together.

DERAIGN, or DEREYN, disrationare; dirationare.] Seems to be derived literally from the Fr. deraigner, or deragner, to confound and disorder, or to turn out of course or displace; as deraignment or departure out of religion. Stat. 33 H. 8. c. 6. And deraignment and discharge of their profession. Stat. 33 H. 8. c. 29.

In our common law this word is used diversely; but generally to prove, viz. to deraign that right, deraign the warranty &c. Glanv. lib. 2. cap. 6: F. N. B. 146. If a man hath an estate in fee with warranty, and enfeoffs a stranger with warranty, and dies, and the feof- or means whereby lands or tenements are defee vouches the heir, the heir shall deraign rived unto any man from his ancestor .-- An the first warranty, &c. Plowd. 7. And joint heir is he upon whom the law casts the estate tenants and tenants in common shall have aid, immediately on the death of his ancestor: and to the intent to deraign the warranty para- the estate so descending is in law called the mount. 31 H. 8. cap. 1. See Bracton, lib. 3. inheritance. See 2 Comm. 200 lib. 2. c. 14. tract. 2. cap. 28. Britton applieth this word to a summons that they be challenged as de- person be the actual complete heir of another, fective, or not lawfully made. c. 21. And till the ancestor is previously dead. Nemoest Skene confounds it with our waging and heres viventis. Before that time the person making of law. See Lex Deraisnia.

proving what is asserted in opposition to truth and fact.

DERELICT, derelictus.] Any thing forsaken or left, or wilfully cast away. Derelict lands suddenly left by the sea belong to the king: but if the sea shrink back so slowly that the gain be by little and little, i. e. by small and imperceptible degrees, it shall go to the owner of the land adjoining. Where certain land on the coast of Lincolnshire had been formed gradually by ooze and soil deposited by the sea, and the increase could not be visible increase took place every year, and in the course of fifty years a large piece of land had thus been found, it was held that it could be said to be left by the sea, and that it belonged to the lord of the manor. Rex v. Lord Yarborough, 2 Barn. & C. 91. See 2 Comm.

Certain goods derelict (spirits and tobacco)

ported. See tit. Wreck.

DERELICT (Ship), is a vessel forsaken at sea. declined to specify his reasons; the Court of Sir Leoline Jekins defines derelict to be "boats or other vessels forsaken, or found on the seas without any person in them: of these the Admiralty has but the custody, and the owner may recover them within a year and a day." See 1 Robinson's Adm. Rep. 41.

In cases of derelict ships an allowance is made in the nature of salvage of two-fifths or more, where the salvage has been attended with danger. 4 Rob. Adm. Rep. 194. See tit.

Salvage, Wreck.
DESCENDER, writ of formedon in. writ which lieth, where a gift in tail is made. and the tenant in tail aliens the land entailed, or is disseised and dies; the heir in tail shall have this writ against him, who is then the actual tenant of the freehold. F. N. B. 211, 212. To be abolished. 3 and 4 W. 4. c. 27. § 36; and tit. Formedon.

DESCENT, OR HEREDITARY SUCCESSION;

Lat. descensus; Fr. discent; in which latter way the term is usually spelt in all old law books. The title whereby a man on the death of his ancestor obtains the freehold of such ancestor, by right or representation, as his heir at law.—It is otherwise defined; the order

By law no inheritance can vest, nor can any who is next in the line of succession is called Perhaps this word deraign, and the word an heir apparent, or heir presumptive. Heirs deraignment derived from it, may be used in apparent are such, whose right of inheritance

is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who the writers on these subjects to be vinculum must by the course of common law be heir to the father whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may hereafter be cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be devested and taken away by the birth of a posthumous child; and in the latter, it shall also be totally devested by the birth of a posthumous son. Bro. tit. Descent. 58.

And besides this case of a posthumous child. if lands are given to a son who dies, leaving a sister his heir; if the parents have at any distance of time afterwards another son, this son shall devest the descent upon the sister, and take the estate as heir to his brother. Co. Lit. 11: Doct. & Stud. d. 2 c. 7. So the same estate may be frequently devested by the subsequent birth of nearer presumptive heirs, before it fixes upon an heir apparent. As if an estate is given to an only child who dies, it may descend to an aunt, who may be stripped of it by an afterborn uncle; on whom a subsequent sister may enter, and who will again be deprived of the estate by the birth of a brother, the heir apparent. Christian's note on 2 Comm. 208. See tit. Posthumous Children, Infant, II.

It seems determined that every one has a right to retain the rents and profits which accrued whilst he was thus legally possessed of the inheritance. I Inst. 11. in n. 2 Wils. 526.—See farther, as to the entry of a posthumous heir, Watkins on Descent, c. 4.

In order to treat the subject the more clearly, it seems better to lay aside such matters as will only tend to cause embarrassment and confusion. The question, who are, and who are not capable of being heirs, comes more properly under the titles Heir, Attainder, Escheat; which see. We may also pass over the frequent division of descents, into those by custom, statute, and common law. As to descendants by particular custom, as to all the sons in gravelkind, or to the youngest in Borough English, see those titles, and title Custom: and as to descents by statute, or fees-tail per formam doni, in pursuance of the stat. of Westm. 2. see tits. Estate, Limitations,

As the law of descents depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state briefly the true notion of this kindred or alliance in blood.

Consanguinity, or kindred, is defined by personarum ab eodem stipite descendentium: the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or colla-

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between a man and his father, grandfather, and greatgrandfather, and so upwards, in the direct ascending line: or between a man and his son, grandson, great grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father is related in this first degree, and so likewise is the son: grandsire and grandson in the second; great grandsire and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil and canon as in the common law.

Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the stirps, or root, the stipes, trunk or common stock, from whence these relations are branched out. As if a man hath two sons, who have each a numerous issue; both these issues are lineally descended from him as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them consanguineos.

The very being of collateral consanguinity, consists in this descent from one and the same common ancestor. Thus A. and his brother are related; Why? Because both are derived from one father: A. and his first cousin are related; Why? Because both descended from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same great grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived.

The method of computing these degrees in the canon law, which our law has adopted (Co. Lit. 23.) is as follows: --- We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus A. and his brother are related in the first degree; for from the father to each of them is counted only one: A. and his nephew are related in the second degree; for the nephew is two depressions of the case and the nature of the title shall regrees removed from the common ancestor; quire, the person last entitled to the land shall, viz. his own grandfather, the father of A. 2 for the purposes of this act, be considered to have been the purchaser thereof upless it shall

By the recent stat. 3 and 4 W. 4. c. 106. many important alterations have been made in the law of descent.

The first section enacts, "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: (that is to say,) the word ' land' shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words 'the purchaser,' shall mean the per-son who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word 'descent' shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression 'descendants' of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression 'the person last entitled to land' shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word 'assurance' shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

By § 2. it is enacted, "That in every case descent shall be traced from the purchaser; acquired the land as a devisce, and not by and to the intent that the pedigree may never be carried further back than the circumstances limited, by any assurance executed after the

of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same; in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

This section abolishes the old rule of law. which was of feudal origin, and was expressed in the maxim seisina facit stipitem. person could become an ancestor from whom lands might be inherited, unless he had the seisin thereof, either by entry, or by the possession of a tenant for years, or, in the case of the freehold being in lease, had received rent, or exercised some act of ownership. Where an estate descended to one who died without having had actual or constructive possession, in tracing the inheritance he was passed over. and the person last seised became the root or stock from which such inheritance was derived. It is obvious that this law was productive of much inconvenience and uncertainty. On the death of the individual last entitled, it became necessary to inquire into the state of the property, from the time his title accrued till the period of his decease. Nor was it an improbable result that his estate would be split into portions, and go to parties standing towards him, or towards the person by whom it was last enjoyed, in very different degrees of relationship. Besides reversions and remainders, there was another kind of property which did not admit of actual posses-To make himself the root or stock from which incorporcal hereditaments might be inherited, a party must have exercised some act of ownership over them, as by presenting to an advowson, &c.; while equitable estates were, in all instances, subject to a constructive possession created by the law. These anomalies induced the real property commissioners to recommend the abolition of the rule, and the passing of the above enactment, which places every species of inheritable property, whether in possession or in reversion, on the same footing, and makes it descendible to the heirs of the person last entitled, although he may never have had seisin. See 1 Real. Prop.

By § 3. "when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the

said thirty-first day of December one thou- of use; if only part of the use were limited. sand eight hundred and thirty-three, to the the residue resulted as undisposed of to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof."

The first part of this section alters an old established rule of law. In order to explain the changes introduced by both clauses of the section, it is requisite to advert to the modes of acquiring property, which by our law are reduced to two, viz. descent and purchase. Descent is where the title to lands is vested in that the estate descending should be destroya man by the single operation of law; purchase, where they are vested in him by his be entirely new. Watkins on Descents. own act and agreement. 2 Comms. 201. Un. 153. der the old law, which had its origin during! the prevalence of the feudal system, descent rule established in Shelly's Case, 1 Rep. 93, was highly favoured, and was considered the where it was laid down, that when the anworthiest means by which land could be acquired. Where a testator devised in fee to tate of freehold, and in the same gift or conhis heir, the latter was not allowed to elect, veyance an estate was limited, either mediatebut was held to take by descent. And this ly or immediately, to his heirs in fee or tail, rule gave rise to a long train of cases, in the word heirs was a word of limitation of the which it was decided, that although the es- estate, and not a word of purchase. Nor was tate devised to the heir was charged with money to be paid to younger children, Hayns- should be expressly given, as it might arise worth v. Pretty, Cro. Eliz. 833, 919; or with by implication of law. Penhay v. Hunell, 2 the payment of debts, and an annuity to the Vern. 370; and see Watkins on Descents widow of the testator, Emerson v. Inchbird, 1, 64. Ld. Raym. 728; or was subject to a previous devise to executors for years, Hedger v. Rowe, now put an end to all discussions as to the ef-3 Lev. 127; or to another person for life, Pres- feet of assurances made by any person, in ton v. Holmes, Styles, 148: 1 Rol. Abr. 626: which land is limited to himself, or to his Chaplin v. Leroux, 5 Maule & S. 14; or was heirs, by declaring that such person shall be preseded by an estate tail, Nottingham v. Jen- considered to have acquired the land as a purnings, 1 Salk. 233; or was accompanied by an chaser, and shall not be entitled thereto as his executory devise over in case the heir died former estate. under twenty-one, Doe d. Pratt v. Timmins, & 4. "When any person shall have acquired 1 Barn. & A. 530; the heir took by descent, any land by purchase under a limitation to and not by purchase. But the devise must the heirs or the heirs of the body of any of have given him the same estate in point of his ancestors, contained in an assurance exelimitation as would have vested in him in his cuted after the said thirty-first of December character of heir; for if it conferred a differ- one thousand eight hundred and thirty-three, ent one, he was held to take by purchase. As or under a limitation to the heirs or to the where a testator devised an estate tail to his heirs of the body of any of his ancestors, or heir. Ploud. 545 b. So where a man made under any limitation having the same effect, a devise in fee in joint-tenancy to his two contained in a will of any testator who shall daughters who were his heirs, and would have depart this life after the said thirty-first day succeeded to his lands as co-pareeners; Cro. of December one thousand eight hundred and Eliz. 431, pl. 36; or where, having two daugh-thirty-three, then and in any of such cases ters, he devised to one. Co. Lit. 163 b.

The question whether a descent was broken, also frequently arose upon wills and deeds, in cases where a party having lands by descent, chaser of such land." made a settlement or disposition of them, under which some portion of the estate was lim- dered to inherit immediately from his or her ited or resulted to him, or his heirs. At com- brother or sister, but every descent from a mon law, where a man granted a less interest brother or sister shall be traced through the in lands than he himself possessed, he con- parent." tinued seised of the reversion expectant on the determination of the estate granted, as of his Though the common ancestor was the root of

person making the conveyance. Sanders on Uses, 103. Neither could any one at common law limit a remainder to his heirs, unless he parted with the whole fee-simple out of himself. Champernon's Case, 4 H. 6. 19 b. pl. 6. And where a man by a devise (O' Keefe v. Jones. 13 Ves. 413), or by a conveyance to uses, limited particular estates, and took back the ultimate estate or fee simple, either to himself or his right heir (Cholmondely v. Clinton, 2 B. & Ald. 625), a remainder was not thereby created but he retained his original reversion. To break the line of descent, it was necessary ed or extinguished, and the estate taken back

Another class of cases sprung out of the cestor by any gift or conveyance took an esit necessary that the estate of the ancestor

The latter clause of the above section has

§ 4. "When any person shall have acquired such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the pur-

§ 5. "No brother or sister shall be consi-

This is an alteration of the old law. old estate. So also in a conveyance by way the inheritance, it was not necessary to name him in making out the pedigree or descent; By the former part of this section, the for the descent between two brothers was held question whether No. 10 or 11 in the table of to be an immediate descent, and therefore descents given by Mr. Justice Blackstone, in title might be made by one brother, or his re- 2 Comm. shall have the preference, is decided presentatives to or through another, without in favour of the former, whose cause was so mentioning their common father. 1 Sid. warmly espoused by the learned commenta-196: 1 Ventr. 423.

ble of being heir to any of his issue; and in 257. no longer law. every case where there shall be no issue of the | § 9. "Any person related to the person purchaser, his nearest lineal ancestor shall be from whom the descent is to be traced by the his heir in preference to any person who half-blood shall be capable of being his heir; would have been entitled to inherit, either by tracing his descent through such lineal antended shall stand in the order of inheritance, so as to be entitled to inherit, shall descendant of such lineal ancestor, so that the father shall be preferred to a brother or of the whole blood and his issue, where the sister, and a more remote lineal ancestor to common ancestor shall be a male, and next any of his issue, other than a nearer lineal after the common ancestor where such comancestor or his issue."

change. No rule was more firmly established, father shall inherit next after the sisters of the than that an inheritance should never lineally whole blood on the part of the father and their ascend, but should rather escheat to the lord. issue, and the brother of the half-blood on the Lit. § 3. The only way in which a father part of the mother shall inherit next after the could succeed to lands purchased by his son, mother." was by an intermediate descent thereof to an uncle, or other collateral relation, from whom which a rule of law that was felt to operate the father might inherit as his next heir, with peculiar hardship in many instances, This rule was clearly derived from that of the has been removed. Where a father had two feudal law, successionis feudi talis est natura sons by different venters or wives they could quod ascendentes non succedunt. 2 Feud. not inherit to each other, but the estate should

the person from whom the descent is to be but such estate would go to a sister (if any) traced, nor any of their descendants, shall be of the whole blood to the eldest son, or othercapable of inheriting until all his paternal ancestors and their descendants shall have failed; and also no female paternal ancestor of such person, nor any of her descendants, shall at edescent; "as if there be two brothers by be capable of inheriting until all his male pa- diverse venters, and the elder is seised of land ternal ancestors and their descendants shall in fee, and dies without issue, and his uncle have failed; and no female maternal ancestor enters as next heir to him, who also dies of such person, nor any of her descendants, without issue, now the younger brother may shall be capable of inheriting until all his have the land as heir to the uncle, for that he male maternal ancestors and their descend- is of the whole blood to him." Lit. § 8. ants shall have failed."

male paternal ancestors of the person from other, may inherit together to their father, whom the descent is to be traced, and their because the descent is immediate from the descendants, the mother of his more remote father. Butler's Co. Lit. 14 a. n. (5.) Hale's male paternal ancestor or her descendants, C. L. c. 11. So in the case of estates tail, the shall be the heir or heirs of such person, in half-blood may inherit as well as the whole preference to the mother of a less remote male blood, for they do not claim as heirs of the paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants."

becomes they do not claim as neirs of the person last sessed, but of the original donee, Lit. § 14, 15: Plowd. 57: 3 Wilson, 516. Also in titles of honour half-blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the preson last sessed, but of the original donee, Lit. § 14, 15: Plowd. 57: 3 Wilson, 516. Also in titles of honour half-blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the first person ennobled. 1 Inst. 15. See this Dict. tit. Peers.

§ 10. "After the death of a person attaint-

tor. The latter clause of the section renders § 6. " Every lineal ancestor shall be capathe case of Hawkings v. Shewen, 1 Sim. & Stu.

recestor or his issue."

This section introduces a very considerable brother of the half-blood on the part of the

This is another important alteration, by rather have escheated to the lord. If the fa-The reasons for excluding a lineal ancestor ther died, and his lands descended to his from inheriting to his issue are obvious to eldest son, who entered thereon and died every one acquainted with the history of without issue, the younger son could not heir feuds, and are to be found in 2 Comm. 212. § 7. "None of the maternal ancestors of blood to the elder son, the person last seised; Under the old law, daughters by different § 8. "Where there shall be a failure of femes, though they cannot inherit to each

ed, persons tracing their descent to lands others, where feuds were most strictly rethrough him may inherit." See tit. Escheat. tained: it only postpones them to males; for

§ 11. "Act not to extend to any descent before January one thousand eight hundred

§ 12. "Where any assurance executed before the first day of January one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January one thousand eight hundred and thirty-four."

the seven rules or canons of inheritance laid down by Mr. Justice Blackstone in his second volume with his explanatory comments, were inserted, four of which, viz. the second, third, fourth, and seventh, remain uninfringed by the above statute. It is advisable still to give them all, briefly noticing such as have been

modified.

I. The first rule was, that inheritance should lineally DESCEND to the issue of the person who last died actually seised, in infinitum;

but should never lineally ASCEND.

The former part of this rule, regarding the necessity of seisin by the person from whom the descent is to be traced, is altered by § 2. and the reverse of the latter part enacted by § 6. of the late statute. See sections ante. The first portion of the rule may be stated now to be, that inheritance shall lineally descend to the issue of the person who died last entitled, in infinitum.

II. A second general rule, or canon, is, that the male issue shall be admitted before the female. Thus sons shall be admitted before daughters; or, as our law expresses it, the worthiest of blood shall be preferred. Hale, H. C. L. 235. As if one hath two sons and two daughters, and dies; first the eldest son, (and in case of his death without issue) then the youngest son, shall be admitted to the succession in preference to both the daugh-

must be deduced from feudal principles; for, wherein the necessity of a sole and deterby the genuine and original policy of that minate succession is as great in the one sex constitution, no female could ever succeed to as in the other. 1 Inst. 165. And the right a proper feud, inasmuch as females were in- of sole succession, though not of primogenicapable of performing those military services ture, was also established with respect to for the sake of which that system was established. But our law does not extend to a a man holds an earldom to him and the heirs total exclusion of females, as the Salic law and of his body, and dies, leaving only daughters,

though daughters are excluded by sons, yet they succeed before any collateral relations.

And see § 7. of the new statute as to the preference to be given to paternal ancestors and their descendants before maternal ancestors and their descendants, and as regards each class to the males before the females.

III. A third rule, or canon, of descent, is. that where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

As if a man hath two sons and two daugh. ters, and dies, his eldest son shall alone succeed to his estate, in exclusion of the second son and both the daughters; but if both the sons die without issue before the father, the daughters shall both inherit the estate as coparceners. Litt. § 5: Hale, H. C. L. 238.
This rule is also of feudal origin, and arose

In the former editions of this Dictionary, on the establishment of that system in Eng-

land by William the Conqueror.

Yet we find that socage estates frequently descended to all the sons equally so lately as when Glanvil wrote, in the reign of Henry II., and it is mentioned in the Mirror (c. 1. & 3.), as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among male children. However, in Henry III.'s time, it appears from Bracton (l. 2. c. 30, 1.), that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands; except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons; and except in some particular manors and townships, where their local customs continued the descent sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the ancient law; for they were all equally incapable of performing any personal service; and therefore one main reason for preferring the eldest ceasing, such preference would have been injurious to the rest; and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords who had the disposal of these female heiresses in marriage. However, the succession by promogeniture, even among females, The true reason of preferring the males took place as to the inheritance of the crown;

the eldest shall not of course be countess, but (if living) would have done the same; and the dignity is in suspense or abeyance till the among these several issues, or representatives Abeyance, Peers, Parceners.

IV. A fourth rule, or canon, of descent, is, that the lineal descendants, in infinitum, of any person deceased, shall represent their an-

living.

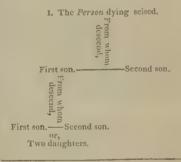
child (either male or female) of an eldest son, hath only three daughters, C., D., and E., and succeeds before a younger son, and so in infinitum. Hale, H. C. L. 236, 7. And these daughters, and E. leaving a daughter and a representatives shall take neither more nor son, who is younger than his sister: here less, but just so much as their principals when the grandfather dies, the eldest son of would have done. As if there be two sisters, C. shall succeed to one third, in exclusion of and one dies, leaving six daughters, and then the younger; and the two daughters of D. the father of the two sisters dies, without to another third, in partnership; and the son other issue; these six daughters shall take of E. to the remaining third, in exclusion of among them exactly as much as their mother his elder sister. And the same right of reprewould have done had she been living; that is, sentation, guided and restrained by the same a moiety of the lands in coparcenary: so that, rules of descent, prevails downwards in infi-upon partition made, if the land be divided nitum. into twelve parts, the surviving sister shall; have six parts, and her six nicces one part and other cases in the course of this title, may each.

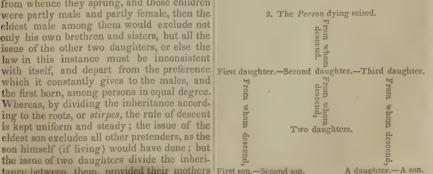
This taking by representation is called succession in stirpes, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. So if the next heirs of a man be six nieces, three by one sister, two by another and one by a third, his inheritance, by the laws of England, is divided only into three parts, and distributed per stirpes, thus, one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males. For if all the children of three sisters were to claim per capita, in their own right, as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female, then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters, or else the law in this instance must be inconsistent which it constantly gives to the males, and the first born, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or stirpes, the rule of descent is kept uniform and steady; the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers First son. - Second son.

king shall declare his pleasure; for he, being of the respective roots, the same preference to the fountain of honour, may confer it on males and the same right of primogeniture which of them he pleases. Ibid. See tits. obtain as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if a man hath two sons, A. and B., and A. dies, leaving two sons, and then the grandfather dies; now the eldest son of A. shall succeed to the whole of cestor; that is, stand in the same place as the his grandfather's estate; and if A. had left person himself would have done had he been only two daughters, they should have succeeded also to equal moieties of the whole, in Thus the child, grandchild, or great grand- exclusion of B. and his issue. But if a man C. dies leaving two sons, D. leaving two

How far the two immediately preceding, be explained by the following scheme, the student is left to determine. It may perhaps afford a hint for statements in more complicated cases of descent. For regular tables of Consanguinity and Descent, see 1 Inst., the Commentaries, and Watkin's Treatise on Descent.





Vol. I.—70

King John, however, who kept his nephew by tracing his descent through such lineal Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm. Hale, H. C. L. 217. 229. But in the time of his son, King Henry III., the rule was indisputably settled in the manner here laid down; Bract. l. 2. c. 30. § 2; and so it has continued ever since. And thus much for lineal descents.

V. A fifth rule was, that on failure of lineal descendants, or issue of the person last seised, the inheritance should descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules. Thus if A. purchased land, and it descended to B. his son, who died seised thereof without issue; whoever succeeded to this inheritance, must have been of the blood of A., the first purchaser of this family. Co. Litt. 12. The first purchaser, perquisitor, was he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method except only that of descent.

This was a rule almost peculiar to our own laws, and those of a similar original; and cannot otherwise be accounted for than by recurring to feudal principles, which did not originally permit the descent of lands to any but one of the lineal descendants of the first purchaser, who in the case of a feudum novum, or estate purchased by the ancestor himself, could only be of his own offspring; so that such estate could not descend even to his brother. See this Dict. tit. Tenures, 1. 3.

But when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantce to the inheritance, by granting him a feudum novum to hold ut feudum antiquum; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even in infinitum, because they might have been of the blood of, that is, descended from, the first imaginary purchaser.

Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a feudum novum to be held ut novum, unless in the case of a fee-tail, and there this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted: but every grant of lands in fee-simple is with us a feudum novum, to he held ut antiquum, as a feud whose antiquity is indefinite; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance.

recent statute, by which the lineal ancestors serted in Shelford or Berrey's Treatise on the of the purchaser are preferred to any person Real Property Acts, with that given in the who would have been entitled to inherit, either | second volume of the Commentaries.

ancestor, or in consequence of their being no such lineal ancestor. See section ante. Subject, however, to the precedence thus given to the lineal ancestors of the purchaser, and to the change in the law with respect to the admission of the half-blood, his collateral relations will succeed to the inheritance in the order established by the old law; as for instance, a brother will take before an uncle, and the latter before a more distant relation.

VI. A sixth rule, or canon, was, that the collateral heir of the person last seised must have been his next collateral kinsman of the whole blood.

This rule is altered by § 9. of the new statute, by which the half-blood is allowed to inherit next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male; and next after the common ancestor, where such common ancestor shall be a female. See section ante.

VII. The seventh and last rule, or canon, is, that in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those of the blood of the female, however near), unless where the lands have, in fact, descended from a female.

Thus the relations on the father's side are admitted in infinitum, before those on the mother's side are admitted at all. Lit. § 4. And the relations of the father's father before those of the father's mother, and so on. This rule seems to have been established in order to effectuate and carry into execution the rule, or principal canon of collateral inheritance, before referred to, by which every heir must have been of the blood of the first purchaser.

That this was the true foundation of the preference of the agnati, or male stocks, in our law, will farther appear, if we consider that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed: and no relation of his by the father's side, as such, can ever be admitted to them, because he cannot possibly be of the blood of the first purchaser. And so e converso if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. 1 Inst. 14. See Watkins on Descent, c. 5.

As to what acts of a party claiming by descent will have the effect of breaking such descent; see ante, § 4. of the late statute.

A table of descents is a material assistance in gaining a knowledge of the law on this subject. A succinct view of the recent alterations The above rule is now altered by § 6 of the may be obtained by comparing the tables in-

See farther, as to the other points concern-leged to have come to the defendant by finding the doctrine of descents, and points involving, it is sufficient for the plaintiff to prove ed therwith, tits. Estate, Heir, Limitation, Re. that the goods came to the defendant by wrong, mainder, Executory Devise, &c.

DESCENT OF THE CROWN. See tit. King. I. DESCENT OF DIGNITIES. See tit. Descent.

Peer.

grants there must be a certain description of the jury, if they find for the plaintiff, assess the lands granted, the places where the lands the several values of the several parcels delie, and of the persons to whom granted, &c., tained, and also damages for the detention. to make them good. But wills are more fa- And the judgment is conditional, that the voured than grants, as to those descriptions: plaintiff recover the said goods; or if they and a wrong description of the person will cannot be had, their respective values, and not make a devise void, if there be otherwise also the damages for dea sufficient certainty what person was in Ent. 170: Cro. Jac. 681. tended by the testator. 1 Nels. Abr. 647.

false, though the second is true, a deed will be being disused, and to the bringing of trover void: contra, if the first be true and the second false. See 3 Rep. 2, 3, 8, 10, 28, 33, 34, occupier of premises, conveyed will not viti- W. 4. c. 42. § 13. See tit. Trover; and also ate the conveyance, if the description of the tit. Bailment. parcels are the same as in a former conveyance of the same premises, and the intention tinue may prove matter of use as well as of to pass the same property is clear. 5 East, 51: 4 Maule & S. 250: Wilkinson v. Malin, 2 Tyr. 544. See tits. Deed, Will.

tit. Courts Martial.

DE SON TORT DEMESNE. See De injurià suà proprià: and tits. Trespass,

DESPITUS. A contemptible person. Fleta,

lib. 4. c. 5. par 4.

DESUBÎTO. To weary a person with continual barkings, and then to bite, which is

DETACHIARE. custody another person's goods, &c. by attachment, or other course of law. Cowel.

Detainer.

DETERMINATION OF WILL. tit. Estate at Will.

DETINET. See Debt.

law is like actio depositi in the civil law, and after grants them to D., he shall not have deis a writ which lies against him who, having tinue after the grant, but the grantee shall goods or chattels delivered to keep, refuseth have it. Yelv. 241: 1 Bulst. 69. When to re-deliver them. In this action of detinue goods are delivered to one, and he delivers it is necessary to ascertain the thing detained them over to another, action of detinue may in such a manner as that it may be specifical- be had against the second person: and if he by known and recovered. Therefore it can-delivers them to one that has a right thereto, not be brought for money, corn, or the like, yet it is said he is chargeable: also, if a perfor that cannot be known from other money, son to whom a thing is delivered dieth, detior corn, unless it be in a bag or a sack, for then nue lieth against his executors, &c., or against it may be distinguishably marked. In order, any person to whom a thing comes. 2 Danv. therefore, to ground an action of detinue, Abr. 511.

which is only for the detaining, these points A man may have a general detinue against are necessary: (see 1 Inst. 286.) 1. That another that finds his goods; though if I dethe defendant came lawfully into possession liver any thing to A. to re-deliver, and he loses of the goods, as either by delivery to him, or it, if B. finds it, and delivers it to C., who has by finding them. [But if the goods are al- a right to the same, he is not chargeable to

at least unless the finding be traversed. Miles v. Graham, New Rep. 141.]—2. That the plaintiff have a property.—3. That the goods themselves be of some value.-4. That they DESCRIPTION, descriptio.] In deeds and be ascertained in point of identity. Upon this also the damages for detaining them.

One disadvantage that formerly attended Where a first description of land, &c. is this action, and, with other reasons, led to its in preference, was the liberty allowed to a defendant to wage his law. Wager of law has, A misdescription in the statement of an however, been recently abolished by 3 and 4

The following cases on the subject of decuriosity, and see farther Viner, tit. Detinue, and Bull. N. P. 49-51.

Detinue may be brought for a piece of gold, DESERTION FROM THE ARMY. See of the price of 21s., though not of 21s. in money; for here is a demand of a certain parti-

cular piece. Bull. N. P. 50.

If a man receiving money from a banker, put part thereof into his bag, and while he is telling the rest the bag is stolen, no action of detinue, &c. lies, because, by putting up the money, he had appropriated it to his own use. Comb. 475. A man lends a sum of money to provided against by old laws. Leg. Alured. another, detinue lies not for it, but debt; but if A. bargains and sells goods to B. upon con-To seize or to take into dition to be void, if A. pays B. a certain sum of money at a day; now if A. pays the money, he may have detinue against B. for the goods, DETAINER. See tits. Forcible Entry and though they came not to the hands of B. by bailment, but by bargain and sale. Cro. Eliz. See 867: 2 Danv. 510.

If a man delivers goods to A. to deliver to B., B. may have detinue, for the property is in DETINUE, detinendo.] In the common him: and where he delivers them to B., and

me in detinue, because he is not privy to my give away the deed of entail, and then die, his. delivery. 7 H. 6. 22: 9 H. 6. 58.

In actions of detinue, the thing must once be in the possession of the defendant; which possession is not to be altered by act of law, as seisure, &c. And the nature of the thing must continue, without alteration, to entitle one to this action. F. N. B. 138. If I find goods, and before the owner brings his action I sell them, or they are recovered out of my hands upon an execution, or outlawry, against the owner, &c., he cannot have detinue against me. 12 Ed. 4.8: 27 H. 8. 13. But action of detinue will lie against him that finds goods, if they are wasted by wilful negligence. Dr. & Stud. 12).

A man buys cloth or other things of another, on a good and perfect contract; if the seller keeps the things bought, detinue lieth. Dyer, 30, 203. Where one takes my goods into his custody to keep them for me, and refuses to restore them, although he have nothing for the keeping of them, this action will lic. 4 Rep. 84: 29 Ass. pl. 28. If I deliver to one a trunk that is locked, with things in it, and keep the key myself, and something be taken out of it, writ of detinue lieth not for this: but if the trunk, and all that is in it, be taken away, there it lies. 11 Rep. 89: 4 Ed. 3

This action will not lie where a man delivers goods to me, and I bid him take them again, if he refuses to do it, or where the my goods or cattle by wrong as a trespasser, or by way of distress for rent, or as damage of detinue for the goods given with her in marriage. Mich. 35 Ed. 1: New Nat. Br. again, if he refuses to do it, or where one takes taken or lent, if he dies of that sickness. Bro. Detin. 242: 43 Ed. 3. 21: 21 Ed. 4. And if it be a ring that is delivered to another, and he breaks it, it is doubted whether action of detinue may lie, because the thing is altered, and cannot be returned as it was; but action on the case lieth. And although, where goods are found, and sold, &c., detinue lies not; yet action upon the case of trover and conversion may be brought. 12 Ed. 4. 8: 13 Ed. 4.

DETINUE OF CHARTERS. A man may have detinue for deeds and charters concerning land: but if they concern the freehold, it must be in C. B. and no other court. Action of detinue lies for charters which make the title of lands; and the heir may have a deti-nue of charters, although he hath not the land; if my father be disseised, and dieth, I shall have detinue for charters, notwithstanding I have not the land; but the executors shall not have the action for them. New Nat. Br. 308. If a man keep my charters from me, concerning the inheritance of my land, and I know the certainty of them, and the land; or if they be in a chest locked, &c., and I know not their certainty, I may recover them by this writ: so where lands are given to me and J. S. and my heirs, and he dies, if 113. And his executor or administrator is another get the deeds, and if tenant in tail liable to a devastavit, by stat. 4 and 5 W. & M.

issue may bring a writ of detinue of charters. Co. Lit. 286: 1 Rep. 2: F. N. B. 138. But if the tenant in fee simple gives away his deeds of the land, his heir may not have this action: and in case a woman great with child by her deceased husband keeps the charters from his daughter and heir that concern the land, during the time she is with child, this writ will lie against her. 41 Ed. 3. 11.

Definue was brought for a deed, and the

plaintiff had a verdict, that the defendant detained the deed, and the jury gave 201. damages, but did not find the value of the deed; and then there issued out a distringus to deliver the deed, or the value, and afterwards a writ of inquiry was awarded for the value: whereupon the jury found a different value from what the first verdict found; and it was adjudged good. Raym. 124: 1 Nels. Abr. 649. In detinue of charters, if the issue be upon the detinue, and it is found that the defendant hath burnt the charters, the judgment shall not be to recover the charters, which it appears cannot be had; but it is said it shall be for the plaintiff to recover the land in damages. 2 Rol. Abr. 101: 2 Danv. Abr. 511. For detaining of deeds and charters concerning the inheritance of lands, or an indenture of lease, the defendant could not wage his law, as he might till recently have done, in a common action of detinue. 1 Inst. 295.

Detinue of Goods in Frank-marriage.

DETRACTARI. To be torn in pieces with horses. Apostatæ, sacrilegi et hujusmodi, detractari debent et comburi. Fleta, lib. 1 cap. 37.

DETUNICARE. To discover or lay open to the world. Matt. Westm. 1240.

DEVADIATUS, or DIVADIATUS, is where an offender is without sureties or pledges. Domesday.

DEVASTAVIT, or DEVASTAVERUNT BONA TESTATORIS. A writ against executors or administrators, for paying debts upon simple contract, before debts on bonds and specialties, &c; for in this case they are liable to action, as if they had squandered away or wasted the goods of the deceased, or converted them to their own use; and are compellable to pay such debts by specialty out of their own goods, to the value of what they so paid illegally. Dyer, 232.

By the stat. 30 Car. 2. c. 7. it is enacted, that if an executor de son tort wastes the goods, and dies, his executors shall be liable in the same manner as their testator would have been, if he had been living. And it has since been adjudged, that a rightful executor, who wastes the goods of the testator, is in effect an executor de son tort for abusing his trust. 3 Mod. c. 24. which statute makes the stat. 30 Car. 2. Third and his barons and others, who had

ecutor, V. 1 VI. 2

DEVENERUNT. A writ heretofore directed to the escheator on the death of the heir of the king's tenant under age and in custody, commanding the escheator that by the oaths of good and lawful men he inquire what lands and tenements by the death of the tenant came to the king. Dyer, 360. This writ is now disused; but see stat. 14 Car. 2. c. 11. for preventing frauds and abuses in his majesty's customs.

DEVEST, or DIVEST, devestire.] Is opposite to invest. As to invest signifies to deliver the possession of any thing to another; so to devest signifieth to take it away. Feud.

lib. 1 cap. 7

DEVISE, from the Fr. deviser, to divide or sort into parcels.] A gift of land, &c., by a last will and testament. The giver is called the devisor; and he to whom the lands are given the devisee. A devise in writing, in construction of law, is not a deed, but an instrument by which lands are conveyed.

To Devise, is to give by will.

The word was formerly particularly applied to bequests of land; but it is now generally used for the gift of any legacies whatever.

For the law relating to devises, as well of real as personal estates, see tit. Will. As to executory devises, see tits. Executory Devise,

Estate, Limitation, Remainder,
DEVOIRES OF CALEIS, Fr. devoir, The customs due to the king, for merchandize brought into or carried out of Calais; when our staple remained there. See stat. 34

DEXTRARIUS. One at the right hand of another. The word dextrarios has been used

token of friendship; or a man's giving up him- be blown down by tempest, thunder, or light-self to the power of another person. Walsingh. ning, the lessee or tenant for life or years, p. 332.

DIARIUM. Daily food; or as much as will suffice for the day. Du Cange.

DIASPERATUS. Stained with many co-

lours. Mon. Angl. tom. 3. p. 314.

DICA. A tally for account, by number of taillees, cuts or notches. Lib. Rub. Scaccar fol. 30. [Gr. dexa ten.]

DICKAR, or DICKER OF LEATHER. A quantity consisting of ten hides, by which leather is bought and sold. Vide stat. Antiq. de Ponderibus et Mensuris. There are also dickers of iron, containing ten bars to the Domesday. dicker.

DICTORES, DICTUM. The one signifies arbitrators, the other the arbitrament.

Malms. p. 348.

DICTUM DE KENELWORTH. edict, award, act, or statute, made for composing differences between King Henry the

c. 7. perpetual. See further, this Dict. tit. Ex- been in arms against him: so called because it was made at Kenilworth, in Warwickshire, anno 51 or 52 H. 3.

DIEM CLAUSIT EXTREMUM. A writ which issued out of the Court of Chancery to the escheator of the county, upon the death of any of the king's tenants in capite to inquire by a jury of what lands he died seised, and of what value, and who was the next heir to This writ was to be granted at the suit of the next heir, &c., for upon that, when the heir came of age, he was to sue livery of his lands out to the king's hands. F. N. B. 251. A debtor of the crown cannot have this writ after the death of his debtor against the estate unless the debt have been found in the lifetime of the deceased. 2 Price, 379.

DIES. See Day.

The day or time of res-DIES DATUS.

pite given to the court. Broke. See Day.

Court. Broke. See Day.

Seetch, hereor meeting of the English and Scotch, heretofore appointed annually to be held on the marches or borders, to adjust all differences between them, and preserve the articles of peace. Tho. Walsingham, in Rich. 2 p. 307.

DIETA. A day's journey. Fleta, lib. 4. c.

28. Bracton, lib. 3. tract. 2. c. 16.

DIET, conventus. A legislative assembly; as the Diet of the Germanic Confederation at Frankfort, of the Swiss Cantons, held at Berne, Lucerne, and Zurich. See this Dict. tits. Parliament, Wittenagemote.

DIEU ET MON DROIT. God and my right; the motto of the royal arms, intimating that the King of England holds his empire of none but God; first given by King

Rich. I.

DIEU SON ACT. Are words often used for light horses, or horses for the great sad-in our old law; and it is a maxim in law, dle; from the Fr. destrier, a horse for service. that the act of God, or inevitable accident, DEXTRAS DARE. Shaking of hands in shall prejudice no man. Therefore, if a house shall be excused in waste: likewise he hath by the law a special interest to take timber, to build the house again for his habitation. Rep. 63: 11 Rep. 82. So when the condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the obligation made, and afterwards one of them becomes impossible by the act of God, the obliger is not bound to perform the other part. 5 Rep. 22. And where a person is bound to appear in court, at a certain day, if before the day he dieth, the obligation is saved, &c. See particularly relative to this term, tits. Bailment, Carrier.

DIFFACERE. To destroy: and diffactio is a maining any one. Leg. H. 1. c. 64, 92.

DIFFORCIARE RECTUM. To take An away or deny justice. Mat. Paris, anno 1164.

DIGEST. The book of Pandects of the

Civil Law; which hath its name from its! The prosecution in these cases may be containing Legalia pracepta excellenter diges- brought either against the incumbent himself. ta, according to Du Cange. See this Dict. or against his executors or administrators; tit. Civil Law; and see Gibbon's Decline and and the executor or administrator of him in Fall, chap. 44, for a succinct account of the whose time it was done or suffered, must formation of the Digest; and Butler's Horæ make amends to the successor: and if the

Juridicæ Subsecivæ, 90. 95. 104.

DIGNITY, dignitus.] Honour and authey ought to be in the Spiritual Court. That thorsty: reputation, &c. Dignitics may be court may also proceed against an executor; divided into superior and interior: as the or the successor may have an action of the titles of duke, earl, baron, &c. are the highest case or debt at the common law, in which names of dignity: and those of baronet, action he shall recover damages in proknight, serjeant at law, &c. the lowest. Nobility only can give so high a name of dignity as to supply the want of a surname in legal | Lev. 268. proceedings, and as the omission of a name of dignity may be pleaded in abatement of a vation, if the bishop, parson, vicar, or other writ, &c., so it may be where a per who has pecel sinstical person, dilapidates the buildings more than one name of dignity is not named or cuts down timber growing on the patriby the most noble. See ut. Abarement. temporal dignity of any foreign nation can give a man a higher title here than that of 259. And that a writ of prohibition will also esquire. 2 Inst. 607. See tits. Addition Descent. Peer.

DIGNITY ECCLESIASTICAL, dignitas ecclesiasticalis.] Is defined by the canonists to be administratio cum jurisdictione et potestatæ aliqua conjuncta; of which there are several examples in Duarenus, de Sacris Eccles. &c. lib. 2. c. 6. Dignitates ecclesiasticæ are mentioned in the stat. 26 H. 8. c. 81. § 32. And of church dignities, Camden, in his Britannia, p. 161. reckons in England,

544.

are advanced to any dignity ecclesiastical; as recovering shall forfeit double the value of a bishop, dean, archdeacon, prebendary, &c. But there are simple prebendaries, without

DILAPIDATION, dilapidatio. Is where an incumbent of a benefice suffers the parsonage house or out-houses to fall down, or to cient to repair the dilapidations. 3 Lev. 268. be in decay for want of necessary reparation: or it is the pulling down or destroying any of ings wherof are in decay by dilapidations, the houses or buildings, belonging to a spiritual living, or destroying of the woods, trees, &c., appertaining to the same; for it is said to extend to the committing or suffering any wilful waste, in or upon the inheritance of the hands in the presence of witnesses, which church. Degg's Pars. Couns. 89. It is the interest of the church in general to preserve what belongs to it for the benefit of the successors; and the old canons, and our own provincial constitutions, require the clergy sufficiently to repair the houses belonging to their benefices; which if they neglect or refuse to do, the bishop may sequester the profits of the benefice for that purpose, &c. Right's Clerg. 143. And by the canon law dilapidations are made a debt, which is to be amount of the workmanship necessary in satisfied out of the profits of the church; but the common law prefers debts on contracts, &c., before debts for dilapidations. Hern. separate actions against the executor of a pre-

proceedings are against the incumbent, then portion to the dilapidations. 1 Nels. Abr. 656: Pars. Couns. 97, 98: Carter, 224: 3

It is also said to be a good cause of depri-No mony of the church, unless for neccessary reorars. 1 Ro. Rep. 86: 11 Rep. 98: Godb. lie against him in the courts of common law.

3 Bulst. 158: 1 Ro. Rep. 335.

By stat. 13 Eliz. c. 10. if any parson, &c. shall make a gift of his goods and personal estate to defraud his successor of his remedy for dilapidations, such successor may have the same remedy in the spiritual court against the person to whom such gift is made, as he might have against the executors of the deceased parson. And by stat. 14 Eliz. c. 11. money recovered for dilapidations is to be employed in the reparations of the same DIGNITARIES, dignitarii.] Those who houses suffered to be in decay, or the party

what he receives to the king.

If a parson suffers dilapidations, and aftercure or jurisdiction, which are not dignitaries. wards takes another benefice, whereby his 3 Inst. 155. See Fens, Navigation, Powdike. may have an action against him, and declare that by the custom of the kingdom he ought to pay him so much money as shall be suffi-In case a parson comes to a living, the buildand his predecessor did not leave a sufficient personal estate to repair them, so that he is without remedy, he is to have the defects surveyed by workmen, and attested under their may be a means to secure him from the incumbrance brought upon him by the fault of his predecessor. Country Parson's Companion, 60.

An action on the case for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor: but when by the statutes of the church the materials are to be supplied out of the church making the repairs. Radcliffe v. D'Oyly, 2 Term Rep. 630. The successor may have ceding rector, for dilapidations to different parts of the rectory. Young v. Manby, 4 for a certiforari to certify diminution.* I Lil. Maule & S. 183; and see Moo. 612.

against the executors of a deceased rector, &c., was laid down in a recent case in the K. bound to maintain the parsonage-house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain any thing in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay) whitewashing and papering. Wise v. error. Godb. 266. But in some cases dimitits. Clergy, Parson.

put in merely for delay; and there may be a instance, that the court in such a case hath demurrer to a dilatory plea, or issue may be awarded a certiorari, to inform their contaken on the fact if false. If the plea is true science of the truth of the record in C. B., in fact and good in law, and is in abatement, where the defendant in error had not joined the plaintiff must enter up judgment of cas- in nullo est erratum. 1 Nels. 658. See fursetur, before he commences a new suit. If ther, tit. Judgment, Reversal of. the plea is adjudged ill, on demurrer, there DIMISSORY LETTERS, literæ, dimismust be a respondeas ouster, and defendant soriæ.] Where a candidate for holy orders must plead another plea. If issue in fact is has a title in one diocese, and is to be ordainthe judgment for plaintiff is final, &c. The daining bishop, giving leave that the ocaretruth of dilatory pleas is to be made out by may be ordained, and have such a cure within affidavit of the fact, &c. by stat. 4 Anne, c. 16. his district. Cowel. 5 11. Several dilatory pleas cannot be pleaded, for they are not within the statute of Anne. Sishop's jurisdiction. For this realm hath See Stephen on Pleading, 295. By stat. 7. G. two sorts of divisions; one into shires or 4. c. 64. § 19. no indictment or information counties, in respect to the temporal state; and the line sheeted by the dilatory pleas of mis-another into discoses, in regard to the eccleshall be abated by the dilatory pleas of mis- another into dioceses, in regard to the ecclenomer, want of addition, or wrong addition; sigstical state, of which we reckon twenty-one but the court may order the indictment, &c. in England, and four in Wales. Co. Lit. 94. to be amended according to the truth, and the Also the kingdom is said to be divided in its party shall plead thereto. See tit. Pleading; ecclesiastical jurisdiction into two provinces and see Bac. Ab. tit. Pleas. &c. (7th ed. by of Canterbury and York; each of which pro-Gwillim & Dodd.)

DILIGIATUS.

ejectus. Leg. H. 1. c. 45.

DILLIGROUF. Pottage formerly made for the king's table on his coronation day : and there was a tenure in serjeanty, by which lands were held of the king, by the service of finding of this pottage, at that solemnity. 39

DIMIDIETAS. moiety, or one half.

DIMINISHING the coin.] See tit. Coin. DIMINUTION, diminutio.] Where the plaintiff or defendant, on an appeal to a superior court, alleges that part of the record is omitted, and remains in the inferior court not certified; whereupon he prays that it may be certified by certiorari. Co. Ent. 232. 242. Of baptized the inhabitants, and administered to course diminution is to be certified on a writ them other divine offices. Gibs. 133. of error; though if issue be joined upon the errors assigned, and the matter is entered upon record, which is made a consilium, in this case there must be rule of court granted 4 W. 4. that no rule to allege diminution shall be necessary. See Error, IV. 1.

Abr. 245. Diminution cannot be alleged of a The principle on which the damages are to thing which is fully certified; but in somebe calculated in an action for dilapidations thing that is wanting, as want of an original, or a warrant of attorney, &c. 2 Lev. 206: 1 Nels. Abr. 658. And if on diminution alleg-B. It was there held that the incumbent is ed, and the plaintiff in error certify one original, &c., which is wrong, and the defendant in error certify another that is true, the true one shall stand. Cro. Jac. 597: Cro. Car. 91.

After a writ of error brought, and the defendant hath pleaded in nullo est erratum, he cannot afterwards allege diminution, because by that plea he affirmeth or alloweth the record to be such as is certified upon the writ of Metcalfe, 10 Barn. & C. 299. See further nution hath been alleged after in nullo est erratum pleaded, ex gratiá curiæ; though not DILATORY PLEAS. Such pleas as are ex rigore juris. Palm. 85. And there is an

taken, and found by the jury, for plaintiff, in ed in another, the proper diocesan sends his case, &c. they assess the damages. In debt, letters dimissory directed to some other or-the judgment for plaintiff is final, &c. The daining bishop, giving leave that the bearer

vinces is divided into dioceses, and every dio-Outlawed, i. e. de lege cese into archdeaconries, and archdeaconries into parishes, &c. Wood's Inst. 2.

The bounds of dioceses are to be determined by witnesses and records, but more particularly by the administration of divine offices. To which purpose there are two rules in the canon law; in one case, upon a dispute between two bishops upon this head, the direc-Used in records for a tion is, that they proceed in the business by ancient books or writings, and also by witnesses, reputation, and other sufficient proof: in the other case, where the question was, by whom a church built upon the confines of two dioceses should be consecrated, the rule laid down is, that it should be consecrated by the bishop of that city who, before it was founded.

in the name of diocese, so saith the canon law: and accordingly in citations in general visitations, directed to the clergy, it is ordered to cite the clergy of the city and diocese. Gibs. 133.

A bishop may perform divine offices, and use his episcopal habit, in the diocese of another, without leave; but may not perform therein any act of jurisdiction, without permission of the other bishop. Gibs. 133.

A clergyman dwelling in one diocese, and beneficed in another, and being guilty of a crime, may, in different respects, be punished in both; that is, the bishop in whose diocese attempting, by drawing a trigger, to discharge he dwells may prosecute him; but the sen- fire-arms at), or maliciously stabbing, cutting, tence, so far as it affects his benefice, must or wounding, any person, with intent to murbe carried into execution by the other bishop, der, maim, disfigure, disable, or do some Gibs. 134. See tits. Bishops, Clergy, Convo-

DISABILITY, disabilitas. An incapacity in a man to inherit any lands, or take that benefit which otherwise he might have done; which may happen four ways: by the act of a thing that had essence before; and disagreean ancestor, or of the party himself, by the

act of God, or of the law.

1. Disability by the act of the ancestor, is where the ancestor is attainted of treason, into arable or pasture. &c., which corrupts his blood, so that his children may not inherit his estate. See tits. unlade a ship or vessel by taking out the Attainder, Corruption of Blood. By 54. G. 3. cargo or goods. Placit. Parl. 18 Ed. 1. See Attainder, Corruption of Blood. By 54. G. 3. c. 145. this disability is confined to cases of Carcatus. treason and murder.

And by 2 and 3 W. 1. c. 106. § 10, the attainder of any relation who shall have died before the descent of any land shall have taken place, shall not prevent any person or authority, and doth that which by law he tracing his descent through him from inheriting such land. This disability, is, therefore, from the matter for which he was confined. now restricted to inheriting lands of which It one be arrested by a latitat out of B.R., the ancestor is in possession at the time he is and the plaintiff do not file a declaration attainted for treason or murder, and which against the defendant in prison in two terms, are still subject to forfeiture and escheat.

where a man binds himself by obligation, that upon surrender of a lease he will grant a new estate to the lessee, and afterwards he grants over the reversion to another, which be discharged. If an obligge discharges one

puts it out of his power to perform it. 3. Disability by the act of God, is where a person is of nonsane memory, whereby he is incapable to make any grant, &c. So that if he passeth an estate out of him, it may after his death be made void; but it is a maxim in law, that a man of full age shall never be received to disable his own person. Lunacy.

4. Disability by the act of the law, is where a man by the sole act of the law, without any thing done by him, is rendered incapable of the benefit of the law: as an alien born, &c. Terms de la Ley: 4 Rep. 123, 124: 5 Rep.

21: 8 Rep. 43. See tit. Alien.

common law, of idiolcy, infancy, and cover- him, on a writ of right sur disclaimer brought, ure, as to grants, &c. And by statute in the tenant shall lose his land. Terms de la Ley.

The jurisdiction of the city is not included | many cases; as, papiets are disabled to make any presentation to a church, &c., which disability is continued by 10 G. 4. c. 7; officers not taking the oaths are incapable to hold offices; foreigners, though naturalized, to bear offices in the government, &c. See the proper titles. A person shall not be admitted to disable himself to avoid an office of charge, &c., no more than a man shall be allowed to say that he was an idiot, &c. to avoid an act done by himself. Carth. 307. As to pleas of disability in the person of the plaintiff, see tit. Abatement.

Maliciously shooting at (or DISABLE. grievous bodily harm, is felony by 9 G. 4.c.

DISADVOCARE. To denv or not acknowledge a thing. Hengham Magna, c. 4.

DISAGREEMENT, will make a pullity of ment may be to certain acts, to make them void, &c. Co. Lit. 380. See tit. Agreement.

DISBOSCATIO. A turning wood ground

DISCARCARE, from dis and cargo.] To

DISCEIT. See Deceit. DISCENT. See Descent.

DISCHARGE. On writs and process, &c., is where a man is confined by some legal writ is required to do; he is released or discharged ne shall be discharged on common bail. 1 2. Disability by the act of the party, is Lil. Abr. 470. Also where a defendant on arrest is admitted to bail, if the bail bring in the principal before the return of the second scire facias issued out against them, they shall joint obligor, where several are jointly bound, it discharges the others. March, 129. And a man may discharge a promise made to himself, &c. Cro. Jac. 483. See tits. Accord, Acquittal, Habeas Corpus, Satisfaction, Bond,

DISCLAIMER, disclaimium, from Fr. clu-See tit. mer, with the privative dis.] A plea containing an express denial or renouncing of a thing; as if a tenant sue a replevin, upon the distress of the lord, and the lord avows the taking, saying, the tenant holds of him as of his lord, and that he distrained for the rent not paid, or service not performed: now, if the tenant say he doth not hold of him, that is called a disclaim-There are also other disabilities, by the er, and the lord proving the tenant to hold of

This disclaimer by a tenant is considered may be good where the tenant hath the reveras a civil crime, and punished accordingly, by sion in fee, and not the freehold: but when forfeiture of lands to the lord, on reasons most such tenant disclaims, or pleads non-tenure apparently feodal. Finch, 270, 1. So if in and disclaims, the demandant shall have the any court of record the particular tenant does whole, as the whole is disclaimed. Ibid. any act which amounts to a virtual disclaimer; if he claims any greater estate than was upon disclaimer, shall be brought after the granted him at the first infeodation, or takes 31st December, 1834; which time, by § 37, is upon himself those rights which belong only to tenants of a superior class; 1 Inst. 252; if he affirm the reversion to be in a stranger by accepting his fine, attorning as his tenant, collusive pleading, and the like; such behaviour amounts to a forfeiture of his particular of trespass quare clausum fregit, wherein the estate. 1 Inst. 253: 2 Comm. 275: 3 Comm.

If a tenant disclaim to hold of his landlord, and set him at defiance, it dispenses with the necessity of a notice to quit, and the landlord may treat him as a trespasser. Bull, N. P. ficient amends before the action brought; and Peake's R. 196.

persons for land, and one of them, the tenant, saith that he is not tenant, nor claims any cerning the same. See tit. Pleading thing in the lands; this is a disclaimer as to him, and the other shall have the whole land. lands, there are disclaimers in divers other Terms de la Ley. And when a tenant hath cases: for there is a disclaimer of blood, disclaimed upon action brought against him, where a person denies himself to be of the

though if the husband hath nothing but in tit. Chancery. And there is a deed of disright of his wife, he cannot disclaim. 2 Danv. claimer of executorship of a will, &c. where Abr. 569. Such person as cannot lose the an executor refuses and throws up the same. thing perpetually in which he disclaims shall And a devisee in fee may by deed, without not be permitted to disclaim; a bishop, &c., matter of record, disclaim the estate devised. may not disclaim: for he cannot divest the 3 B. & A. 31. right out of the church. Though in a quo warranto, at the suit of the king, against a bishop or others for franchises and liberties, if the bishop, &c., disclaim them, this shall sare.] An interruption or breaking off. bind the successors. Co. Lit. 102, 103. If a This happened when he who had an e man be vouched because of a reversion on a lease made by himself, he cannot disclaim; but an heir may disclaim, being vouched upon a lease made by his ancestor. 2 Danv. 569.

reversion, saving the seignory. 40 Ed. 3.27. If the lord disclaim his seignory in a court of no farther than to make a lease for his own record, it is extinct, and the tenant shall hold of the lord next paramount to the lord dis- lawful during the life of the feoffor; but if he claiming. Lit. sect. 146.

of right sur disclaimer should be brought discontinuance, the ancient legal estate, which against the person that disclaims; for if it be ought to have survived to the heir in tail, beonly against him that is found tenant of the ing gone, or at least suspended, and for a land, though he be a stranger, it is not mate- while discontinued. For, in that case, on the rial. 2 Danv. 570. By plea of non-tenure, death of the alienors, neither the heir in tail,

By 3 and 4 W. 4. c. 27. § 36. no writ of right prolonged to 1st June, 1835, in cases where persons not having a right of entry are entitled to maintain the writ in respect of any

By stat. 21 Jac. 1. c. 16. § 5. in all actions defendant shall disclaim any title to the land, and the trespass be by negligence or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender of sufif the issue be found for the defendant, or the If a writ of pracipe be brought against two plaintiff be nonsuited, the plaintiff shall be barred from the said action, and all suits con-

Besides these disclaimers by tenants of the shall not have restitution on writ of error, blood or kindred of another in his plea; F. N. &c., against his own act, but is barred of his right to the land disclaimed. 8 Rep. 62. But a verbal disclaimer shall not take place against a deed of lands; nor shall the disclaimer of a wife during the coverture bar her entry on her lands. 3 Rep. 26. Baron and seme may disclaim for the wise; in question, this is likewise a disclaimer. See

DISCONTINUANCE.

DISCONTINUATIO, from Fr. discontinuer, ces-

This happened when he who had an estatetail made a larger estate of the land than by law he was entitled to do: in which case the estate was good, so far as his power extended a lease made by his ancestor. 2 Dano. 569. who made it, but no farther. Finch. L. 190. A person may disclaim in the principal, As if tenant in toil made a feoffment in fee-and not in the incident; as he that is vouched simple, or for the hie of the feoffee, or in tail, because of a reversion, cannot disclaim in the all which were beyond his power legally to make, for that by the common law extended life: in such case, the entry of the feoffee was retained the possession after the death of the It is said not to be necessary, that the writ feoffor, it was an injury which was termed a nothing is disowned but the freehold, which nor they in remainder or reversion expectant

Vol. I.-71

have entered on and possessed the land so aliened, but must have brought their writ, and sought to recover possession by law. 3 Comm. 172: 1 Inst. 325: F. N. B. 191. 4.

In the case of a disseisin (see that title), while the possession remained in the disseisor, it was a mere naked possession unsupported by any right; and the disseisee might have restored his own possession, and put a total end to the possession of the disseisor by an entry on the land, without any previous action; but if the disseisor died, his heir came to the possession of the estate by a lawful title: it was the same if the disseisor aliened: the alience came in by a lawful title. By reason of this lawful title, the heir in the first instance, and the alience in the second, acquired a presumptive right of possession, which was so far good, that even the person disseised lost by it his right to recover the possession by entry, and could only recover it by an action at law. When the right of entry was thus lost, and the party could only recover by action, the possession was said to be discontinued. This was the general import of the word discontinuance; but in its usual acceptation it signified the effect of alienations made by husbands seised in right of their wives; by ecclesiastics seised in right of their church; or by tenants in tail; those being the three instances adduced by Littleton of discontinuance. Thus before the stat. 11 H. 7. c. 20. the alienation of a woman seised of an estate in dower, or of an estate of the gift of her husband, or of any of his ancestors, was said to be a discontinuance; and before the stats. 32 H.S.c. 31. 14 Eliz.c. 8. recoveries suffered by tenants for life, tenants by the curtesy, or tenants in tail after Lit. 33: 2 Danv. Abr. 572. possibility of issue extinct, or even by the feoffee of tenant for years, worked a discontinu- by feoffment, fine, recovery, release, and confirance. See 1 Rep. 14.

rial difference between the situation or title of ranty, were no discontinuances: an exchange the alienee of any person, whose alienation would not make a discontinuance: as if, tenmade a discontinuance, and the situation or ant in tail exchanged land with another, that title of the heir or alience of a disseisor; for was not any discontinuance, by reason no the heir and alience of a disseisor immedilivery was requisite thereon. 2 Dany. 57. It ately claimed under a person coming in by a was the same of a bargain and sale, &c. wrongful title, and their estates, though not And an alteration of such things as laid in defeasible by entry, were immediately defeat grant, and not in livery; worked no disconsible by action. But the alience of every per- tinuance; for such grant did no wrong either son, whose alienation was said to be a discon- to the issue in tail, or him in reversion or retinuance [or rather whose alienation caused mainder, because nothing passed but during a discontinuance], claimed by a person having the life of tenant in tail, which was lawful: a lawful estate; and the estate of the alience and every discontinuance worked a wrong. was unimpeachable during the life of the Co. Lit. 332. alienor. It should also be observed, that a If tenant in tail of a rent, common, advowdiscontinuance extended to those cases only son, or the like, granted it in fee, it was not a where a person was dispossessed of an estate discontinuance: nor where such tenant grantof freehold, and where, though he had lost his ed any thing out of land, &c. Lit. 138: right of entry, he could still recover the pos- Finch's Law, 193. But where a tenant in session by action. The peculiar import of the tail of a manor made a lease for life, word discontinuance, where applied to the not warranted by stat. 32 H. 8. c. 28. of cases mentioned by Littleton, is thus shortly, part of the demesnes, this was a discon-

on the determination of the estate-tail, could | but forcibly, expressed by Honard, in his Ancient Laws of the French :- "An interruption of the right which one has on an estate, by the sale which another, charged to preserve that right, has made of it." See 1 Inst. 325. a. and the long and learned note there on the doctrine of discontinuance.

> By the common law, the alienation of an husband, who was seised in right of his wife. worked a discontinuance of the wife's estate; till the stat. 32. H. S. c. 28. provided that no act by the husband alone should work a discontinuance of, or prejudice the inheritance or freehold of the wife; but that after his death she or her heirs might enter on the lands in question. Also, if an alienation was made by a sole corporation, as a bishop or dean, without consent of the chapter, this was a discontinuance. F. N. B. 194. But by the disabling stats. 1 Eliz. c. 19. 13 Eliz. c. 10. all such alienations were declared absolutely void ab initio, and no discontinuance could be thereby occasioned. 3 Comm. 172.

> A discontinuance took away an entry only; and to every discontinuance it was necessary there should be a divesting or displacing of the estate, and turning the same to a right; for if it were not turned to a right, they that had the estate could not be driven to an action. Co. Lit. 327. And an estate-tail could not be discontinued, but where he that made the discontinuance was once seised by force of the entail where the estate-tail was executed; unless by reason of a warranty. Lit. sect. 637. 641: Driver, d. Burton, v. Hussey, 1 H. Blackst. 269. Also if tenant in tail levied a fine, &c., this was no discontinuance till the fine was executed, because if he died

A discontinuance might be five ways, viz. mation with warranty. 1 Rep. 44. A grant It is to be observed, that there was a mate- without livery, or a grant in fee without war-

it no parcel to the manor. 2 Rol. Abr. 58.

ant in tail of the gift of the crown. Stat. 34 the stat. 1 Ed. 6. c. 7. enacts that no action and 35 H. 8. c. 20. Nor by tenant in tail of fee-farm rents, to bar the remainder vested by the statute. Stat. 22 and 23 Car. 2. c. 24. § 6. Some discontinuances at common law were made bars as to the issue in tail; though they still remained discontinuances to him in continued from one term to another, the conremainder, &c., such as fines with procla- tinuances must be all entered; otherwise mations, by stats. 4 H. 7.c. 24: 32 H. 8.c. 36. If the husband levied a fine with proclamations, and died, the wife must have entered, Abr. 660. If the plaintiff in a suit doth noor avoided the estate of the conusce within thing, it is a discontinuance, and he must befive years, or she was barred for ever, by the stat. 4 H. 7. c. 24; for the stat. 32 H. 8. c. 28. helped the discontinuance, but not the bar. advised to prosecute in another court, he is to Co. Lit. 326.

A discontinuance could only be created by a tenant in tail in possession. 2 D. & R. 373: S. C. 1 B. & C. 238. But the existence of a term of years prior to his estate did not prevent a fine levied by a tenant in tail from effecting a discontinuance. 1 Neville & M.

The learning upon this subject, which was formerly an important branch of the law, has now become more curious than useful; as by 3 and 4 W. 4. c. 27. § 39. no discontinuance made after the 31st December, 1833, shall toll or defeat any right of entry or action for the

recovery of land.

DISCONTINUANCE OF PLEA. Where divers things should be pleaded to, and some are omitted, this is a discontinuance. 1 Nels. Abr. 660, 661. If a defendant's plea begin with an answer to part, and answers no more, it is a discontinuance: and the plaintiff may take judgment by nil dicit for what is not answered: but if the plaintiff plead over, the whole 1 Salk. 139. Debt action is discontinued. upon bond of 500l.; the defendant as to 225l. part of it, pleads payment, &c. And upon demurrer to this plea, it was adjudged that there being no answer to the residue, it is a discontinuance as to that, for which the plaintiff ought to take judgment by nil dicit. 1 440. Salk. 180. Where no answer is given to one part, if the plaintiff pleads thereto, he cannot have judgment according to his declaration; for which reason it may be a discontinuance of the whole. 1 Nels. 660. But this is helped after verdict by stat. 32 H. 8. c. 30. See tits. Amendment, Pleading, Practice. And see Stephen on Pleading, 233.

DISCONTINUANCE OF PROCESS. This discontinuance is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and by a side bar rule on payment of costs. R. time to time, as he ought to do, the suit is discontinued, and the defendant is no longer ant cannot have such a rule. bound to attend; but the plaintiff must begin his action afresh, usually paying costs to his action on payment of costs was obtained by antagonist. Anciently by the demise of the the plaintiff: the costs were not taxed till

tinuance of this parcel; and it is said made king all suits depending in his courts were at once discontinued; but to prevent the expense There could be no discontinuance by ten- as well as delay attending this rule of law, shall be discontinued by such death of the king. The continuance of the suit by improper processes, or by giving the party an illegal day, is properly a miscontinuance.

Where an action is long depending, and there will be a discontinuance, whereupon a writ of error may be brought, &c. 1 Nels. gin his suit again: and where it is too late to amend a declaration, &c., or the plaintiff is discontinue his suit, and proceed de novo. But a discontinuance of an action is not perfect till it is entered on the roll, when it is of record. Cro. Car. 236.

The plaintiff cannot discontinue his action after a demurrer joined, and entered; or after a verdict, or a writ of inquiry, without leave of the court. Cro. Jac. 35: 1 Lil. Abr. 473. In actions of debt or covenant after a demurrer joined, the court will give leave to discontinue, if there be an apparent cause, as if the plaintiff through his own negligence is in danger of losing his debt: but if the demurrer be argued, then he shall not have leave to discontinue: nor where he brings another action for the same cause, and this is pleaded in abatement of the first action. Sid. 84.

It has been ruled, upon a motion to discontinue, that the court may give leave after a special verdict, which is not complete and final, but never after a general verdict. Salk. 178. See Hardw. 200, 1. So after inquiry executed and returned. Carth. 31.

After issue and a verdict plaintiff cannot discontinue without consent of defendant; for if plaintiff will not enter up judgment defendant may. Salk. 178. After demurrer argued and allowed, discontinuance may be allowed on payment of costs. Str. 76. 116: 3 Lev.

And where a man hath a just cause of action, for a matter of any consequence, and unadvisedly demurs to a plain bar, &c., and defendant joins in demurrer, and it is argued, and the court are of opinion the plea is good in law, though it may be false in fact, the court will, even after giving their opinions, but before judgment given on motion, permit the plaintiff to withdraw his demurrer, on payment of costs, and take issue.

The plaintiff may, if he see occasion, discontinue before or after declaration delivered Mich. 10 G. 2. But in a replevin the avow-

On 6th February, a rule to discontinue the

11th March: the court held that when the costs were taxed and the judgment of discontinuance entered up, it referred back to the day when the rule was obtained, and that the action was to be discontinued from that time.

1 B. & C. 649.

An appeal may as well be discontinued by the defect of the process or proceedings in it, as it may be by the insufficiency of the original writ, &c. For by such defect, the matter depending, is as it were, out of court. 1 Lill. 473. A discontinuance or miscontinuance at common law, reverses a judgment given by default; and discontinuance upon demurrer is error: but a miscontinuance after appearance is not so. 8 Rep. 150: 46 Ed. 3. c. 30.

mon law by appearance: and by stat. 32 H. 8. c. 30. all discontinuances, miscontinuances, and negligencies therein, of plaintiff or defendant, are cured after verdict. See tit. Amend-

By one of the general rules made by the judges in Hilary Term, 2 W. 4., after discontinuance a defendant shall not be arrested

without the order of a judge.

An agreement to discontinue an indictment (even supposing such an agreement to be legal) can only be effected by the attorney general's entering up a nolle prosequi. 2 Bing. 258.

DISCOVERT. The law term for a woman unmarried or widow, one not within the

bonds of matrimony. Law Fr. Dict.
DISCOVERY. The act of revealing or disclosing any matter by a defendant in his answer to a bill filed against him in a court

of equity. See tit. Chancery.

To administer to the ends of justice, without pronouncing a judgment which may affect any rights, the courts of equity, in many cases, compel a discovery. This jurisdiction is exercised to assist the administration of justice, in the prosecution or defence of some other suit, either in the court of equity itself, or in some other court: and a discovery has been compelled to aid the jurisdiction of a foreign court. But if a bill be brought to aid, by discovery, the prosecution or defence of any proceeding, not merely civil, in any other court, as an indictment or information, a court of equity will not exercise its jurisdiction to compel a discovery; and the defendant may demur. 2 Vos. 3.88. And in the case of suits merely civil in a court of ordinary jurisdiction, if that court can itself compel the discovery required, a court of equity will not interfere. 1 Ath. 255: 1 Ves. 205: 2 Ves. 451.

A bill for a discovery must show an interest in the plaintiff in the subject to which the required discovery relates; and such an interest as entitles him to call on the defendant for the discovery. See Finch, Rep. 36. may in some cases be compelled to discover 44: 1 Vern. 399.

As the object of a court of equity in compelling a discovery is either to enable itself or some other court to decide on matters in dispute between the parties, the discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted. If, therefore, the plaintiff does not show by his bill such a case as renders the discovery which he seeks material to the relief, if he pray relief; or does not show a title to sue the defendant in some other court: or that he is actually involved in litigation with the defendant, or liable to be so; and does not also show that the discovery which he prays is material to enable him to support or defend a suit; he shows no title to the discovery; and consequently a demurrer to the bill for such purpose will be allowed. See Finch, Rep. 214: 1 Ves. 205: 2 Ves. 396.

9: 2 Atk. 388: 1 Vern. 204.

The situation of a defendant may render it improper for a court of equity to compel a discovery; either, 1. Because the discovery may subject the defendant to pains and penalties, or to some forfeiture, or something in the nature of a forfeiture; or, 2. It may hazard his title in a case where, in conscience, he has at least an equal right with the person requiring the discovery; though that right may not be clothed with a perfect legal title; as to which latter, see 1 Ves. 205: 3 Atk. 453. It is a general rule that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise (as by pains and penalties, a criminal prosecution, &c.); or whatever may be the nature of the punishment. 2. Ves. 245. 251: 1 Ves. 246: 1 Eq. Ab. 131. p. 10: 1 Atk. 450: 2 Atk. 393: Viner, tit. Usury, Q. 4: Toth. 135.

But if the plaintiff alone is entitled to the penalties, and expressly waives them by his bill, the defendant shall be compelled to make the discovery; for it can no longer subject him to a penalty. 1 Vern. 60. And though a discovery may subject a defendant to penalties, to which the plaintiff is not entitled, and which consequently he cannot waive, yet if the defendant has expressly covenanted not to plead or demur to the discovery sought, which is the common case with respect to servants of the East India Company, he shall be compelled to answer. Lq. Ab. 77, 8. Where, too, a person, by his own agreement, subjects himself to a payment in the nature of a penalty on his doing a particular act, a demurrer to discovery of that act will not be allowed.

It seems, however, that a demurrer will be allowed to any discovery which may tend to show the defendant guilty of any moral turpitude, as the birth of a child out of wedlock. Park. 163: but see 2 Ves. 451. But a mother where her child was born, though it may lead to prove the child an alien. 294.

A defendant may likewise demur to a bill which may subject him to any forfeiture of interest; as if a bill be brought to discover whether a lease has been assigned without a license; or whether a defendant entitled during widowhood, or liable to forfeiture of a act at discretion, is bound by the rule of realegacy in case of marriage without consent, is married: or to discover any matter which may subject a defendant entitled to any office yet he is circumscribed, that what he does be or a franchise to a quo warranto. See Toth. 69: 1 Ves. 56: 2 C. R. 68: 2 Atk. 392: 2 Ves. 265: 1 Eq. Ab. 131. c. 10.

A defendant may in the same manner demur to a discovery which may subject him to any thing in the nature of a forfeiture. See 3 Atk. 457: 2 Comm. 661: 3 Bac. Abr.: 3 Atk. 453.

But a defendant cannot protect himself from answering a bill for discovery, by showing that the answer must relate to matters which could be of no use to the party in action pending at law. 3 Price, 489. Nor can he by disclaimer deprive the plaintiff of the right to require a full answer from him, unless it is evident that after such disclaimer he ought not to be retained as a party to the suit. 2 Russ. 458.

to discover his own case, is confined to matters of title, and does not extend to matters of account. 1 Younge & J. 426. Where relief is prayed, and discovery only as ancillary to that relief, the discovery cannot be obtained. 2 Younge & J. 33. The court will not compel a defendant to answer allegations which may subject him to penalties, and the protection extends not only to the particular question, but to every link in the chain of proof. Where the chairman of a joint stock company, with a knowledge that the company had been the fruits of the earth, and of beasts, or ladissolved, and that the managing committee had determined to buy up the shares, sent his shares into market and sold them as good and available shares, the court protected him from answering the allegations, on the ground that there existed a reasonable probability he might be indicted for fraud. 2 Younge &. J. A broker in London has, however, been held bound to answer a bill of discovery in aid of an action brought against him for misconduct, though the discovery would subject him to the penalty of a bond given to the corporation on his admission. 1 Sim. Rep. 404: and see 5 Madd. 219: 1 Meriv. 391: 19 Ves. 225: 16 Ves. 59. 239: 14 Ves. 59. Where a bill states defendant's marriage with a particular woman, a plea stating that she is his sister protects him from answering any or personal estate fallen to him, or be guilty fact forming a link in the chain. 14 Ves. 59.

See further this Dict. tit. Chancery. DISCRETION, discretio. When any ing to his discretion, the law intends it must II.

2 Ves. 287.1 be done with sound discretion, and according to law: and the Court of B. R. hath a power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them. 1 Lil. Abr. 477.

Discretion is to discern between right and wrong; and therefore whoever hath power to son and law. 2 Inst. 56. 298. And though there be a latitude of discretion given to one, necessary and convenient; without which no liberty can defend it. Hob. 158. The assessment of fines on offenders committing affrays, &c., and the binding of persons to the good behaviour, are at the discretion of our judges and justices of the peace. And in many cases, for crimes not capital, the judges have a discretionary power to inflict corporal punishment on the offenders. Infants, &c. under the age of discretion, are not punishable for crimes; and want of discretion is a good exception against a witness. See tit. Age: and other apposite titles.

DISFIGURE. Maliciously shooting at (or attempting, by drawing a trigger, to discharge fire arms at), or maliciously stabbing, cutting, or wounding any person with intent Russ. 458.

to murder, maim, disfigure, disable, or do some grievious bodily harm, is a capital felony

by 9 G. 4. c. 31. § 11, 12.

TO DISFRANCHISE, is to take one's freedom or privilege; it is the contrary to enfranchise. Corporations have power to disfranchise members in certain cases. Sec tits. Corporation, Bye-law.

DISHERISON. A disinheriting. 20 Ed. 1. de vocatis ad Warr. Disherison of the crown. Stat. 8. Ric. 2. c. 3. Disherison

of the people.

DISMES, decime.] The tenth part of all bour, due to the clergy. It signifieth also the tenths of all spiritual livings granted to the crown, which is called a perpetual disme. Stat. 26 H. 8. c. 3. § 8. &c. It also formerly signified a tax or tribute levied on the Temporality. See Taxes, Tenths, Tithes.

DISORDERLY HOUSES. See Bawdy

Houses, Riots, Theatres.

DISPARAGEMENT, in the time of the old tenures, the matching an heir in marriage under his degree, or against decency. Co. Lit. 107: Magna. Chart. c. 6. See this Dict. tit. Tenures.

TO DISPAUPER. When a person by reason of his poverty is admitted to sue in formâ pauperis; if afterwards, before the suit be ended, the same party have any lands of any thing whereby he is liable to have this privilege taken from him, then he is put out of the capacity of suing in forma pauperis, thing is left to any person to be done accord- and is said to be dispaupered. See tit. Costs,

as to dispensations to hold pluralities, see tits.

Chaplains, Cession.

DISPENSATIONS OF THE KING. If a dispensation by the Archbishop of Canterbury be to be in extraordinary matters, or in a case that is new, the king and his council are to be consulted: and it ought to be confirmed under the broad seal. The king's authority to grant dispensations remains as it did at common law: notwithstanding stat. 25 H. 8. c. 21. Cro. Eliz. 542. 601. See farther as to the dispensing power of the crown by non obstante, &c. this Dict. tit. King.

To scandalize or dis-DISPERSONARE.

parage. Blount.

DISSECTION. By the 2 and 3 W. 4. c. 75. the dissection or anatomical examination of human bodies is sanctioned under certain restrictions; and his Majesty's Secretary of State for the Home Department in England, and the Chief Secretary for Ireland are authorised to grant licences to practise anatomy, and to appoint inspectors of the places or schools where it is carried on.

By § 16. so much of the 9. G. 4. c. 31. § 5. as directed that the body of a person convicted of murder should be dissected is repealed.

DISSEISIN. From the Fr. Dissaisin.

A species of injury by ouster to the freehold estate of another. A wrongful putting out of him that is seised of the freehold. 1 Inst. 277. As where a person enters into lands or tenements, and his entry is not lawful, and keeps him that hath the estate from the posession thereof. Bract. lib. 4. c. 3. And disseisin is of two sorts; either single disseisin, committed without force of arms, or disseisin by force; but this latter is more properly deforcement. Brit. cap. 42, 43.

By Magna Charta, 9 H. 3. c. 29. no man is to be disseised or put out of his freehold, but by lawful judgment of his peers, or by the

law of the land.

Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted, or pass. Disseisin must, therefore, mean the turning the tenant out of his tenure, and usurping his place and feudal relation. Lord Mansfield. in the case of Taylor, ex dem. Atkins v. Horde, 1 Burr. 60: 5 Bro. P. C. 247.

necessary that the disseisor had not a right of entry (or, to use the old law expression, that his entry was not congeable); that the person disseised was, at the time of the disseisin, in the actual possession of the lands; that the disseisor expelled him from them by some degree of constraint or force; and that he substituted himself to be tenant to the lord. But to be remedied by entry only, without any

DISPENSATION. See title Bishops; and I how this substitution was effected it is difficult, perhaps impossible, now to discover. 1 Inst. 266. b. in. n.; 350. b. in. n.: the latter a very long and abstruse note on the subject, and entering fully into the principles of the case above mentioned.

The injuries of abatement and intrusion (see those titles) are by a wrongful entry where the possession is vacant; but this of disseisin is an attack upon him who is in actual possession, and turning him out of it. The former were an ouster from a freehold in law: this is an ouster from a freehold in deed. Disseisin may be effected either in corporeal inheritances, or in incorporeal. Disseisin of things corporeal, as of houses, lands, &c. must be by entry, and actual dispossession of the freehold; Co. Lit. 181; as if a man enter either by force or fraud into the house of another, and turn, or at least keep, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession, for the subject itself is neither capable of actual bodily possession, nor dispossession; but it depends on their respective natures and various kinds, being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them. But all disseisins of hereditaments incorporeal are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he be pleased to suppose himself disseised. Litt. § 588, 589. Otherwise, as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditaments.

And so, too, even in corporeal hereditaments, a man may, frequently suppose himself to be disseised when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy of an issue of novel disseisin, instead of being driven to the more tedious process of a writ of entry. Heng. Paro. c. 7: 4 Burr. 110.

The true injury of an actual or compulsive disseisin, according to what has been already stated, seems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which, in the times of pure feodal tenure, the consent or connivance of the lord, who upon every descent or alienation personally gave, and who therefore alone could change, the seisin or investiture, seems to have been considered as necessary. But when, in process of time, the feodal form of alienations wore off, and To constitute an actual disseisin, it was the lord was no longer the instrument of giving actual seisin, it is probable that the lord's acceptance of rent or service from him who had dispossessed another might constitute a complete disseisin. Afterwards no regard was had to the lord's concurrence, but the dispossessor himself was considered the sole disseisor; and this wrong was then allowed

form of law, as against the disseisor himself; the injury is done, or of the act which is combut required a legal process against his heir or alience. And when the remedy by assise was introduced under Henry II., to redress such disseisins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be seised merely for the sake of the remedy. 3 Comm. 169. &c.

A disseisin may be committed by a mere stranger, or by one who is entrusted with the possession, as a tenant at years, or tenant at will. Br. Ab. Disseisin, 3. 64. 66: T. Jones, 317. If the act be committed by tenant for life, it cannot, as it has been said, be properly called a disseisin; and when committed by tenant in tail, or one who is seised in autre droit, it is a discontinuance, and not a dis-

seisin.

freehold, it can only be accomplished by means adequate to transfer the freehold. Thus, if the act be committed by a stranger, an assumption of the property in the freehold is necessary. If he enter upon the lands merely, asserting his rights, had proved a better title this is no disseisin; he must enter and oust the true owner, which ouster may be by expressly claiming the freehold, or by taking the profits. Co. Lit. 181. a. According to Lord Holt, a bare entry only, without an expulsion, makes such a seisin only that the law will adjudge him in possession who has the right; but it will not work a disseisin or abatement without actual expulsion. Anon. 1 Salk 246; and see Lit. sect. 701. Whatever may have been the doctrine formerly, it seems to be now established law, that in order to cause a disseisin, the act must be such, that an intention to disseise may be inferred from Cro. Car. 304: 3 Price, 575: 12 East. 141: 3 Maule & S. 271. Nor does this rule militate in any degree against the old and correct distinction between actual disseisin and disseisin at election. It is said in some modern cases, that in order to constitute a disseisin, there must be a wrongful entry. Per Bayley, J., 5 Barn, & A. 689: 3 Maule & S. 271. But this doctrine must not be understood to affect the operation of a feotiment made by tenant for years during the continuance of the term, which creates a dis-

The doctrine of disseisin at election has been much discussed in modern times; and, according to the view of the subject taken by Lord Mansfield, it is difficult to imagine a case in which an actual disseisin can at the present day be committed. Atkyns v. Horde, This opinion has been most ably controverted by Mr. Butler; Co. Lit. 330. b. note 1; and the question may, perhaps, be considered as still open to discussion. It seems that the doctrine of disseisin at election is to eth or puts another out of his land, without be confined to those cases in which, either on order of law; and a disseisee is he that is so

mitted, no actual disseisin can take place; but that in every case where the property is susceptible of such an injury, and the act has all the qualities necessary to constitute a disseisin, it is not in the power of the injured party to elect, whether or not he will consider himself disseised. Roscoe on Real Actions, 61.

A disseisor gained a mere naked possession that might have been put an end to by the disseisee entering and restoring his own possession, which he could have done at any time during the life of the disseisor, provided the latter retained the land. But if the disseisor died or aliened, the disseisee's right of entry was taken away, and his only remedy was by action. The reasons why a descent to an heir, or an alienation to a third person, was allowed to work such an alteration in the condition of the disseisee's title, were, that the As a disseisin is a wrongful ouster of the heir and the alienee, taking by act of law, were presumed to come in under a lawful title; and, therefore, the law would not suffer their possession to be disturbed until the claimant, who had been guilty of neglect in not sooner in open court. As, however, a disseisor might have died before the disseisee had had an opportunity of restoring his possession by entry, the power of a descent to the heir, to take away a right of entry, was restricted by the 23 H. 8. c. 38. to cases where the disseisor had been in peaceable possession for five years previous to his death, without entry or claim from the person having lawful title. And this continued to be the law until the passing of 3 and 4 W. 4. c. 27. which, by § 39. enacts, that no descent, cast after the 31st December, 1833, shall toll or defeat any right of entry or action for the recovery of land. See tit.

> Assises that lie against disseisors are called writs of disseisin; and there are several writs of entry sur disseisn, of which some are in the per, and others in the post; but it seems unnecessary to enumerate and distinguish them here, as they all have been long disused, and are speedily to be abolished. For by § 36 of the 3 and 4 W. 4 c. 27. no writ of assise of novel disseisin, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, shall be brought after the 31st December, 1834; which time, by § 37. is prolonged to the 1st June, 1835, in the cases therein mentioned.

Those who wish for further information on the subject of disscisin, and the nature of the above writs, may consult 3 Comm. c. 10. and Booth & Roscoe on Real Actions. Also see this Dictionary, tit. Assise of Novel Disseisin; which was printed off before the alteration of the law.

DISSEISOR, is in general he that disseisaccount of the nature of the property to which put out. 4 H. 4. As the king in judgment of law can do no wrong, he cannot be a dis- | scribed by their ministers and schoolmasters. seisor. 1 Ed. 5. 8. A disseisor is to be fined and imprisoned; and the disseisee restored to the land, &c. by stat. 20 H. 3. c. 3. Where a disseisor is disseised, it is called disseisin upon disseisin. See tit. Disseisin.

A name bestowed on DISSENTERS. those who dissent from the Church of England, and refuse to partake of her communion. Under this designation is comprehended a variety of sects, who, differing among themselves on many points, agree in rejecting the forms and discipline of the establishment. No sooner had the latter succeeded in throwing off the yoke of Rome, than she asserted her own supremacy, and endeavoured to impose her doctrines upon the whole nation. With the view of creating a uniform system of faith and mode of worship throughout the realm, various acts were passed during the reign of Elizabeth and her immediate successors. these, non-attendance at church, persuading others from attending, impugning the sovereign's ecclesiastical authority, or being present at what were termed unlawful conventicles, were visited with heavy punishments, extending, in some instances, to imprisonment or banishment for life. It is only charitable to attribute such enactments rather to the intolerance of the age, than of the church they were designed to protect. They were undoubtedly framed in times when the principles of religious liberty were little understood, and rarely practised, even by the dissenters themselves. It is fortunately now unnecessary to trace the progress of the prosecution endured by the latter, and which kept augmenting in severity down to the period of the Revolution. Having been previously denied the freedom of worship, they were, by the 13 Car. 2. st. 2. c. 1., and the 25 Car. 2. c. 2., commonly called the Test and Corporation Acts, deprived of their civil rights, and excluded from all places of honour and profit under the crown, and from all offices of trust among their fellow citizens. After the Revolution dissenters were, for the first time, allowed by the Toleration Act to exercise their religion under certain restrictions; and were, on the taking of the oaths of allegiance and supremacy, and subscribing the declaration against popery, relieved from the penalties of nonconformity. But it was not until the year 1828, and after many fruitless efforts, that they were successful in obtaining a repeal of the Test and Corporation Acts. By the 9 G. 4. c. 17. a declaration is substituted for the sa- duly qualified are allowed to preach in any cramental test imposed by those statutes, and every class of his Majesty's protestant subjects placed on an equal footing, as regards their elegibility to offices and employments, either under the government, or in any city or corporation.

The law, however, still requires dissenters to register their places of worship, and certain oaths and declarations to be taken and sub-place of such articles.

1. As to dissenting places of worship.—By the 52 G. 3. c. 155. § 2. no congregation or assembly for religious worship of protestants. consisting of more than twenty persons, besides the family and servants in whose house the meeting is held, shall be permitted, unless the place of meeting (if not registered under former acts) shall be certified to the bishop of the diocese, the archdeacon, or the quarter sessions, and subsequently registered in the manner therein mentioned. And every person permitting any such meeting in any place occupied by him until the same shall have been so certified, shall forfeit a sum not exceeding 201., or less than 20s.

By § 11. the doors of places where such meetings are held are not to be locked or fastened, under a penalty not exceeding 201.

nor less than 40s.

By § 12. any person wilfully disturbing any meeting for religious worship, permitted by that or any former act, or molesting any person officiating or assembled there, shall, upon conviction at the sessions, suffer the penalty of 401.

By 7 and 8 G. 4. c. 30. § 8. persons demolishing, pulling down, or destroying, or beginning to demolish, pull down, or destroy, any dissenting chapel duly registered, are guilty of felony, and shall suffer death. And by c. 31. of the same session, § 2. the hundred shall make full compensation for the damage done, which, if under 30l., may (by § 8.) be awarded by two justices in petty sessions.

By 3 and 4 W. 4. c. 30. all chapels and other places of religious worship are exempted

from poor and church rates.

2. As to dissenting ministers.—They seem to be still liable to the penalties enacted by the Act of Uniformity (1 Eliz. c. 2), for not using the service of the Common Prayer-book, or using any other service in lieu thereof.
By the Toleration Act (1 W. & M. st. 1. c.

18. § 8.) dissenting ministers, in addition to the oaths of allegiance and supremacy, and the declaration against popery to be taken and made by other dissenters, were required to subscribe the articles of religion mentioned in the 13 Eliz. c. 12., with the exception of the 34th, 35th, and 36th, and part of the 20th, to exempt them from the penalties imposed by various statutes passed in the reign of Charles II. for officiating in any congregation permit-

By 10 Anne, c. 2 § 9. dissenting ministers certified meeting, although not within the county where they became qualified.

By the 19 G. 3. c. 44. dissenting ministers scrupling to subscribe the above articles, were, on taking the oaths of allegiance and supremacy, and making the declaration against popery, allowed to subscribe the declaration of Christian belief therein mentioned in the in any meeting certified under that or any effect of it is to compel the party either to reformer act, are exempted from the penalties plevy the distress, and contest the taking in referred to in the Toleration Act, and 19 G. 3. an action against the distrainer; or, what is c. 44; provided (§ 5.) they shall, when required by a justice of peace, by writing under his hand, take and subscribe in his presence the oaths and declarations specified in compulsory, to cause a man to appear in the latter statute.

By § 11. of the Toleration Act, dissenting sonal, of a man's moveable goods, and proministers complying with the requisitions of fits of lands, &c., for contempt for not apthe statute, were exempted from serving upon pearing after summoned; and distresses real, any jury, or from being appointed church-upon immoveable goods. And none shall be warden, overseer, or to any other parochial distrained to answer for any thing touching office, or to any office in any hundred of any their freeholds but by the king's writ. Stat. shire, city, &c. And by 19 G. 3. c. 44. they 52. H. 3. c. 1. are further exempted from serving in the militia; all which exemptions are confirmed to finite: Finite is that which is limited by law, such as are not engaged in trade, by the 52 how often it shall be made to bring the party G. 3. c. 155. § 9. And see 6 G. 4. c. 155. § 2. to trial of action, as once, twice, &c. with respect to their exemption from serving infinite is without limitation, until the party

on juries.

3. As to dissenting schoolmasters.—Even so late as the 12 Anne, st. c. 7. (repealed by 5 G. 1. c. 4.) dissenters were prohibited from educating their own children, and were required to place them in the hands of conformists.

By 19 G. 3. c. 44. § 2. no dissenting minister or other dissenter taking the oaths of al-algiance and supremacy, and subscribing the declarations against popery and of Christian belief, shall be prosecuted in any court for teaching and instructing youth as a tutor or schoolmaster.

By § 3. the act is not to be construed to extend to enable any dissenter to hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless the same shall have been founded since the first year of William and Mary, for the use and benefit of protestant dissenters.

tits. No-conformists, Blasphemy, Religion, Toleration, Quakers, Moravians, Separatists, Unitarians.

DISSIGNARE. To break open a seal-Sepulto patre testamentum dissignatum est. Neubrigensis, lib. 2. c. 7.

DISTILLERS, of strong waters, spirits, &c. are subject to divers regulations under the excise laws, in order to avoid frauds in the revenue. See this Dict. tit. Spirituous Liquors; and also tit. Excise.

tit. Distress.

DISTRESS.

DISTRICTIO. chattel out of the possession of the wrong- rent reserved upon a gift in tail, lease for life, doer into the custody of the party injured, to years, &c., though there be no clause of disprocure a satisfaction for the wrong committees in the deed, so as the reversion be in ted. 3 Comm. 6. The term distress is also himself: but, on a feoffment in fee, a distress applied to the thing taken or distrained.

A man may take a distress for homage, in the deed. Co. Lit. 57. 205; Doctor and fealty, or any services; for fines and amerce- Student, cap. 1. See Co. Lit. 204. Vol. I.-72

By 52 G. 3. c. 155. § 4. preachers officiating ments, and for damage-feasant, &c. And the

There are likewise distresses in actions court: and of these there is a distress per-

Distress is also divided into finite and inappears; which is likewise applicable to jurors not appearing: then it hath had a further division into a grand distress, and ordinary distress; the former whereof extends to all the goods and chattels which the party hath within the country. F. N. B. 904: Old Nat. Br. 43. 113: Brit. c. 26. f. 52: 3 Comm.

Let us now consider more particularly,

1. Who may distrain, and for what; 2. What may be distrained.

II. At what Time and Place, and, generally, in what Manner the Distress should be made.

The Remedies for illegal Distress. IV. Of the Statutes regulating the Sale of Distresses, &c.

1. Who may distrain, and for what .--For further matter relative to dissenters, see To justify taking a distress, the party must see he hath good cause to distrain; that he have power to take the distress, and from the person from whom he takes it; that the thing, for the quality of it, be distrainable, and he distrain it in due time and place, &c. He who takes a distress for another ought to have good warrant for doing it; and must do it in his name; and a bailiff or servant may distrain for his master. 1 Cro. 748: 2 Cro. 436: Godb. 110. A distress ought to be made of such things whereof the sheriff may make DISTRAIN. To distrain is to take and replevin, and deliver again in as good plight keep any thing in custody as a distress. See, and condition as they were at the time of the taking. Co. Lit. 47.

Of common right a person may distrain The taking of a personal for rents, and all manner of services, and for may not be taken, unless expressly reserved

A person who has not the reversion cannot agreement for a lease has paid rent, he may distrain of common right, but he may reserve be distrained upon for subsequent arrears. to himself a power of distraining; or the re- 3 Bing. 361: Ryan & Moody, 355. servation may be good to bind the lessee by way of contract, for the performance whereof ready-furnished lodgings. 2 New. Rep. 224. the lessor shall have an action of debt. Bac. Abr. 106: Lit. s. 214. So if a lessee for years assigns his term rendering rent, he cannot distrain for it without a clause for that purpose, because he has no reversionary interest; his only remedy is by action on his contract. 2 Wils. 375. Also if an assignee of a term surrenders to the original lessor, though tor. And by the insolvent act 7 G. 4. c. 57. § he reserves a gross annual payment, he cannot distrain for that, or for the original rents, as he has no privity of estate. 1 T. R. 441:

5 Bing. 24.

trators of a man seised of a rent-service, rentcharge, rent-seek, or fee-farm, in fee-simple, kind of rent in arrear. For neglecting to do or fee-tail, could not distrain for arrears ac- suit to the lord's court, or other certain percrued in the life-time of the owner of such sonal service, the lord may distrain of comrents. Co. Lit. 162. a. But by the 32 H. 8. mon right. Bro. Distress, 15: 1 Inst. 46 .c. 37. the executors or administrators of ten- For amercements in a court-leet, a distress ants in fee-simple, fee-tail, or for term of lives, may be had of common right; but not for of rent-services, rent-charges, rent-seck, and amercements in a court baron, without a spefee-farms, may distrain for such arrears upon cial prescription to warrant it. Brownl. 36. the lands chargeable so long as they remain | Another injury, for which distresses may be in the possession of the person who ought to taken, is where a man finds beasts of a stranhave paid, or of any person claiming under ger wandering in his grounds damage-feahim by purchase, gift, or descent. § 3. gives sant; doing him hurt or damage by treading the like remedy to husbands entitled, in right down his grass, &c., in which case the owner of their wives, to any rents or fee-farms; after the death of their wives. And by § 4. it is extended to tenants pour autre vie, after the |-Lastly, for poor rates and taxes, and for vadeathof the cestui que vie.

One of several co-heirs in gavelkind may distrain for rent due to him and his companions, without an actual authority from his companions. 2 Brod. & B. 465: 5 Moo. 297. And so also of several joint tenants. 4 Bing. 562. A man may distrain without any express authority; the assent of the person in whose right he made the distress will be as effectual as his command; for such assent shall have relation to the time of taking the

distress. 2 Leon. 196.

A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it: and if he do, the other tenant in common may distrain for his share. 5 Term. Rep. 246.

Where lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be taken for the rent due for the whole term, under stats. 32 H. S. c. 37: 8 Anne, c. 14: 1 H. Blackst. 465.

A landlord has no right to distrain unless there is an actual demise at a fixed rent; therefore where a tenant is let into possession under an agreement for a lease, and no lease has been executed, and no rent paid, the landlord cannot distrain. 5 B. & A. 322.

A landlord may distrain for the rent of

A landlord treating his tenant as a trespasser cannot afterwards distrain on him. 5 Bing. 410.

By stat. 6. G. 4. c. 15. § 74. the landlord's right of distress in case of the tenant's bankruptcy is limited to one year's rent, and for the rest he must come in as a common credi-31. no distress on the goods of an insolvent is to be available for more than a year's rent.

The most usual injury for which a distress may be taken is, that of non-payment of rent; By the common law, executors or adminis- and it may now be laid down as an universal principle, that a distress may be taken for any of the soil may distrain them, till satisfaction made to him for the injury he has sustained. rious duties and penalties imposed by act of parliament, remedy by distress and sale is given. See post, IV.

2. What may be distrained .- Distresses are to be of a thing valuable, whereof somebody hath a property; things feræ naturæ, as dogs, conies, &c. may not be distrained. 1 Rol.

A distress was anciently no more than a pledge in the hands of the lord to compel the tenant to pay the service, or perform the duty for which it was taken; and at common law could not be sold, but, like all other pawns or pledges, was to be restored to the owner when the service or duty was performed. Yelv. 135. Therefore, nothing could be distrained for rent which might not be rendered again in as good plight as when it was at the time of the distress taken. Co. Lit. 47. a. For which reason milk, fruit, and the like cannot be distrained. 3 Comm. 10. So sheaves or shocks of corn, or corn or hay in a cock, or barn, could not be distrained, because some damage would be sustained by their removal; but carts with corn might. Co. Lit. 47. a. Now, however, by 2 W. & M. c. 5. sheaves or cocks of corn, or corn loose, or in the straw, or hay lying in any barn or granary, or otherwise, may be seized for a distress. Also beasts of the plough, averia carucæ, and sheep were privi-But where a tenant occupying under an leged from distress at common law; but by

plough may be taken for the poor's-rate, under Lutw. 214: Mod. 385. The right of distress stat. 43 Eliz.; because the remedy given by that and other statutes for compelling the payment of particular rates or sums of money, though called a distress, is in effect an execu-1 Burr. 579. See acc. Com. Dig. Distress (C.)

A horse with a rider upon his back, or an horse in an inn, or put into a common; an axe in a man's hand, cutting down wood, or any thing a person carries about him; utensils and instruments of a man's trade or profession, or the books of a scholar; corn in a mill, or goods in a market, to be sold for the use of the public; materials in a weaver's shop, for making of cloth; another person's garment in the house of a tailor, &c. are not distrainable; nor is any thing that is fixed to the freehold, as a furnace, doors, windows, boards, an anvil, or mill-stone, &c. 1 Sid. 422. 440: Co. Lit. 47: 2 Danv. Abr. 461: 4 Term Rep. 565: 6 Term Rep. 138.

But implements of trade may be distrained for rent if they be not in actual use at the time, and if there be no other sufficient distress on the premises; and so may beasts of the plough under the same circumstances. 4

Term Rep. 565: 9 Bing. 15.

Deer in a private inclosure may be distrained. 3 Comm. 8. Some have thought that a horse on which one is riding may be they have been levant and couchant; nor afterdistrained for damage-feasant; 2 Keb. 596: 1 Sid. 440: but the opinion was extrajudicial; less, on notice, the owner of the beasts negand see 6 Term Rep. 138. that such distress lects to remove them: though it is said that cannot be made. See also Cro. Eliz. 549. such notice is not necessary where the distress 596. Some also have inclined to think that is by the lord of the fee for an ancient rent, or horses drawing a cart laden with corn, though by the grantee of a rent charge. See this subone is riding in the cart, may be distrained ject argued at large in Kemp. v. Crewes, 2 for rent; and for that purpose may be sever-Lutw. 1573. ed from the cart, if the person distrained If A. brin doth not choose to take the cart with the corn to weigh, it cannot be distrained by the lord. also, all of which, as it seems, are equally lia- Noy, n. 298: vide 15 Ed. 3. Avoury, 216. ble to the distress. See 2 Keh. 529. 596: See Noy, 65, and S. C. in Cro. Eliz. 319, 596. Raym. 18: 1 Vent. 36: 1 Nid. 422, 440; in Cloth in a tailor's shop, or things delivered to which latter book the reporter makes a query, persons in exercise of their trade, cannot be whether the man's being on the eart should distrained. 4 Term Rep. 569. For other cases in not privilege the whole team. If ferrets and which the property of strangers is privileged nets in a warren be taken damage-feasant it from distress, for the sake of trade and commerce is good; but if they are in the hands of a see Francisy, Wyatt, 3 Burr. 1498. In that case man, they cannot be distrained any more the question was, whether a person's chariof, (says the reporter) than a horse on which a man | which stood at a common livery stable, could is; nor can they be destrained if they are out of the warren. 2 Ed. 2 Arowry, 182: 7 Ed., 3. ib. 199. See Vin. tit. Distress, A.

At common law corn growing could not be distrained, because it adheres to the freehold. declined bringing the question to a third argu-1 Ro. Ab. 666: H. pl. 4. But by stat. 11 G. 2. c. 19. landlords are empowered to distrain all sorts of corn, grass, or other product growing on the estate demised, and to cut and gather them when ripe; and so in Ireland, under stat. 56 G. 3. c. 88. § 16.

51 H. 3. they are only protected while there bag, &c., may be distrained for rent: and so is no other sufficient distress. And see post. may cattle or goods driving to market, if put But it has been adjudged that beasts of the into a pasture by the way. Co. Lit. 47: 1 is generally confined to things found on the land demised; and, therefore, where a wharf was demised, and with it the use of the adjoining land of the river between high and low water mark, it was held that barges moored in the river adjoining the wharf could not be distrained, since the land of the river where they lay was not part of the demise, but an easement only was granted upon it. Capel Buzzard. 6 Bing. 150: 8 Barn. & C. 141. S. C.

If a driver of cattle asks leave of the lessor to put his cattle into his ground for a night, and he gives leave, as well as the lessee, yet it is said he is not concluded from distraining them for rent. 2 Vent. 59: 2 Danv. 642.

Beasts that escape into the tenants ground may be distrained for rent, though they have not been levant and couchant. 1 Inst. This doctrine has been objected to as too general; and several distinctions are taken, the sum of which seems to be, that if a stranger's beasts escape into another's land by default of the owner of the beasts, as by breaking the fences, they may be distrained for rent immediately, without being levant or couchant; but that if they escape there by default of the tenant of the land, as for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind, till wards by a landlord for rent on a lease, un-

If A. brings yarn to his neighbour's house be distrained for rent due from the keeper of the livery stable; and the court, after two arguments, appearing to be strongly inclined in favour of the distress, the owner of the chariot

The goods of a third person, found on the premises, may be distrained by the collector of the house and window tax, for arrears under 43 G. 3. c. 161. though the goods are only borrowed and the person in arrear has other Money in a bag sealed, though not out of a goods of his own on the premises sufficient to

satisfy the arrears. 1 Maule & Sel. Rep. 601 | the tenant, before the distress, may tender the See 1 Barn & C. 666.

The goods of a carrier are privileged, and cannot be distrained for rent, though the wagon wherein loaded is put into the barn of a house, &c. on the road. 1 Salk, 249. Goods of a principal in the hands of his factor cannot be distrained for rent due from the factor. 3 Brod. & Bing. 75 6 Moo. 243: 1 Bing. 283. Also goods sent to an auctioneer to be sold on premises occupied by him are privileged from distress for rent. Adams v. Grave, 1 C. & M.

If goods remain on the demised premises after a fictitious bill of sale made of them under an execution, they are nevertheless liable to be distrained for rent. 3 Taunton, 400.

Trees grown on a nurseryman's ground, the nurseryman being a yearly tenant, and the trees being removeable by such tenant from time to time, are not distrainable under the 11 G. 2. c. 19. § 8. 8 Taunt. 742: 3 Moo.

Where the servant of an ambassador did not reside in the ambassador's house, but rented and lived in another, part of which he let in lodgings, it was held that his goods in that house not being necessary for the convenience of the ambassador, were liable to be distrained for poor-rates. 1 Barn & Cres. 554.

Growing crops taken on a fi. fa., or in the hands of the sheriff's vendee, are protected from the landlord's distress for rent subsequently accruing. 2 B. & B. 362: 5 Moore, 79: and see Willis, 131.

II. At what Time and Place, and, generally, in what Manner the Distress should be made.—All distresses must be made by day, unless in the case of damage-feasant; an exception allowed lest the beasts should escape before they are taken. 1 Inst. 142. At common law, for rent due the last day

of the term the lessor could not distrain, because the term ended before the rent was due, (see 1 Inst. 476.); but now, by the stat. 8 Anne, c. 14. where leases are expired, a distress may be taken, provided it be made within six months afterwards, and during the landlord's title and tenant's possession. See 1 H. Blackst. 5; where a distress of corn left on the premises under a custom, was held liable to distress after the expiration of the six

Where a tenant by permission of the landlord remained in possession of part of a farm after the expiration of the tenancy, it was held that the landlord might distrain on that part of the farm within six months after the expiration of the tenancy, the statute not being confined to a tortious holding over, nor to a holding over of the whole farm. Nuttall v. Staunton, 4 Barn. & C. 51.

arrears; and if the distress be afterwards taken it is illegal. So if the landlord has distrained and the tenant tenders the rent before the impounding of the distress, the landlord ought to deliver it up; and if he does not the detainer is unlawful. See 1 Rep. 147: 2 Inst. 507. And where cattle, distrained damage feasant, are put into a private pound, with the intention of forwarding them to a public pound, a tender of amends is good. 4 Bing. 230.

Distresses for services are to be on the land: but for an amercement in a leet the distress may be taken any where within the hundred, as well out of the land as on it whereever the cattle are of him that is amerced; for the amercement charges only the person, and not the land; and for this a distress may be taken in the high street. 2 Danv. Abr. 644, The lord cannot distrain for amercements in a court-baron, without a prescription, though he may in the leet: and the goods and cattle of another may not be taken in distress on my ground, for an amercement, &c. set upon me in a court-leet or court-baron. 11 Rep. 44: 12 H. 7. 13. For services a distress cannot be taken but where the services are certain, or may be reduced to a certainty. Co. Lit. 96.

By 52 H. 3. c. 15. no man is, for any manner of cause, to take distresses out of his fee or in the king's highway, or in the common street, but only the king or his officers having special authority to do the same.

All distresses for rent must be made on the premises, by the common law. But where a landlord comes to distrain cattle, which he sees on the tenant's ground, if the tenant, or any other, to prevent the distress, drives the cat-tle off the land, the landlord may make fresh pursuit, and distrain them, though if before the distress the owner of the cattle tenders his rent, and a distress is taken afterwards, it is wrongful. 2. Inst. 107. 160. By stat. 8. Anne, c. 14. if any tenant fraudulently remove goods from off the premises, the landlord may within five days seize such goods wheresoever found, as a distress for the rent in arrear, unless the goods are sold for a valuable consideration before the seizure. By stat. 11 G. 2. c. 19. thirty days are allowed. The statute applies to goods of the tenants only, and not to goods of a stranger. 5 Maule & S. 38: and see 4 Camp. 136: 1 Moo. & Malk. 175.

By § 8. of the same statute, cattle or stock upon any common appendant or appurtenant to the demised premises may be taken for a distress.

To support a distress for damage feasant, it must appear that the party distraining had actually got into the locus in quo before the cattle were driven out of it. 3 Esp. 95.

The landlord may not break open a house to make a distress; for that is a breach of the A distress must not be made after tender of peace. But when he was in the house, it payment; for if a landlord come to distrain, was held that he might break open an inner

door. 1 Inst. 161: Comb. 17. By stat. 11. G.; pounded, but not afterwards. Co. Lit. 47. 2. c. 19. he may, with the assistance of a peaceofficer, break open in the day-time any place,
whither the goods have been fraudulently his own judge, if any. If lands lie in several
counties, but the safest way is to replevy, as there are
few cases in law where a man is allowed to be
whither the goods have been fraudulently his own judge, if any. If lands lie in several
counties, a distress may be made in one councounties, a distress may be made in one counoath being first made in case it be a dwelling- ty for the whole rent. Co. Lit. 154. And if house, of a reasonable ground to suspect that a landlord comes into a house, and seizes such goods are concealed therein. See 3 upon some goods as a distress, in the name

A distress of cattle must be brought to the seizure of all. 6 Mod. 215. common pound, or be kept in an open place; and if they are put into a common pound, the entire duty, he ought to distrain for the whole owner is to take notice of it at his peril; but at once, and not for part at one time, and part if in any other open place, notice is to be at another. 2 Lutw. 1532. But if he disgiven to the owner, that he may feed them; trains for the whole, and there is not sufficient and then if the cattle die for want of food, the on the premises, or he happens to mistake in tenant shall bear the loss, and the landlord the value of the thing distrained, and so takes may distrain again for his rent. 5. Rep. 90: an insufficient distress, he, his executors, &c., Co. Lit. 47. 96. Where one impounds cattle may take a second distress to complete his distrained, he cannot justify the tying them remedy. Cro. Eliz. 13: stat. 17 Car. 2. c. 7: in the pound: if he ties a beast, and it is 4 Burr. 590: 1 Barn. & A. 157. strangled, he must answer it in damages. 1 Salk. 248. If the person distraining da-several duties imposed by different acts of parmage feasant put the distress in a broken liament, each giving a power of distress, is pound, and the distress escapes, he can have legal. 7 Term Rep. K. B. 367. no action for the same: it is otherwise if from a good pound, without his default, when he distrained for. By the stat. of Marlbridge 52

shall drive a distress out of the county, on pain to be fined and amerced: and no distress of cattle shall be driven out of the hun-taking of both is an unreasonable distress. 2 dred where taken to any pound, except to a Inst. 407. But if there were no other distress pound overtin the same county, and not above nearer the value to be found, he might reathree miles distant; nor shall any distress be impounded in several places under the penalty

of 5l. and treble damages.

By stat. 11 G. 2. c. 19. § 10. persons distraining for rent, may impound the distress on any convenient part of the land chargeable with the distress.

After a distress is in the pound, it is said to be in custodia legis, so that the owner of it hath no absolute property therein; and therefore he cannot sell or forfeit it, nor may the same be taken in execution, &c., but it must be as a pledge or means to help the party distraining to his debt or duty. Co. Lit. 190: used, because by law they are only as a pledge, unless it be for the owner's benefit, by milk-

ing, &c. Cro. Jac. 148.

When a distress is taken of household goods, or other dead things, they are to be impounded in a house, or other pound covert, &c. And if the distress is damaged, the distrainer must answer it. Wood's Inst. 191. And they are to be removed immediately, except 5. But if a landlord doth not remove goods the case, at their election. Since this statute immediately, but quits them till another day, trover will not lie where goods have been during which time they are taken away, it is not a rescous, for want of posession. Mod. Ca. is otherwise where the goods have been taken 215: 1 Nels. 672.

of all the goods of the house, this is a good

Where a man is entitled to distrain for an

One warrant of distress for the amount of

Distresses must be proportioned to the thing may have action for the trespass. Salk. ibid. H. 3. c. 4. if any man takes a great or unrea-By stats. 53 H. 3. c. 4: 1 P. & M. c. 12. none sonable distress for rent arrere, he shall be nearer the value to be found, he might reasonably have distrained one of them; but for homage, fealty, or suit and service, as also for parliamentary wages (when they used to be paid) it is said no distress can be excessive. Bro. Ab. Assise, 291: Prerog. 98. For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. 3 Comm. 12.

III. The Remedies for legal Distresses.— At common law, though a distress for rent or damage feasant were legal in its inception, yet if there were any subsequent irregularity, the parties became trespassers ab initio. Bac. Finch L. 135. Cattle distrained may not be Ab. tit. Trespass: 8 Co. 146. This is still the law as regards a distress for damage feasant; but it is altered with respect to distresses for rent by 11 G. 2. c. 19. § 19. which enacts that a distress for rent justly due shall not be deemed unlawful, or the parties making it deemed trespassers ab initio, by reason of any irregularity or unlawful act afterwards done by such parties; but the persons aggrieved may recover satisfaction for the dacorn and hay, by stat. 2. W. & M. sess. 1. c. mage sustained in an action of trespass or on under a wrongful distress, such as, since the Where goods are unlawfully distrained, the above statute, is properly the subject of an owner may rescue them before they are im- action of trespass. 6 T. R. 298. Where the

distress is illegal in its inception, or if the and afterwards, by stat. 4 G. 2. c. 28. was experson making it turns the tenant out of pos- tended to rents-seek, rents of assise, and session, or continues more than five days in chief-rents. possession, or sells corn before it is ripe, &c. remedy by distress was very imperfect; for trespass may be supported; but the tenant the distress was merely taken nomine poence, may waive the trespass and declare in case. to compel satisfaction, and could not be sold 1 East, 139: 3 B. & A. 470: 4 B. & A. 208: or used for the profit of the person distraining. 3 Stark. 171. So where a distress is made, after tender of the rent, case as well as tres- secure distresses lawfully taken, and sell them pass lies. 1 B. & C. 145: 9 Bing. 15. If a upon the premises, in like manner as may be distress is regular in other respects, trespass cannot be maintained for an omission to appraise under the 11 G. 2. c. 19. § 10: 2 Camp. 115: but case may be brought. 1 M. & M. 172.

By stat. 2 W. & M. c. 5. if any distress and sale be made where there is no rent due, the owner of the goods distrained shall recover double the value of the goods, and full costs. Also by the common law, if a lord or other person shall distrain several times for his service or rent, when none is in arrear, the tenant may have an assise de sovent distress, &c. F. N. B. 176.

By stat. 56 G. 3. c. 88. § 16, 17. tenants in Ireland having paid rent to their immediate landlord, if distrained by the superior landlord, may recover damages against their immediate landlord, and retain them out of the

future accruing rent.

In an action on the case for an excessive distress, the plaintiff need not prove the precise amount of rent due. 1 Bing. 401. The tenant does not waive his remedy for an excessive distress, by entering into an arrangement with the landlord respecting the sale of the goods. 2 Barn. & Cres. 821.

Where a party distrains for more rent than is due, and takes only a single chattel, he is not liable to an action for distraining for more than is due, though the chattel exceed in value the rent due, unless there were other goods of less but sufficient value. 1 Moo. & Malk. 172.

IV. Of the Statutes regulating the Sale of Distresses, &c.—(See further as to distress, 3 Comm. 6. 145. and in the several abridgments, tits. Distress, Rent, and Replevin; and also Gilbert on Replevins. See also stats. 2 W. & M. st. 1. c. 5: 8 Anne, c. 14: 4 G. 2. c. 28: 11 G. 2. c. 19.)

These statutes have made great alterations in the ancient law of distress, particularly by empowering persons who distrain for rent of any kind, to sell the distress for payment of rent in arrear, if the tenant or owner fails to replevy, with sufficient security, within five days after taking of the distress and giving the tenant notice of the cause: in this case the constable is bound to assist; the goods are to be appraised, by two sworn appraisers, and the overplus, if any, left in the constable's hands for the use of the owner. This improvement of the remedy by distress was first introduced by stat. 2 W. & M. c. 5. with respect to rents due on demise, or contract; law no subject can distrain out of his fee or

Before these two statutes, the

By stat 11 G. 2. c. 19. § 10. persons may done off the same, by 2 W. & M. sess. 1. c. 5. And any persons may go to and from the premises to view, appraise, buy, or take away the goods of the purchaser; and if a rescous be made of the distress, the persons aggrieved shall have the remedy given by the last-men-

By 56 G. 3. c. 88. as amended by 58 G. 3. c. 39. the powers of distress on corn, &c. growing, even in England by stat. 11 G. 2. c. 19. are extended to Ircland: and other provisions are made for the recovery of tenements from tenants absconding, overholding, and

guilty by default.

By stat. 27 G. 2. c. 20. justices of peace, in all cases, where they are empowered to levy penalties by any act of parliament, are, in their warrants of distress, to limit a time for the sale of the goods: the constable making such distress may deduct the reasonable charges of detaining, keeping, and selling such distress, out of the money arising by the sale; and the overplus, if any, after such charges, and also the penalty or sum of money, shall be fully paid, shall be returned to the owner of the goods distrained; and the constable, if required, shall show the warrant to the party whose goods are distrained, and suffer a copy thereof to be taken.—This act not to alter or repeal the stats. 7 and 8 W. 3. c. 34. and 1 G. 1. c. 6. relating to Distresses on Quakers for Tithes and Church Rates.

By stat. 57 G. 3. c. 93. regulations are made for restraining the charges of distresses for rent not exceeding 201., and persons aggrieved may be relieved by one justice of peace, who shall adjudge the party transgressing to pay troble the amount received by him contrary to the act. The charges allowed are-for levying the distress, 3s.; for a man in possession, 2s. 6d. a day; for advertisements (if any) 10s.; for appraisement, 6d. per pound on the value of the goods; for catalogues, sales, commission and delivery of the goods, 1s. per pound on the net produce of the sale.

The provisions of the above act are now extended by 7 and 8 G. 4. c. 17. to distresses for all taxes, rates, or assessments, not exceeding 201. See tits. Avoury, Replevin, Re-

caption, Rescous.

Personal representatives may now distrain for arrears for rent due in the life-time of the deceased lessor, who was seised in fee of the land. See the statute Rent, II.

DISTRESS OF THE KING. By the common

seigniory, unless cattle are driven to a place There may be an alias, or pluries distringas out of the fee, to hinder the lord's distress, jur' where the jury doth not appear. See &c. But the king may distrain for rent, ser-vice, or fee-farm, in all the lands of the tenant wheresoever they be, not only on lands held of himself, but of others, where his tenant is in actual possession, and the land manured with his own beasts, &c. 2 Inst. 132; 2 Danv. Abr. 643.

DISTRESSES, were pledges taken by the sheriff from those who came to fairs, for their good behaviour: which, at the end of the fair, or mercat, were delivered back, if no harm was done. Scotch Dict.

DISTRIBUTION of intestate estates; see tit. Executor.

DISTRICTIONE SCACCARII. The stat. 51 H. 3. st. 5. as to distresses in the Exchequer

for the king's debt.

DISTRICT, districtus.] A territory, or place of jurisdiction; the circuit wherein a man may be compelled to appear; also the place in which one hath the power of distrain- act is done, whereby the right of another to ing: and where we say hors de son fee, out of his common is incommoded or diminished. his fee, it has been used for extra districtum As where one, who is not a commoner, puts suum. Brit. c. 120.

DISTRINGAS. A writ directed to the sheriff, or other officer, commanding him to distrain a man for a debt to the king, &c., or for his appearance at a day affixed. There is a great diversity of this writ; which was sometimes of old called constringus. F. N. B. There is also a distringas against peers and persons entitled to privilege of parliament, under stat. 10 G. 3. c. 50. by which the effects (in law called the issues) levied may be sold to pay the plaintiff's costs. And it has been held that this statute extends to all writs of distringus. 5 Burr. 2726. See tits. Process, Parliament (privilege of). In detinue after judgment, the plaintiff may have a distringas to compel the defendant to deliver the goods, by repeated distresses of his chattels. 1 Ro. Ab. 737: Rast. Entr. 215. By the uniformity of Process Act, 2 Will. 4. c. 39. the appearance of a defendant may be enforced by distringus, in case a defendant cannot be served with a writ of summons. See § 3. and } Tidd on the Uniformity of Process. Act, p. 11.

DISTRINGAS JURATORES. A writ directed to the sheriff, to distrain upon a jury to appear; and return issues on their lands, &c. for non-appearance. Where an issue in fact is joined to be tried by a jury, which is returned by the sheriff in a panel upon a venire facias for that purpose, thereupon there goes forth a writ of distringus jurator' to the sheriff, commanding him to have their bodies in court, &c. at the return of the writ. 1 Lil. Abr. 483. The writ of distringas jur' ought to be delivered to the sheriff so timely, that he may warn the jury to appear four days before the writ is returnable, if the jurors live within forty miles of the place of trial, and 2 Roll. Abr. 369: 2 Comm. 278. eight days if they live father off. Ibid. 484. DITTAY. A Scotch word i

DISTRINGAS NUPER VICECOMITEM.

Venditioni Exponas.

DISTURBANCE is usually a wrong done to some incorporcal hereditament, by hindering or disquieting the owner in his regular and lawful enjoyment of it. Finch, L. 187. Blackstone enumerates five kinds of this injury, viz .- 1. Disturbance of franchises. 2. Disturbance of common. 3. Disturbance of way. 4. Disturbance of tenure. 5. Disturb. ance of patronage.

1. Disturbance of franchises happens when a man has the franchise of holding a courtleet, or keeping a fair or market, of free warren, of taking toll, of seizing waifs or strays, or (in short) any other species of franchise whatsoever; and he is disturbed or incommoded in the lawful exercise thereof.

- 2. Disturbance of common is where any cattle upon a common, and thereby robs the cattle of those who are of their respective shares of the pasture. Or if one who has a right of common puts in cattle which are not commonable, as hogs and goats, or surcharges it by putting more cattle therein than the herbage will sustain, or the party is entitled
- 3. Disturbance of ways happens when a person, who has a right to a way over another's ground, by grant or prescription, is obstructed by enclosures, or other obstacles, or by ploughing across it, by which means he connot enjoy his right of way, or, at least, not in so commodious a manner as he might have
- 4. Disturbance of tenure was where there was a tenant at will of any lands and tenements, and a stranger, either by menaces or threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrived to drive him away, or inveigled him to leave This the law construed to be a his tenancy. wrong and injury to the lord, and gave him a reparation in damages against the offender by a special action on the case. Hal. Anal. c. 40: 1. Roll. Abr. 108.
- 5. Disturbance of patronage is a hindrance or obstruction of a patron to present his clerk to a benefice, and is by far the most considerable of the whole.

See further, 3 Comm. c. 16; and tits. Ad. vowson, Common Franchise, Tenure, Ways.

DISTURBER. If a bishop refuse or negleet to examine and admit a patron's clerk, without good reason assigned, or notice given, he is styled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong.

DITTAY. A Scotch word introduced in-

and Scotland. It is a term of art, and signi. 89: 7. Rep. 43. The woman under separafies the manner of proceeding against a crim- tion by this divorce must sue by her next inal in the Court of Justiciary. There is likewise a brief or writ of Dittay, directed from the justice to the Sheriff, the form whereof may be seen in Skene de verb. signif. v. Iter, where is shown at large the manner of proceeding by dittay. Terms de la Ley.

DIVERSITY OF PERSON, is a plea by a prisoner in bar of execution, alleging that he is not the same as was attainted; upon which a jury shall be immediately impanelled to try the collateral issue thus raised, viz. the identity of his person; and not whether he is guilty or innocent; for that has been

decided before. 4 Comm. 396.

DIVIDEND IN THE EXCHEQUER, is taken for one part of an indenture. Stat. 10 Ed. 1. c. 11.

DIVIDEND OF STOCKS. A dividable proportionate share of the interest of stocks erected on public funds; as the Bank, South Sea, and

India stocks, &c. See tit. Funds.

DIVISA, hath various significations; sometimes it is used for a device, award, or decree; sometimes for derise of a portion or parcel of and as for money, &c. which cannot be lands, &c. by will; and sometimes it is taken for the bounds or limits of division of a parish or farm, &c., as divisas perambulare, to ables the parties to marry again. But in the walk the bounds of a parish; in which sense it has been extended to the division between counties, and given name to towns, as to Devises, a town of Wiltshire, situate on the band and wife, and the heirs of their bodies in confines, the division of the West Saxon Mer- frank marriage; if they had been afterwards cian kingdoms. Leg. H. 2. c. 9: Leg. Ina, divorced, the wife was to have her whole c. 44: Leg. H. 1. c. 57: Correl.

separation of two, de facto married together, made by law; it is a judgment spiritual; and the spiritual court causa pracontractus, the istherefore, if there be occasion, it ought to be sue of that marriage shall be bastards, so long reversed in the spiritual court. Co. Lit. 335. as the sentence stands unrepealed; and no And, besides sentence of divorce, in the old, proof shall be admitted at common law to the law, the woman divorced was to have of her contrary. Co. Lit. 235: 1 Nels. 674. In husband a writing called a bill of divorce, such case issue of a second marriage may which was to this effect: viz. I promise that hereafter I will lay no claim to thee, &c. See tit. Baron and Feme, III. 2. VI. and particularly XI. See also tit. Marriage and Bac. ab.

tit. Marriage and Divorce, (7th edit.)

There are many divorces mentioned in our books; as causa pracontractus; causa frigidatus ; causa consanguinitatis ; causa affinitatis; causa professionis, &c. But the usual divorces are only of two kinds, i. e. a mensa et there from bed and board; and à vinculo matrimonii, from the very bond of marriage. A divorce a mensa et thoro dissolveth not the marriage, for the cause of it is subsequent to the marriage, and supposes the marriage to be vinculo matrimonii; and therefore, in the lawful; this divorce may be by reason of adultery in either of the parties, for cruelty of the husband, &c. And as it doth not dissolve the marriage, so it doth not debar the woman of her dower, or bastardise the issue, H. 44 Eliz. in the Star-Chamber, that opinion or make void any estate for the life of hus- was changed; and Archbishop Bancroft, by

to our statute law since the union of England | band and wife, &c. Co, Lit. 235: 3. Inst. friend: and she may sue her husband in her own name for alimony. Wood's Inst. 62.

A divorce a vinculo matrimonii, absolutely dissolves the marriage, and makes it void from the beginning, the causes of it being precedent to the marriage; as precontract with some other person, consanguinity or affinity, within the Levitical degrees, impotency, impuberty, &c. On this divorce dower is gone; and if, by reason of pracontract, consanguinity, or affinity, the children begotten between them are bastards. Co. Lit. 335; 9 Inst. 93. 687. But in these divorces, the wife, it is said, shall receive all again that she brought with her, because the nullity of the marriage arises through some impediment; and the goods of the wife were given for her advancement in marriage, which now ceaseth; but this is where the goods are not spent; and if the husband give them away during the coverture, without any collusion, it shall bind her; if she knows her goods unspent, she may bring action of detinue for them; known, she must sue in the spiritual court. Dyer, 62: Nels. Abr. 675. This divorce enother cases, a power for so doing must be obtained by act of parliament.

Where lands were formerly given to huslands; and by divorce an estate tail of baron DIVORCE, divortium; a divertendo.] The and feme, it is said, may be extinct. Godb. 18. After a sentence of divorce is given in inherit until the sentence is repealed. 2 Leon. 207. If after a divorce a mensa et thoro either of the parties, the other being living, marry a third person, such marriage is a mere nullity; and by sentence to confirm the first contract, she and her first husband become husband and wife to all intents, without any formal divorce from the second. 1 Leon. 173. Also on this divorce, as the marriage continues, marrying again while either party is living hath been held to be bigamy within the 1 Jac. c. 11. Cro. Car. 333: 1 Nels. st.tt. 674.

A divorce for adultery was anciently d beginning of the reign of Queen Elizabeth, the opinion of the church of England was, that after a divorce for adultery, the parties might marry again; but in Foliambe's case, the advice of divines, held that adultery was only a cause of divorce d mensa et thoro. 3 Salk. 138.

By the Scotch law, divorces à vinculo matrimonii may be obtained on the ground of adultery, and the Scotch courts grant such divorces to dissolve marriages solemnized in England; but it is held by the English judges, rally omitted. It was carried into effect only that if a man, married in England, obtains in one very obnoxious case, where the mar-

may be repealed in the spiritual court after again; but this does not preclude the legality the death of the parties. Co. Litt. 33. 244: 7 of the future marriage of the offending party Rep. 44: 5 Rep. 98. Upon the divorce of a to their associate in guilt or any other, and it man and his wife, equity will not assist the ought not to do so. See Dr. Ireland's Nup. wife in recovering dower at the husband's tice Sacre, published in 1801, 1821, and 1830. death, but shall leave her to the law; neither DOCKET, or DOGGET. A brief writing ought the spiritual court to grant her admi- on a small piece of paper or parchment, connistration, she not being such a wife as is taining the effect of a greater writing. West. entitled to it; nor will the Chancery decree her Symbol. par. 2. § 106. And when rolls of

obtained by act of parliament. For this pur- term; so that upon any occasion you may pose it is necessary that on the petition for soon find out a judgment, by searching these the bill to the House of Lords (where such dockets, if you know the attorney's name. bill usually originates) an official copy of the Stat. 4 and 5 W. & M. c. 20. It appears by proceeding, and definitive sentence d mensa et the Report of the Committee, 26th Feb. 1800, thoro, in the ecclesiastical courts, at the suit that the docket rolls, or docket of records at of the petitioner, shall be delivered at the bar on oath. Upon the second reading of the bill, of the chief prothonotary about the time of the petitioner must attend the house to be Edward VI., those of the second prothonotary examined at the bar, if the house think fit, in the 1st of Henry VIII., and those of the whether there is any collusion respecting the third prothonotary in the 2d of Elizabeth. act of adultery, or the divorce, or any action See tit. Judgments. Exemplification of decrees for crim. con., and whether the wife was living apart from her husband under articles of are also docketted. separation. Evidence must be given, in the committee of the House of Commons, on the docks is, by consent of the owners, invested bill, that an action for damages has been brought against the seducer, and judgment for the plaintiff had thereon; or a sufficient it as a private property only, but must hold it reason given why such action was not brought subject to the rights of the public. 12 E. R. or judgment obtained. See the standing or. 527. ders of the two houses.

passed in the reign of Edward VI., from E. R. 165: 8 E. R. 16: 5 E. R. 115: 11 E. which period to the Revolution, few, if any, are to be found. Since 12 W. & M. there has been 150, and above 70 since the commencement of the present century. commissioners appointed by Henry VIII. and Edward VI. for reforming the ecclesiastical law, in their elaborate report, recommend divorces a mensa et thoro to be abolished, and c. 207. 10 Barn. & C. 283. complete divorces to be allowed for adultery, desertion, bad treatment, &c., the innocent record or equity, stealing, or, for any frauddesertion, bad treatment, &c., the innocent party to be allowed to marry again, the offending party to be punished by banishment or injuring, or destroying, is a misdemeanor, imprisonment. When this reformation failed, and punishable by transportation, fine, and the practice of divorce bills originated. See Reformatio Legum Ecclesiasticarum, 1640: § 21. See tit. Larceny.

Colored Tenn. 536: Burnet's Hist. Ref.

DOGS. The law takes notice of a grey-mastiff dow, spaniel and tumbler, for

Vol. 1.-73

An order was made (about 1809 or 1810) by the House of Lords, that in any bill of divorce on account of adultery a clause should be inserted prohibiting the marriage of the offending parties with each other as a rule of infamy upon them; but the rule has not been enforced, and the clause is now very genesuch a divorce and then marries again, he is guilty of bigamy. Rex v. Lolley, Russ. & Ry.

Sentence of divorce must be given in the line of the forbidden degrees. Sentence of divorce must be given in the line of the forbidden degrees. The acts merely contain a clause expressly life of the parties, and not afterwards; but it

a distributive share. Preced. Chanc. 111, 112. judgments are brought into C. B. they are Divorces a vinculo matrimonii are usually docketted, and entered on the docket of that Westminster, commence as follows:-those in Chancery and commissions of bankruptcy

DOCKS. When the private property of with a privilege or interest for the benefit of the public, the owner can no longer deal with

So as to particular points arising on the The first bill of this sort appears to have construction of the West India Dock Act, 9 R. 533.

As to the Liverpool Docks, see 11 E.R. 675: 2 Taunt. 97: 12 E. R. 439: 5 M. & S. 328: 8 Price 180.

As to the London Docks, 12 E. R. 479. As to the Bristol Docks, 12 E. R. 429.

As to the Commercial Docks, see 50 G. 3.

DOCUMENTS, belonging to any court of

trover will lie for them. Cro. Eliz. 125: Cro. small value, prohibited by the stat. 3 H. 5. Jac. 44. A man hath a property in a mastiff, c. 1. We still retain the phrase, in common and where a mastiff falls on another dog, the saying, when we would undervalue a man, owner of that dog cannot justify the killing of the mastiff, unless there was no other way to save his dog, as that he could not take off the mastiff, &c. 1 Saund. 84: 3 Salk. 139. The owner of a dog is bound to muzzle him if mischievous, but not otherwise; and if a man doth keep a dog that useth to bite cattle, &c., if after notice given to him of it, or his knowing the dog is mischievous, the creature shall do any hurt, the master shall answer for it. In case for injury by a dog accustomed to bite mankind, it is not necessary that the defendant should be the owner, if he harbours it, or suffers it to remain about his premises. M'Kone v. Wood, 5 C. & P.1: Cro. Car. 254. 487: Stra. 1264. See tits. Action, Trespass.

By stats. 7 and 8 G. 4. c. 29. § 31. if any person shall steal any dog, or any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, being convicted thereof before the justices, they shall pay over and above the value of the animal a sum not exceeding 201.; and upon a second conviction be committed to the common gaol, or house of correction, to hard labour not exceeding twelve calendar months, and, if a male, may be once or twice publicly composed under the direction of Alfred, for or privately whipped. By § 32 persons found in possession of a stolen dog, or beast, or bird, or the skin or plumage thereof (knowing the provinces of the kingdom, This book is said

like punishment.

the use of the lords thereof, all dogs that shall be used for killing game by any person not authorized to kill game for want of a sheriff's tourn. See 1 Comm. 64: 4 Comm. certificate.

Dogs form one among the many articles, for keeping of which a tax is levied on the possessor. See this Dict. tit. Taxes.

DOG-DRAW. The manifest deprehension of an offender against venison in a forest, when he is found drawing after a deer by the scent of a hound led in his hand; or where a person hath wounded a deer or wild beast, by shooting at him, or otherwise, and is caught of Northumberland, Cumberland, Westmorewith a dog drawing after him to receive the

Dutch dogger, &c.; stat. 31. Ed. 3. c. 1. and dogger fish are fish brought in ships. Stat. There is also a third book, which differs from

DOGGER-MEN. Fishermen that belong to dogger ships.

that he is not worth a doit. See tit. Coin.

DO LAW, facere legem.] Is the same with to make law. Stat. 23. H. 8. c. 14.

DOLE, dola.] A Saxon word, signifying as much as pars or portio in the Latin; and anciently where a meadow was divided into several shares, it was called a dole meadow. 4 Jac. 1. c. 11. See Dalus.

DOLEFISH, seems to be the share of fish which the fishermen yearly employed in the north seas do customarily receive for their allowance. Stat. 35 H. 8. c. 7.

DOLG-BOTE, Sax.] A recompense or amends for a sear or wound. Sax. Dic. LL. Aluredi Reg. c. 22.

DOLLAR. A piece of foreign coin, passing for about 4s. 6d. Lex Mercat. And see Foreign Coin.

DOM-BEC or DOM-BOC, Sux.]

DOME, or DOOM, from the Sax. dom.] A judgment, sentence or decree. And several words end in dom, as kingdom, earldom, &c. from whence they may be applied to the jurisdiction of a lord, or a king. Mon. Angl.

DOME-BOOK, liber judicialis.] A book or the skin or plumage thereof (knowing the provinces of the kingdom. This book is said same to have been stolen), are liable to the to have been extant so late as the reign of te punishment.

Edward IV. but it is now lost. It probably It seems to be a misdemeanor indictable to contained the principal maxims of the comlct a mastiff, or other dog, go in the street mon law, the penalties for misdemeanors, and unmuzzled, especially if it be a furious one, the forms of judicial proceedings. Thus and accustomed to bite. See Burn. Nuisance, much at least may be collected from the 1.: 3 Chitt. C. L. 643: Russ. & Ryan, i. 303. injunctions to observe it which were found in By 1 and 2 W. 4. c. 32. § 13. gamekeepers the laws of Edward the Elder, son of Alfred, appointed under the act are empowered, c. 1. See also Leg. Inc. c. 29. and Spelm. within the limits of their manors, to seize, for in verb. Dombec. The book was compiled by 411. See post Domesday.

DOMESDAY, or DOMESDAY.BOOK; liber judiciarius, vel censualis Anglia.] A most ancient record, made in the time of William I. called the Conqueror, and now remaining in the Exchequer fair and legible, consisting of two volumes, a greater and a less; the greater containing a survey of all the lands in England, excepting the counties land, Durham, and part of Lancashire, which same. Manwood, par. 2. c. 8. See tit. Forest. it is said were never surveyed; and excepting DOGGER. A light ship or vessel, as a Essex, Suffolk, and Norfolk, which three last are comprehended in the lesser volume. the others in form more than in matter, made by the command of the same king. And there is a fourth book kept in the Exchequer, DOITKIN, or DOIT, was a base com of which is called Domesday, and though a very

large volume, is only an abridgment of the follows the person of the owner, and on his others. Likewise a fifth book is kept in the decease must be distributed according to the Remembrancer's office in the Exchequer, law of the country in which he was domiwhich has the name of Domesday, and is the ciled at the time of his death, and not accordvery same with the fourth, before mentioned. ing to the law of the country where such pro-Our ancestors had many dome-books. King perty is situate. Bruce v. Bruce, 2 Bos. & Alfred had a roll which he called Domesday; Pul. 229. See tit. Executor. and the Domesday book made by William I. referred to the time of Edward the Confessor, England, having personal property only, exeas that of King Alfred did to the time of cuted, during a visit to Scotland, and depo-Ethelred. See ante Dome-book. The fourth sited there a will, prepared in the Scotch book of Domesday, having many pictures, form, and died in England, it was held that and gilt letters in the beginning, relating to the time of King Edward the Confessor, led the author of the notes on Fitzherbert's Register into a mistake in p. 14. where he tells us that tiber domesday factus fuit tempore Scotland. When there are two houses, which the tells are the constitutes a domicile as to jurisdiction in Scotland. When there are two houses, which regis Edwardi.

justices, assigned for that purpose in each anno 1086. And the question whether lands by the Domesday of William I. from whence there is no appeal; and it is a book of that authority, that even the Conqueror himself submitted some cases, wherein he was concerned, to be determined by it. The addition of day to this Dome-book was not meant with any allusion to the final day of judgment, as most persons have conceived, but was to strengthen and confirm it, and signifieth the judicial decisive record or book of dooming judgment and justice. Hammond's Annat'. Camden calls this book Gulielmi Librum Censualem, the Tax-book of King William, and it was further called Magna Rolla Winton. See the printed copy of Domesday-book, p. 332. (b.) There is an ancient roll in Ches. ter Castle called Domesday-roll. Blount. At York, Worcester, and other cathedrals, their registers or chartularies are called Domesdaybooks. A transcript of the Domesday-book of William I. has been made, and printed, by which it has been rendered more familiar to our antiquaries and historians. See Spelm in verb. Domesdei, and this Dict. tit. Tenures,

DOMES-MEN. Judges or men appointed to doom, and determine suits and controversies, hence Æg deme, I deem, or judge. Suitors in a court of a manor of ancient demesne, who are judges there. Vide Days-men.

DOMICELLUS. An obsolete Latin word, anciently given as an appellation or addition to the king's natural sons in France, and sometimes to the eldest sons of noblemen ject in favour of which the service is constitutere, from whence we borrowed these addituted, as the tenement over which the servitions, as several natural children of John of tude extends is called the servient tenement. Gaunt, Duke of Lancaster, are stiled domi-Bell's Scotch Law Dict. celli by the charter of legitimation. 20 R. 2. But according to Thorn the domicelli were Palm Sunday. only the better sorts of servants in monas-

Where a native of Scotland domiciled in

appear equally entitled to the appellation of The book of Domesday was begun by five domicile, the person is liable to both jurisdictions; but a person may have no domicile, as county, in the year 1081, and was finished a soldier or travelling merchant, in which care a personal citation renders him subject are ancient demesne or not is to be decided to the jurisdiction of the judge within whose jurisdiction he is cited. Bell's Scotch Law

The domicile of origin, which arises from birth and connexions, remains till clearly abandoned and another taken. In the case of Lord Somerville, who had two acknowledged domiciles, the family seat in Scotland and a leasehold house in London, the former, which was the domicile of origin, prevailed. 5 Ves. 750. And see Huber de conflictu legum. An acquired domicile is not lost by mere abandonment, but continues till a subsequent domicile is acquired. 5 Madd. 379.

A British subject domiciled abroad must conform in his testamentary acts to the formalities required by the lex domicilii. Therefore two codicils to the will of a British subject resident and naturalized in the Portuguese dominions, disposing solely of money in the English funds, but not executed according to the Portuguese law, were refused probate. Hunley v. Bernes, 3 Hug. 373.

DOMIGERIUM, is sometimes used to signify danger; but otherwise, and perhaps more properly, it is taken for power over another; sub domigerio alicujus vel manu esse. Bract. lib. 4 tract. 1. c. 10.

DOMINA. A title given to honourable women, who anciently in their own right of inheritance held a barony. Paroch. Antig.

DOMINANT TENEMENT. A term used in the Scotch law in the constitution of servitudes, and means the tenement or sub-

DOMINICA IN RAMIS PALMARUM.

Dominium Directum and Dominium Utile, are terms by which the rights of the superior DOMICILE. The place where a man has and vassal are distinguished in the Scotch his home. See tit. Alien. Personal property law. The right of superiority is termed the

dominium directum, as being the highest and important of the town. The vassal's right is termed the dominium utile, because under it he enjoys the whole fruits and produce of the estate.

Also by the civil law any kind of property might be the subject of a donatio mortis is termed the dominium utile, because under or other chattel, bond for money, &c. But the law of England restricts such donations

DOMINUS. This word prefixed to a man's name, in ancient times, usually denoted him a knight, or a clergyman; and sometimes a gentleman, not a knight, especially a lord of a manor.

Dominus Litis, in the civil law, an advocate who after the death of his client prosecuted a suit to sentence for the executor's use.

DOMO REPARANDA, is a writ that lay for one against his neighbour, by the fall of whose house he feared a damage and injury

to his own. Reg. Orig. 153.

DOMUS CONVERSORUM. An ancient house built or appointed by King Henry III. for such Jews as were converted to the Christian faith; but King Edward III. who expelled the Jews from this kingdom, deputed the place for the custody of the rolls and records of the Chancery. See Rolls.

of the Chancery. See Rolls.

DOMUS DEI. The hospital of St. Julian, in Southampton, so called. Mon. Angl. tom.
2.440. A name applied to many hospitals.

DONATIO CAUSA MORTIS. A gift in prospect of death; a death-bed disposition; viz. when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another, the possession of any personal goods, to be kept in case of his decease. To constitute a donatio mortis causa the transaction must first possess the requisites of a gift of a chattel, to which, when made by parol delivery is essential to pass the property in it from the donor to the donce. 2 B. & A. 551. There must be a delivery of possession to the donee, or to a third person in trust for him; which possession must continue uninterrupted to the time of the donor's death. 2 Marsh. 532: 7 Taunt. 224.

In this respect our law differs from the civil law, which did not require delivery.

The civil law admitted donations mortis causa for other reasons than the fear of approaching death; as where a man about to set forth on a long journey or voyage, and contemplating the perils of the way, was desirous of making a conditional gift of his property, to take effect in favour of some relative or friend in case he died, but to be resumed should be escape the threatened danger. But the law of this country recognises no other cause than the apprehension of death; and the donatio mortis causa must be made in the last illness of the donor. 1 Ves. Jun. 546. For if the gift be without reference to death, it is an absolute gift. 2 Ves. 111. And the reference to death must be either by words of the donor, or from the circumstances under which he makes the gift, as where he is in extremis. 2 Swanst. 92.

Also by the civil law any kind of property might be the subject of a donatio mortis causā; as, a farm, a house, a slave, a horse, or other chattel, bond for money, &c. But the law of England restricts such donations to personalty. Choses in action (with the exceptions hereinaster noticed) cannot be the subject of a donatio mortis causā. As for instance, a note (not being a cash note, or payable to bearer), 3 P. W. 356; or receipts for South Sea annuities. Ward v. Turner, 2 Ves. 431. It has been held, however, that there may be a donatio mortis causā of a bond, 3 Atk. 214: 3 Madd. 184; and of a mortgage. 1 Bligh, N. S. 527.

There are several other points on which the civil law differs from the law of this country. By the former a donatio mortis causá might be made either in writing or by parol; by the latter it can only be made by parol. By the former five witnesses were requisite to establish the validity of such a gift; by the latter no particular number is required. By the former the gift was considered in the nature of a legacy; but by the latter it need not be proved in the ecclesiastical courts. 1 P. W.

442.

In some particulars the civil law and the law of England agree. Both permit a wife to receive a donatio mortis causa from her husband. By both the gift may be recalled should the donor repent; is revoked by the death of the donee before the donor; and is

liable to the debts of the latter.

DONATIVE, donativum.] Is a benefice merely given and disposed of by the patron to a man, without either presentation to, or institution by, the ordinary, or induction by his order. F. N. B. 35. Donatives are so termed, because they began only by the foundation and erection of the donor. The king might of ancient time found a church or chapel, and exempt it from the jurisdiction of the ordinary; so he may by his letters patent give license to a common person to found such church or chapel, and make it donative, not presentable; and that the incumbent or chaplain shall be deprived by the founder and his heirs, and not by the bishop; which seems to be the original of donatives in England. See 2 Comm. 22. and this Dict. tit. Advowson.

In the case of a donative the party is in full possession immediately on the nomination, and may maintain an action for money had and received against any person who receives the profits. 1 Term. Rep. K. B. 403.

When the king founds a church, &c. donative, it is of course exempted from the ordinary's jurisdiction, though no particular exemption is mentioned; and the Lord Chancellor shall visit the same; and where the king grants a license to any common person to found a church or chapel, it may be donative, and exempted from the jurisdiction of the bishop so as to be visited by the founder, &c. Co. Lit. 134: 2 Roll. Abr. 230. The resigna-

tion of a donative must be to the donor or fore it seems if donatives are taken last they patron, and not to the ordinary; and donatives are not only free from all ordinary jurisdic. DONIS, Statute de. The statute of West. tion, but the patron and incumbent may 2. viz. 13 Ed. 1. c. 1. called the statute de charge the glebe to bind the successor; and donis conditionalibus. This statute revives, if the clerk be disturbed, the patron may bring quare impedit, &c. Also the patron of which were originally laid on alienations; by a donative may take the profits thereof when it is vacant. Co. Lit. 344: Cro. Jac. 63.

If the patron of a donative will not nominate a clerk, there can be no lapse, but the bishop may compel such patron to nominate a clerk by ecclesiastical censures; for, though the church is exempt from the power of the ordinary, the patron is not exempted; and the clerk must be qualified like unto other clerks of churches, no person being capable of a donative, unless he be a priest lawfully ordained, &c. Yelv. 61: Stat. 14 Car. 2. c. 4: 1 Lill. 488.

There may be a donative of the king's gift with cure of souls, as the church of the Tower of London is; and if such donative be procured for money, it will be within the statute lay for a widow, where it was found by office of simony. Mich. 9. Car. B. R. A parochial that the king's tenant was seised of lands in church may be donative, and exempt from the fee, or fee-tail at the day of his death, and ordinary's jurisdiction. Godolph. 262. The that he held of the king in chief, &c. In which church of St. Mary-le-bone, in Middlesex, is case the widow came into the Chancery, donative, and the incumbent being cited into and there made oath, that she would not marthe spiritual court, to take a license from the ry without the king's leave; whereupon she bishop to preach, pretending that it was a had this writ to the escheator, to assign her chapel, and that the person was a stipendary; dower, &c. But it was usual to make the asit was ruled in the King's Bench that it was signment of the dower in the Chancery, and a donative; and if the bishop visit the court to award a writ to the escheator, to deliver the of B. R. will grant a prohibition. 1 Mod. 90; lands assigned unto her. Stat. 15 Ed. 4. c. 4: 1 Nels. Abr. 676.

If a patron of a donative doth once present er. his clerk to the ordinary, and the clerk be admitted, instituted, and inducted, then the of dower that lies for the widow against the donative ceaseth, and it becomes a church presentative. Co. Lit. 344. But when a donative is created by letters patent, by which lands are settled upon the parson and his successors, and he is to come in by the donation of the king and his successors; in this case. though there may be a presentation to the donative, and the incumbent come in by institu-

How far the nature of a donative is changed by having been augmented by Queen Anne's

bounty, see 1 T. R. 397.

3 Rep. 75. See tit. Bishop.

Donatives have two peculiar properties; rent of the vassal's free estate. Scotch Dict. one, that the presentation does not devolve to

in some sort, the ancient feodal restraints enacting, that from thenceforth the will of the donor be observed, and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any, or if none, should revert to the donor. See 2 Comm. 12. and this Dict. tits. Estate Tail, Limitation.

DONOR AND DONEE. Donor is he who gives lands or tenements to another in tail, &c.; and the person to whom given is the donee.

DORTURE, dormitorium. The common room or chamber, where all the fryars, or religious of one convent slept and lay all night. DOSSALE. Hangings of tapestry. Mat.

DOTE ASSIGNANDA. Is a writ that Reg. Orig. 297: F. N. B. 26. See tit. Dow-

tenant, who bought land of her husband in his life-time, whereof he was solely seised in fee-simple or fee-tail, and of which she is dowable. F. N. B. 147.

See the law and form of the writ in Booth's Real Actions, 166, and Roscoe on Real Ac-

See further tit. Dower.

DOTIS ADMINISTRATIONE, Admea. tion and induction, yet that will not destroy surement of dower, where the widow holds the donative. 2 Salk. 541. more than her share, &c. See tits. Admeasurement, Dower.

DOUBLE AVAIL OF MARRIAGE, is the double of the value of the vassal's wife's All bishopricks being of the foundation of tocher, due to the superior; because he rethe king, they were in ancient time donative. fused a wife equal to him when offered by the superior; but this is modified to three years'

DOUBLE PLEA, duplex placitum.] Is the king as in other livings when the incum- where a defendant allegeth for himself two bent is made a bishop. Ca. Parl. 184.—The several matters, in bar of the plaintiff's acother, that a donative is within the statute of tion, when one of them is sufficient; which pluralities, if it be the first living; but if a shall not be admitted: as if a man plead sevdonative be the second benefice taken without cral things, the one not depending upon the a dispensation, the first would not be void; for other, the plea is accounted double, and will the words of the statute are instituted and not be allowed; but if they mutually depend inducted to any other, which are not applica- on each other, and the party may not have the ble to donatives. 1 Wood. 330. And there-last plea without the first, then it shall be rea double plea that is wrong, is pleaded; if the 1. c. 7. See tit. Cinque Ports. plaintiff reply thereto, and take issue of one matter; if that be found against him, he cannot afterwards move in arrest of judgment; for by the replication it is allowed to be good. 18 Ed. 4. 17.

Before the 4 Anne, c. 16. a defendant could not plead two or more pleas to the same part of the declaration, but that statute (§ 4.) enabled him to do so, with leave of the court. Now, by one of the general rules made by the judges in T. T. 1 W. 4. r. 13. no rule to show cause, or motion, is required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but such rule is to be drawn up upon a judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances. And no summons or order is necessary where the plea of non assumpsit, or nil debet, or non detinet, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, plene administravit, plene administravit præter, infancy, and coverture, or any two or more of such pleas shall be pleaded together, but in all such cases a rule is to be drawn up by the clerk of the rules upon the production of the engrossment of the pleas, or a draft or copy thereof. By another rule made in H. T. 2 W. 4. r, 34. if a party plead several pleas, avowries, or congnizances, without a rule for that purpose, the opposite party may sign judgment. See furthcr. tit. Pleading, and Stephen on Pleading, p. 271: Bac. Ab. Pleas, K. (7th ed.)

DOUBLE QUARREL, duplex querela.] Is a complaint made by any clerk, or other, to the archbishop of the province against an inferior ordinary, for delaying, or refusing to do justice in some cause ecclesiastical, as to give sentence, institute a clerk, &c.; and seems to be termed a double quarrel, because it is most commonly made against both the judge, and him at whose suit justice is denied or delayed: the effect whereof is, that the archbishop, taking notice of the delay, directs his letters under his authentical seal to all clerks of his province, commanding them to admonish the ordinary within a certain number of days to do the justice required, or otherwise to appear before him or his official, and there allege the cause of his delay: and to signify to the ordinary, that if he neither perform the thing enjoined nor appear and show cause against it, he himself in his court of audience will forthwith proceed to do the justice that is Cowel. See Quare Impedit ..

DOVER CASTLE. The constable of Dover Castle shall not hold plea of any foreign county within the castle gates, except it concern the keeping of the castle; nor shall he elsewhere, or otherwise than as they ought after his death might enter into the land of

ceived. Kitch. 223: 1 Burr. 316. And where according to the charters, &c. Stat. 28 Ed.

DOW. To give or endow, from the Latin

word Do.

DOWAGER, dotata, dotissa.] A widow endowed; applied to the widows of princes. dukes, earls, and other great personages.

Dowager, Queen.] Is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death, or violate her chastity, because the succession to the crown is not thereby endangered. But no man can marry her without a special licence from the king, on pain of forfeiting his lands and goods. 2 Inst. 18. See Riley's Plac. Purl. 672: 1 Comm. 223. See tit. King.

DOWER.

DOTARIUM.] The portion which a widow hath of the lands of her husband at his decease, for the sustenance of herself, and education of her children. 1 Inst. 30. See tit. Tenure III. 8.

I. Of the several kinds of Dower.

II. 1. What Woman shall be endowed; 2. Of what Estate in Freeholds; 3. Of what Estate in Copyholds, &c.

III. Of the Assignment and Admeasure-

ment of Dower.

IV. What shall be deemed a Bar and Forfeiture of Dower.

V. Of the Remedies for the Recovery of

I. Of the several Kinds of Dower.—There were formerly five kinds of dower in this kingdom:—1. Dower by the common law; which is a third part of such lands or tenements whereof the husband was sole seised in fee simple, or fee tail, during the coverture; and this the widow is to enjoy during her life.

2. Dower by custom; which is that part of the husband's estate to which the widow is entitled after the death of her husband, by the custom of any manor or place, so long as she lives sole and chaste; and this is more than one-third part, for in some places she shall have half the land, as by the custom of gavelkind; and in divers manors the widow shall have the whole during her life, which is called her free bench; but as custom may enlarge, so it may abridge dower to a fourth part. Co.

3. Dower ad ostium ecclesia, at the churchdoor; made by the husband himself immediately after the marriage, who named such particular lands of which his wife should be endowed: and in ancient time it was taken that a man could not by this dower endow his wife of more than a third part, though of less he might; and as the certainty of the land distrain the inhabitants of the ports to plead, was openly declared by the husband, the wife

assignment. Co. Lit. 34: Lit. § 39.

4. Dower ex assensu patris, which is only a species of the dower ad ostium ecclesia; have dower in his life-time; it is held otherby a son who was the husband, with the consent of his father then living, and always put her jointure in his life. Co. Lit. 133: Perk. in writing as soon as the son was married: 5.307. and if a woman thus endowed, or ad ostium ecclesia, after the death of her husband the death of her husband, she shall be enentered into the land allotted her in dower, dowed, of whatsoever age he is; because after and agreed thereto, she was concluded to death of the husband the marriage is adjudged claim any dower by the common law. Lit. lawful. Co. Lit. 33. § 40, 41.

where the wife was endowed with the fairest

part of her husband's estate.

The three last kinds of dower have long been obsolete, and two of them, dower ad ostium ecclesia, and dower ex assensu patris, are abolished by the 3 and 4 W. 4. c. 105. § 13. This statute has introduced several as it was before.

entitled to dower; for the marriage being only ces relating to the coin, reduced to felony. voidable and not actually avoided, in the lifetime of both parties, it cannot afterwards be Plowd. 261. a. 262. a. So if the husband be set aside. 1 Salk. 120: 2 Salk. 548: 1 Ves. outlawed in trespass, or any civil action; for 245.

A divore d mensa et thoro only doth not feiture of lands. Bro. 82: Perk. 338: Co. destroy the dower, Co. Lit. 32; no, not even Lit. 31. a. for adultery itself by the common law. But If a woman, being a lunatic, kill her husa wife, her husband and she demean them- is only undutivilness which the law does not selves as husband and wife, it is evidence of punish with the loss of her entire subsistence. reconciliation. Lady Powy's case, Dyer, 107. Perk. 364, 365. a., where the reconciliation was specially pleaded and allowed

which she was endowed without any other her husband's death; otherwise she shall not be endowed. Lit. § 36. See 2 Comm. 130.

The wife of a man who is banished shall which likewise was of certain lands named wise if he is professed in religion; and a jointress of a banished husband shall enjoy

If a woman be of the age of nine years, at

A marriage colebrated bona fide in Scotland 5. Dower de la plus belle; which was entitles the woman to dower in England: and the lawfulness of such a marriage may be tried by a jury in England. 2 H. Blackst.

It was formerly held that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy. Co. Lit. 31. But it seems to be at present important alterations with respect to dower at agreed, upon principles of sound sense and common law, but dower by custom remains reason, that an idiot cannot marry, being incapable of consenting to any contract. the ancient law the wife of a person attainted II. 1. What Woman shall be endowed .- 'of treason or felony could not be endowed; to A woman to be endowed must be the actual the intent, says Staundford (P. C. b. 3, c. 3.) wife of the party at the time of his decease that if the love of a man's own life cannot re-If she be divorced d vinculo matrimonii, she strain him from such atrocious acts, the love shall not be endowed; for ubi nullum matri- of his wife and children may: though Britton monium, ibi nulla does. Bract. lib. 2. c. 39. § 4. (c. 110.) gives it another turn, viz. that it is A sentence in the spiritual courts, annulling presumed the wife was privy to her husa marriage by reason of canonical impediment, band's crime. The stat. 1 Ed. 6. c. 12. abated as consanguinity, affinity, frigidity, &c. renders the marriage void ab initio, 1 Phil. 203; lar, and allowed the wife her dower; but a and consequently takes away the title to subsequent stat. (5 and 6 Ed. 6. c. 11.) revived dower. 7 Co. 140: Rol. Abr. Dow. (R.) pl. the severity of the old law in cases of treason. 1—5. But in cases of voidable marriages, if It is to be observed that many crimes which the husband die before the sentence annulling were formerly treasons are no longer so; the marriage is pronounced, the wife will be petit-treason having been, as well as all offen-

The wife of a felo de se shall have dower. this works no corruption of blood, or for-

by stat. West. 2. (13 Ed. 1. c. 34.) if a woman band or any other, yet she shall be endowed; voluntarily leaves (which the law calls eloping because this cannot be felony in her who was from) her husband, and lives with an adul- deprived of her understanding by the act of terer, she shall lose her dower, unless her God: so though she be of sound mind, and husband be voluntarily reconciled to her, refuse to bring an appeal of his death, when And in a case where John de Camoys had he is killed by another, yet she shall be enassigned his wife by deed, it was decided in dowed; for this is only a waiver of that parliament, that, notwithstanding the preten-privilege the law has given her to be avenged ded purgation of the adultery in the spiritual of her husband's murderer: so it seems if court, the wife was not entitled to dower. 2 she refuses to visit and assist her husband in Inst. 435. If, however, after the elopement of sickness, yet she shall be endowed; for this

If a man take an alien to wife and dieth, she shall not be endowed, except the wife The wife must be above nine years old at of the king, who shall be endowed by the

law of the crown. And if a Jew born in England murry a Jewess also born here, the dies without heir, his wife shall be endowed; husband becomes a Christian, purchases lands, but not where the rent arises upon a reservaand dies, the wife (not being also a Christion to the donor and his heirs, on a gift in tian), shall not have dower. 1 Inst. 31 b. 32. a.

Co. Lit., the latter part of the preceding paragraph is confirmed; as to the former there is the following note: "Anciently a woman alien was not dowable; but by special as to her dower in the eye of the law they act of parliament, not printed, Rot. Parl. 8. H. have continuance. Co. Lit. 32. And where 5. n. 15. all women aliens, who from thenceforth shall be married to English men by license of the king, are enabled to demand their dower after the death of their husbands, to whom they should in time to come be married, in the same manner as English But this act did not extend to those married before; and therefore in Rot. Parl. 9 H. 5. n. 9. there is a special act of parliament to enable Beatrice Countess of Arundel, born in Portugal, to demand her dower. Hal. MSS. See Acc. 1 Ro. Ab. 675.". See also 9

Vin. 210. (8vo. ed.)

2. Of what Estate in Freeholds .- A woman is entitled to be endowed of all lands and tenements, of which her husband was seised in fee-simple, or fee-tail general at any time during the coverture; and of which any issue, which she might have had, might, by possibility, have been heir. Lit. § 36. 53. Therefore if a man, seised in fee-simple, has a son by his first wife, and afterwards marries a second wife, she shall be endowed of his lands; for her issue might by possibility have version, expectant on a term of years, and of been heir, on the death of the son, by the a rent reserved thereon. Latw. 729. former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on A. his wife, though not a lay fee, but now they are dowable of A. may be endowed of these lands, yet if A. dies, and he marries a second wife, that se. Lit. 32. a. 159. a.: 1 Rol. Abr. 682. cond wife shall never be endowed of the lands entailed; for no issue that she could have gross, a woman shall be endowed; for this could, by any possibility, inherit them. Ibid. may be divided as to the fruit and profit of it, δ 53.

and wife in tail, the remainder in tail to the Cro. Jac. 621: Cro. Eliz. 360: 1 Rol. Abr. husband, and the first wife dying without 683; Co. Lit. 379: 3 Leon. 155: Cro. Jac. 691. issue he marries another wife; this second wife will be entitled to dower after his death. coverture, whether by the husband or lessee

Kitch. 160.

estate in tail or fee, and cannot be taken away of the profits or separate alternate enjoyment by condition. If one seised in fee of lands of the whole for short proportionate periods. make a gift in tail, on condition that the wife 1 Taunt. 402. shall not have dower, the condition is void. 6 Rep. 41. If tenant in tail die without issue, able of all kinds of freehold lands of inherso that the land reverts to the donor, or in itance and hereditaments with a few excepcase he covenants to stand seised to uses, and tions, such as that already noticed of common dies, his wife shall be endowed. 8 Rep. 34: sans nombre, and personal annuities. See 1 Yelv. 51: Bro. Dower, 69.

Where a grantee of a rent in fee or tail tail, and the donce dies without issue; for In the notes on Mr. Hargrave's edition of this is a collateral limitation. Ploud. 156: F. N. B. 149. If, during the coverture, the husband doth extinguish rents by release, &c., yet she shall be endowed of them; for. a rent is descended to the husband, but he dies before any day of payment, notwith-standing the wife shall be endowed of it. 1 H. 7. 17. If lands are given to the husband and wife in tail, and, after the death of the husband, the wife disagrees, she may recover her dower; for, by her waiving her estate, her husband, in judgment of law, was sole seised ab initio. 3 Rep. 27. If lands are improved, the wife is to have one-third according to the improved value. Co. Lit. 32. And if the ground delivered her be sowed, she shall have the corn. 2 Inst. 81.

A woman shall not be endowed of a castle built for defence of the realm; but if a castle is only maintained for the private use and habitation of the owner, she may. Co. Lit. 31. 5: 3 Lev. 401. Nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. Co. Lit. 32:1 Jon. 215. But she shall be endowed of a re-

Of tithes women were not dowable till 32

Of an advowson, be it appendant or in viz. to have the third presentation. See Perk. But in case land be given to the husband 343, 344: F. N. B. 148. 150: Co. Lit. 32:

Dower is due of mines wrought during the where will be entitled to dower after its death. Coverture, whether by the husband or lessee Lit. δ 53: 40 Ed. 3. 4: 2 Shep. Abr. 63. For here he hath an estate in tail. The wife of a rents in kind, and whether the mines are untenant in common, but not a joint-tenant, shall have dower; and she shall hold her part solutely granted to him to take the whole in common with the tenants in common. stratum in the land of others. And such dower shall be assigned by metes and bounds, Dower is an inseparable incident to an if practicable; otherwise either by a proportion

It may be laid down that a woman is dow-

R. P. Report, 16.

law that the freehold and inheritance should try or action might be enforced."

be in the husband simul et semel to entitle the wife to dower. They must have met in him hold estates are not liable to dower, being as one integral estate, and not as several and successive estates. But it was not necessary that they should result from one entire limitation, or that there should have been a unity of title as to the freehold and inheritance. By whatever means they met so as to become absolutely consolidated, the attachment of a title of dower was the consequence. Park on Dower, 56. But the interposition of any vested estate, not being a chattel interest, between the limitation to the husband for life and the remainder to his heirs, during the continuance of that estate, prevented dower attach-Duncomb v. Duncomb, 3 Lev. 437. The decision in that case suggested to Mr. Fearne a form of limitation on the purchase of lands by which dower would be excluded, and which was very generally adopted in practice, and was known by the name of dower uses.

It had also long been settled, that although a husband might be tenant by the curtesy, a wife was not dowable of a trust estate of ined for this anomaly, that a wife was not endowed of a use previous to the 27 H. 8. c. 10., and that a trust in equity was the same as a use at common law. 3 P. W. 234. And as a necessary consequence of this doctrine, it was held that dower did not attach upon an equity of redemption, where the husband had mortgaged in fee previous to his

marriage. 1 Bro. C. C. 326.

But now, by the 3 and 4 W. 4. c. 105. § 2. beneficially entitled to any land (which words by § 1. extends to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, except such as are not liable to dower), "for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in jointtenancy), then his widow shall be entitled in equity to dower out of the same land."

Likewise prior to the act it was requisite that a husband should be seised either in deed or in law, to entitle his wife to dower, for if he had merely a right of entry or of action to lands and died before he had recovered pos-

session, dower did not attach.

This had been altered by § 3. which enacts that "when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of that such dower be sued for or obtained with- to marry afresh if she chose to live without a

Previous to the late statute it was a rule of in the period during which such right of en-

originally only estates at the will of the lord, unless by the special custom of the manor, in which case it is called the widow's free-bench. 4 Rep. 22. And consequently where such a custom exists, the estate she is to take must, both as to its quantity and duration, be such as the custom prescribes. In some manors the widow shall have the whole lands of which her husband died seised, and in others only a portion, as a moiety, or a third, or a fourth part. Free-bench differs from dower in common law, in that the former, unless the particular custom declares it to be otherwise, does not attach even in right till the actual decease of the husband. 2 Ves. 633: 2 Atk. 526: 2 T. R. 580. Therefore any alienation by him alone to take effect in his life-time, though without any concurrence of the wife, whether it be by surrender in court (Carth. 275: 12 Mod. 49), by forfeiture, (1 Freem. 516. ca. 692), or in consequence of enfranchisement (Cro. Jac. 126), will effectually bar heritance. It was one of the reasons assign- her claim. Another important difference between free-bench and dower is, that the latter arises only out of an estate of inheritance; whereas by the custom of many manors, the widow of a copyholder for life is entitled to the whole estate for her free-bench. 1 Lev. 20. See further Watkyn's on Copyholds, vol. 2. 68.

Although of copyhold lands a woman shall not be endowed, unless there be a special custom for it, yet if there be a custom to be endowed thereof, then she shall have the it is enacted that when a husband shall die assistance of such laws as are made for the more speedy recovery of dower in general, being within the same mischief, and therefore shall recover damages within the statue of Merton. 4 Co. 22: Hob. 216: 5 Co. 116.

In gavelkind lands a wife shall be endowed during her widowhood of a moiety of the land whereof her husband died seised. Co. Lit. 111. By the custom of borough-English, the widow shall have the whole of her husband's lands for her free-bench. Co. Lit. 33. 111.

III. Of the Assignment and Admeasurement of Dower .- By the old law grounded on the feodal exactions, a woman could not be endowed without a fine paid to the lord: neither could she marry again without his licence, lest she should contract herself, and so convey part of the feud, to the lord's enemy. Mirr. c. 1. § 3. This licence the lord took care to be well paid for; and as it seems, would sometimes force the dowager to a second marriage in order to gain the fine. But, to remedy these oppressions, it was provided, first by the famous charter of Henry I. A. D. 1101, and afterwards by Magna Charthe same although her husband shall not ta, c. 7. that the widow should pay nothing for have recovered possession thereof; provided her marriage, nor should she be "distrained" against the consent of the lord: and, further, that nothing should be taken for assignment of the widow's dower, but that she should remain in her husband's capital mansion-house for forty days after his death, during which time her dower should be assigned. These forty days are called the widow's quarantine, a term made use of in law to signify the number of forty days, whether applied to this occasion or any other. The particular lands to be held in dower must be assigned by the heir of the husband, or his guardian; Co. Lit. 34. 5; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir in respect of the lands so holden. For the heir, by this entry, becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of sub-infeudation, or under-tenancy, completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of quia emptores, because the heir parts not with the fee simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the time of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign

Co. Lit. 34.5. this subject (p. 262), that an important distinction prevails between an assignment of accepts of this dower less than her third dower made by the sheriff in pursuance of a judgment at law, and a voluntary assignment by the heir or grantee. In the former case 121. dower shall be assigned according to the particular nature and circumstances of the property, are to be strictly pursued. Styles, 276; Perk. s. 414: 12 Ed. 4.2: but see 18 H. 6. 27. contra. For although the wife has only a title to have dower and not the death of her husband's death, &c.; for then the wife has only a title to have dower and not the land, accept of a lease for years thereof after land, accept of the rules of law, as to the mode in which should consent to take her dower in some an immediate right of dower. Bro. Ca. 372: other manner than that due of common right, Jenk. Cent. 15. A widow accepting of dower yet the sheriff cannot bind the heir or tenant, of the heir, against common right, shall hold whose assent to an assignment against com- it subject to the charges of her husband; but mon right is as necessary as that of the wife. otherwise it is if she be endowed against Perk. s. 332: see, however, Anc. Entries, right by the sheriff. 2 Danv. 672. By pro-Qua. Imp. 529. 10; and Qua. Imp. in Dow. 1. contra. But on a voluntary assignment by of the husband's lands, and hold them disthe heir or terre-tenant, the parties may, by mutual agreement, waive a strict assignment according to the rules of law, and make such arrangement for the mode of enjoying dower as they think fit. Styles, 226: 12 Ed. 4. 2. b. 26. Ass. 41. 1.

Thus, the heir may, on the acceptance of the widow, assign one manor in lieu of a third part of each of three manors. 1 Rol. for the heir's enjoyment of the residue suffi-Abr. 683, 4. Or he may assign an undivided ciently accounts for her title to what she has third part in common in lieu of a third part 1 Rol. Abr. 683: Moor, pl. 47. 66. in severalty. Coots or Booth v. Lambert,

be divisible, her dower must be set out by manner of title to those lands, cannot with-

husband; but should not, however, marry | metes and bounds: but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third tolldish of a mill, the third part of the profits of an office, the third sheaf of tithe and the like. Co. Lit. 32.

It was decided in a late case, with respect to mines opened by the husband in his life-time, whether in his own land, or in the lands of others, that the sheriff may assign such a number of them as may amount to one-third in value of the whole, or direct separate alternate enjoyment of the whole for short periods, or give the widow a proportion of the profits. 1 Taunt. 410.

The assignment of the lands is for the life of the woman: and if lands are assigned to a woman for years, in recompense of dower, this is no bar of dower, for it is not such an estate therein as she should have. 2 Danv. Abr. 668. Also where other land is assigned to the woman that is no part of the lands wherein she claims dower, that assignment will not be good or binding; and there must be certainty in what is assigned; otherwise, though it be by agreement it may be void. 4 Rep. 2: 1 Inst. 34. If a wife accept and enter upon less land than the third of the whole, on the sheriff's assignment, she is barred to demand more. Moor, 679. But if It is stated by Mr. Park in his work on where a wife is entitled to dower of the lands of her first husband, her second husband

If a wife, having right of dower in the vision of law, the wife may take a third part charged. Ibid. If dower be assigned a woman on condition, or with an exception, the condition and exception are void. Cro. Eliz. 541.

If a woman be dowable of land, meadow, pasture, wood, &c. and any of these be assigned in lieu of dower of all the rest, it is good, though it be against common right, which gives her but the third part of each;

If lands whereof a woman hath no right (1651), 9: Vin. Ab. 682: Styles, 276: Co. Lit. 32. b. n. (1.) See also 1 B. & P. N. R. 1.

If the thing of which the widow is endowed

If the thing of which the widow is endowed bar her demand of dower; for she having no out livery and seisin be any more than tenant at will, which is no sufficient recompense for feiture of Dower .- A widow may be barred an estate for life, which her dower was to be. of her dower, not only by elopement, divorce, Perk. 407: Co. Lit. 34; 4 Co. 1; Co. Lit. 169; Bro. 3.

A woman entitled to dower cannot enter till it be assigned to her, and set out either by the heir, terre-tenant or sheriff, in certainty. 1 Rol. Abr. 681: Dyer, 343: Plowd. 529: Bro. 16: Co. Lit. 34. b. 37. a. b.

None can assign dower but those who have a freehold, or against whom a writ of dower lies: therefore a tenant by statute merchant, statute staple, or elegit, or lessee for years, cannot assign dower: for none of these have an estate large enough to answer the plaintiff's demand. Perk. 403, 404: Co. Lit. 35: Bro. 63. 94: 1 Rol. Abr. 681: 6 Co. 57.

If the heir within age assign to the wife more land in dower than she ought to have, he himself shall have a writ of admeasurement of dower at full age by the common law: so if too much be assigned in dower by the heir within age, or his guardian in chivalry, and the heir dies, his heir shall have such writ to rectify the assignment; but the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, because till then the interest of the guardian continues; and if any wrong be done, it is to the guardian himself, and not to the heir. If a disseisor assigns too much, the heir of the disseisee shall have admeasurement by the common law. F. N. B. 148. 332: Co. Lit. 39. a.: 2 Inst. 367: 7 H.2. 4. See stats. 13 Ed. 1. c. 7, 8.

If the heir within age before the guardian enters assigns too much in dower, the guardian shall have a writ of admeasurement of dower, by the stat. of Weston 2. c. 7. before which statute the guardian had no remedy; because the writ of admeasurement being a real action, lay not for the guardian, who had but a chattel: also by the same statute it is provided, that if the guardian pursue such writ feignedly, or by collusion with the wife, the heir at full age shall have a writ of admeasurement, and may allege the feint pleading or collusion generally. 2 Inst.

If the wife after assignment of dower improves the lands, so as thereby they become of greater value than the other two parts, no writ of admeasurement lies: so if they be of recoverer had right, then the wife is barred; greater value, by reason of mines open at the time of the assignment, no writ of admeasurement lies, because the land in quantity was no more than she ought to have; and then it is lawful to work the mines, which were open at the time of such assignment. F. N. B. 149: 2 Inst. 368: 5 Co. 12.

not such an interest in the land of which she is dowable, as to be irremoveable from the husband was seised before of a rightful estate parish in which the land lies. 2 B. & C. 724.

IV. What shall be deemed a Bar and Forbeing an alien, the treason of her husband, and other disabilities before mentioned (see ante, II.), but also by detaining the title deeds or evidences of the estate from the heir, until she restores them. Ibid. 39. If she denies the detainer, and it is found against her, she loses her dower. Hob. 199: 9 Rep. 19. By the stat. of Gloucester, 6 Ed. 1. c. 7. if a dowager aliens the land assigned her for dower, she forfeits it ipso facto, and the heir may recover it by action.

Under the 13 Ed. 1. c. 34. adultery is a bar to dower, though the wife did not elope with the adulterer, but previously left her husband's house, and lived apart from him with his consent. Hetherington v. Graham, 6 Bing.

Further as to the means by which a woman may be barred of her dower. Where a woman releases her right to him in reversion, her dower may be extinguished. 8 Rep. 151.

If a woman takes a lease for life of her husband's lands after his death, she shall have no dower, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have dower during these years, because it was her own act to suspend the fruit and effect of her dower during that time. Perk. 350: F. N. B.

If a recovery be had against the husband by collusion, this shall not bar the wife of dower, as if the recovery be by confession, or reddition, which are always understood to be by collusion, the husband always acting and concurring in obtaining of them; but it seems to have been a very great doubt, whether a recovery by default should not be a bar: and the better opinion being that such re-covery was a bar at common law, therefore the stat. W. 2. c. 4. was made, which ordains that notwithstanding such recovery by default, &c. pleaded, the tenant shall moreover in bar of the dower show his right to the tenements recovered; and if it be found that he had no right, then shall the demandant recover her dower notwithstanding such recovery by default against her husband. 2 Inst. 349: Perk. 376.

By stat. W. 2. c. 4. it appears that if the therefore if the heir of the disseisor be in by descent, and the disseisee enters upon him, and marries, and the heir of the disseisor recovers by default, or reddition, in a writ or entry, in nature of an assise, and the husband dies, his wife shall not have dower, because he who recovered had right to the possession A widow before assignment of dower has by the descent; aliter, if this disseisin, descent, &c. were after marriage, because the during the coverture, whereof his wife had title of dower, which cannot be defeated by

the disseisin, descent, and recovery, which herself to her dower at common law; for she all happened during the coverture. Perk. 379, 380.

One method of barring dower is by jointures, as regulated by the stat. 27 H. 8. c. 10.

A jointure, which, strictly speaking, signifies a joint-estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Coke, 1 Inst. 36: "A competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least." This description is framed from the stat. 27 H. 8. c. 10. commonly called the Statute of law is subject to no tolls or taxes; and her's Uses. (See tit. Uses.)—Before the making of that statute the greatest part of the land in England was conveyed to uses; the property or possession of the soil being vested in one man, and the use and profits thereof in another, whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the use of lands in absolute fee simple, yet the wife was not entitled to any dower therein, he not being seised thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife for their is more, though dower be forfeited by the lives in joint-tenancy, or jointure, which settlement would be a provision for the wife in jointure remain unimpeached to the widow. case she survived her husband. At length the statute of uses ordained, that such as had the it the preference, as being more sure and safe use of lands should, to all intents and purpo- to the widow than even dower ad ostium ecses, be reputed and taken to be absolutely clesia, the most eligible species of any. seised and possessed of the soil itself. In Comm. 135, &cc. An additional advantage consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure, had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she should be for ever precluded from her dower. 4 Rep. 1, 2.

But in this case these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 4 Co. 3. 2. It must be for the life of the wife herself at least, and not pur auter vie, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 1 Inst. 36. b. 4. It must be made in satisfaction of her whole dower, and not of any part, and must be so stated in the deed, either in express terms, or by reasonable or necessary construction of its language. 1 Inst. 36. b.: 4 Rep. 3: Ow. 33: Cro. Eliz. 128: Dy. 220: 2 Vent. 340: 1 Ch. Ca. 181.

was not capable of consenting to it during coverture. See tit. Jointure.

If, by any fraud, or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same stat. 27 H. 8. c. 10.) have her dower pro tanto at the common law. 2 Comm. 138. c. 8: 1 Sim. & Stu. 620.

There are some advantages attending tenants in dower that do not extend to jointresses; and so, vice versa, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt, if contracted during the coverture. Co. Lit. 31. a.: F. N. B. 150. But on the other hand a widow may enter at once, without any formal process, on her jointure land, as she also might have done on dower ad ostium ecclesiæ, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. Co. Lit. 36. And, what 1 Inst. 37. Wherefore Coke very justly gives Comm. 135, &c. An additional advantage is, that a jointure is not forfeited by the adultery of the wife as dower; and Chancery will decree against the husband a performance of marriage articles, though he alleges and proves that the wife lives separate from him in adultery. Sidney v. Sidney, 3 P. Wms. 269, &c., and the notes to that case.

Besides the legal bar provided by the above statute, a woman may also be bound in equity by a provision by way of jointure, although it may not be attended with all the requisites which have been noticed. Bonds for the payment of sums of money, leasehold estates, or funded property, before marriage, settled on the wife or in trust for her, have been held to defeat her title to dower. Equity appears to consider any provision, however inadequate or precarious it may be, which an adult accepts previous to marriage in lieu of dower, a good equitable jointure. 3 Ves. 545: 4 Brown's C. C. 513: Sugden's Vendors and Purch. 334.

If a woman who is under age at the time of marriage, agrees to a jointure and settle-If the jointure be made to her after mar. ment in bar of her dower, and of her distririage she has her election after her husband's butive share of her husband's personal prodeath, as in dower ad ostium ecclesiae, and perty, in case he dies intestate, she cannot afmay either accept it, or refuse it, and betake terwards waive it, but is as much bound as if

she were of age at the time of the marriage.! § 10. "No gift or bequest made by any Drury v. Drury (or Buckingkam, E. v. Dru-husband to or for the benefit of his widow of ry,), 3 Bro. P. C. (8 vo. ed.) 492. See tit. or out of his personal estate, or of or out of Jointure.

Previous to the late statute, when a title to dower had once attached, a husband could not defeat it by any act of his, except by a fine, levied with proclamations; in which case if his widow neglected to make her claim within five years after his death, she was barred. Where a man wished to sell an estate of which his wife was dowable, it was necessary for him to obtain her concurrence in levying a fine, or suffering a recovery, in order to extinguish her right, unless there was an outstanding term in the property, which might be assigned to the purchaser; and which was held in equity to be a sufficient protection against her title to dower. 1 I. & W. 665.

A material alteration has, however, been made in the law in this as well as in other respects, by the 3 and 4 W. 4. c. 105. which enables a husband to bar his wife's dower, by disposing, either by deed or will, of the property out of which she is dowable, and to prevent her becoming entitled to dower out of any land he may purchase, by a declaration

in the deed of conveyance.

The fourth section enacts, "That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his life-time, or by his will."

§ 5. " All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements, to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.'

§ 6. "A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be

entitled to dower out of such land."

§ 7. "A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land."

§ 8. "The right of a widow to dower shall be subject to any conditions, restrictions, or directions, which shall be declared by the will of her husband, duly executed as aforesaid."

By § 9. "Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will."

any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will."

The two latter sections set at rest a question that frequently arose, how far a wife was precluded, by a benefit given to her by the the will of her husband, from claiming dower out of lands devised by such will; for if the gift was inconsistent with the claim of dower, or if an intention could be gathered from the will that she should accept it in lieu of dower, she could not take both, but was put to her election. The cases upon this point were very numerous, and many of them hardly re-concileable with each other. Those who wish to refer to them will find them collected in Powell on Devises, by Jarman, 1 vol. 447-55; and Roper on Husband and Wife, by Jacob,

§ 11. "Nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands,

or any of them."

§ 14. "This act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty four, the effect of defeating or prejudicing any right to dower."

See further, as to bar of dower, tits. Uses and Trusts, and Jointure. And as to forfeiture thereof by the crime of the baron, ante,

II., and this Dict. tit. Forfeiture, I.

V. Of the Remedies for the Recovery of Dower.—As a dowress has no right of entry until her dower is assigned, it follows, as a necessary consequence, that she cannot enforce its assignment by a possessory action. Her only legal remedy is by a writ of dower, unde nihil habet, or by a writ of right of dower brought against the tenant of the freehold; but which latter writ is never resorted to, except in cases where the former cannot be adopted. Should she obtain judgment, dower is thereupon assigned her by the sheriff, and she may then proceed by ejectment to recover possession.

In case of deforcement of dower, by not assigning any dower to the widow within the time limited by law, she has her remedy by writ of dower unde nihil habet. F. N. B. 147. But if she be deforced of part only of her dower, she cannot then say that nihil habet; and therefore she may have recourse to another action by writ of right of dower; which

part or the whole, and is (with regard to her or seisin to the woman by a clod, or by grass claim) of the same nature as the grand writ of right is with regard to claims in fee-simple. On the other hand, if the heir, (being within age) or his guardian assign her more than she ought to have, this may be remedied by a writ of admeasurement of dower. F. N. B. 16. 148: Finch. L. 314. Stat. Westm. 2, 13 Ed. 1. c. 7.

A wife may have her writ of dower against an heir, an alienee, a disseisor, &c., or against any one that has power to assign dower: if the lord enters on the land for an escheat, she may bring it against him; but to the king she must sue by petition. 9 Rep. 10: Ploud. 141: Dyer, 263: Co. Lit. 59. This writ was brought against eight persons, feoffees of the husband after marriage; two confessed the action, and the other six pleaded to issue: here the demandant had judgment to recover the third part of two parts of the land, in eight parts to be divided; and after the issue being found for the demandant against the other six, she recovered against them the third part of the six parts of the same land as her dower. Dyer, 187: Co. Lit. 32.

Although courts of equity at first refused

to interfere, except where a dowress laboured under some difficulty or impediment in prosecuting her rights at law, they have latterly assumed a jurisdiction in setting out dower, which has rendered the bringing of a writ of versed, because the jury did not find that the dower a matter of rare occurrence. whenever the title of the dowress has been disputed upon a bill in equity for a commission to set out dower, the plaintiff has been sent to try her right at law. 2 Bro. C. C. 631. 633: 2 Ves. Jun. 128.

In an action of dower the first process is summons to appear: and if the tenant or defendant neglects or does not cast an essoin, a grand cape lies to seize the lands, &c. stat. 31 Eliz. c. 3. every summons on the land is to be made fourteen days before the return of the writ, and proclamation made at the church door on a Sunday, or else no grand for the heir is not bound to assign this provicape to be awarded, but an alias and pluries summons till proclamation. But on the return of the writ of summons, the attorney for the tenant or defendant may enter with wife: but a demand in pais before good testithe filazer that the tenant appears and prays view, &c. Then passes in some cases a writ of view, whereby the sheriff is to show the tenant's land; upon the return whereof the tenant's attorney takes a declaration, and puts in a plea: the most general one is ne unques seizie, &c., viz. the husband was had not the land all the time since the death never seised of any estate whereof the wife of the ancestor, and therefore she shall recan be endowed. When issue is joined you proceed to trial as in other actions: upon the trial the jury are to give damages for the nity and recompense against the heir, it is mesne profits from the death of the husband his own folly. Co. Lit. 32. (if he die seised), for which execution shall the sheriff to give possession of a third part writ of inquiry, though the writ of seisin

is a more general remedy, extending either to of the lands. The sheriff may give possession growing on the land, or by any beast thereon. 40 Ed. 3: Fitz. Dower, 48. See Impey's Sheriff.

In case there be any thing objected, precedent to the title of dower, such as an outstanding term of years, a widow may nevertheless recover her dower with a cesset executio during the term. 1 Nels. 684. 687: 1 Salk. 291. Judgment in dower is to recover a third part of lands and tenements by metes and bounds.

A writ of dower was not within any of the former statutes of limitations, and might be brought at any distance of time; but the 3 and 4 W. 4. c. 27. § 2. limits the period to twenty years after the right of the claimant first accrues.

Dower being a real action, no damages were recoverable at common law. They are, however, given by the stat. of Merton, c. 1; but that statute extends only to the writ of dower unde nihil habet, and not to the writ of right of dower, because they are intended as a compensation for the detention of the possession; and on writs of right, where the right itself is questionable, no damages are given, because no wrong is done till the right be determined. Also that statute extends only to lands whereof the husband died seised; and therefore judgment for the damages was rehusband died seised; for otherwise she shall have no damage. Where the husband aliens and takes back an estate for life, the wife shall recover dower, but no damages; because this dving seised was only of an estate of freehold, not of the inheritance; but if he makes a lease for years only, rendering rent, she shall recover a third part of the reversion, with a third part of the rents and damages, because there he dies seised as the statute speaks. Lit. Co. 32. b.: Dyer, 284. pl. 33: Yelv. 112: Doctor & Stud. lib. 2. c. 13. § 166: 2 Inst. 80.

Damages must be after demand of dower, sion till demanded, because the law casts the freehold of the whole upon him, which he cannot divide without the concurrence of the mony is sufficient; and if the heir appear the first day on summons, and plead that he hath always been ready, and still is, to render her dower, she may plead such request and issue may be taken upon it: but the feoffee of the heir cannot plead tout temps prist, because he cover the mesne profits and damages against him; and if he hath not provided his indem-

Damages are given in dower from the be made out; and then you have a writ to death of the husband, and to the return of the issued a year before but was not executed. | Man, Jersey, and Guernsey, or in any other Hardw. 19. &c. Where there are two joint- part of the British dominions, any such protenants in dower, and one dies after judgment duction as aforesaid, not printed and publishfor damages, and his heir and the other joint- ed by the author thereof or his assignee, and tenant bring error, the value from the time of shall be deemed and taken to be the propriethe judgment to the affirmance cannot be tor thereof; and that the author of any such recovered against the surviving plaintiff in production, printed and published within ten error only. Id. 50. See 2 Stra. 271. On a writ years before the passing of this act by the auof dower damages cannot be awarded by 16 tor thereof or his assignee, or which shall Car. 2. without speeding a writ of inquiry. hereafter be so printed and published, or the Hardw. 51.

equity to arrears in dower any more than at law without a special ground; 9 Ves. 222; but by the 3 and 4 W. 4. c. 27. § 41. no lication of the same, and also, if the author arrears of dower, or any damages on account or authors, or the survivor of the authors, shall of such arrears, shall be recovered for a be living at the end of that period, during the longer period than six years before the com- residue of his natural life, have as his own mencement of any action or suit.

dividere, and from thence come the word

her husband in marriage, otherwise called ment whatsoever, any such production as aforemaritagium, or marriage goods: but these said, in all cases in which the author thereof are termed more properly goods given in or his assignee shall, previously to the passing marriage, and the marriage portion. Co. of this act, have given his consent to or au-Lit. 31. This word is often confounded with thorized such representation, but that sole libdower, though it hath a different meaning.

DOZEIN. A territory or jurisdiction, ject to such right or authority." mentioned in the statute of View and Frank. By § 2. "if any person shall

pledge, stat. 18 Ed. 2. See Deciners.

signed at the instance of the barons in the the author or his assignee, represent, or cause reign of King Henry III. to be privy coun- to be represented, without the consent in cillors to the king, or rather conservators of writing of the author or other proprietor first the kingdom.

or military colours, borne in war by our such production as aforesaid, or any part ancient kings, having the figure of a dragon thereof, every such offender shall be liable

ber so joined together, that by swimming on shillings, or to the full amount of the benefit the water they may bear a burden or load of or advantage arising from such representa-

has at length received from the legislature the greater damages, to the author or other the protection of which it stood so much in proprietor of such production so represented need.

tragedy, comedy, play, opera, farce, or any costs of suit, by such authors or other propri-other dramatic piece or entertainment, com- etors, in any court having jurisdiction in such posed and not printed and published by the cases in that part of the said United Kingdom author thereof or his assignee, or which here or of the British dominions in which the of-after shall be commposed, and not printed fence shall be committed; and in every such or published by the author thereof or his as-proceeding where the sole liberty of such au-signee, or the assignee of such author, shall thor, or his assignee as aforesaid shall be have as his own property the sole liberty of subject to such right or authority as aforerepresenting, or causing to be represented, at said, it shall be sufficient for the plaintiff to any place or places of dramatic entertainment state that he has such sole liberty, without whatsoever, in any part of the United Kingdom stating the same to be subject to such right or of Great Britain and Ireland, in the Isles of authority, or otherwise mentioning the same."

assignee of such author, shall, from the time Until recently there was no limitation in of passing this act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first pubproperty the sole liberty of representing, or DOWL AND DEAL. A division: from causing to be represented, the same at any the Brit. dal, divisio, from the Sax. dalan, i. e. such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the So the stones which are laid to the proprietor thereof: provided nevertheless, that boundaries of lands are called dowle stones, nothing in this act contained shall prejudice, i. e. such as divide the land. Cowel.

DOWRY, dos mulieris.] Was in ancient time applied to that which the wife brings at any place or places of dramatic entertainerty of the author or his assignee shall be sub-

By § 2. "if any person shall, during the continuance of such sole liberty as aforesaid, DOZEN PEERS, were twelve peers as- contrary to the intent of this act, or right of had and obtained, at any place of dramatic DRACO REGIS. The standard ensign, entertainment within the limits aforesaid, any painted on them. Rog. Hoved. sub. ann. 1191. for each and every such representation to the DRAGS, seem to be floating pieces of tim- payment of an amount not less than forty other things down a river. Stat. 6. H. 6. c. 15. tion, or the injury or the loss sustained by DRAMATIC LITERARY PROPERTY the plaintiff therefrom, whichever shall be ed.

By 3 W. 4. c. 15. § 1. "the author of any this act, to be recovered, together with double under the act to twelve calendar months after | Domesday. the commission of the offence. See tit. Literary Property.

DRANA. A drain or water-course; some-

times written drecca. MSS. antig.

DRAPERY, pannaria.] Is used as a head in our own statute books, extended to the making and manufacturing of all sorts of other real writs whatsoever, and hath the woollen clothes. See tits. Clothiers, Manufac-

DRAUGHTS. See Bills of Exchange.

bers: Lambert, in his Eiren, lib. 1. cap 6. our law, ascalls them thieves, wasters, and roberdsmen; the last two words are grown out of use. They are mentioned in stats. 5 Ed. 3. c. 14. and 7 R. 2. c. 5.

DRAWN.TITHES. See Tithes, V.

DREDGE NET OR ENGINE, using within the limits of oyster fisheries, for the purpose of taking oysters, or oyster brood, a misdemeanor, punishable by fine and imprisonment, by 7 and 8 G. 4. c. 29. § 36.

DREDGERMEN. Fishers for oysters, &c. Stat. 2 G. 2. c. 19. See tits. Fish, Oys-

DREIT-DREIT, or DROIT-DROIT, jus duplicatum.] Are words signifying formerly a double right, viz. of possession, and of against the disseisor. Terms de la Ley. See property or interest. Bract. lib. 4. cap. 27: Co. Lit, 266. See 2 Comm. 199. and this

Dict. tit. Estate.

DRENCHES, or DRENGES, drengi.] Tenants in capite. Mon. Angl. tom. 2. fol. 598. And, according to Spelman, they are such as at the coming of William, the Conqueror, being put out of their estates, were afterwards restored thereto, on their making it appear that they were owners thereof, and neither in auxilio, or consilio, against him. Spelm.

The tenure DRENGAGE, drengagium.] by which the drenches or drenges held their Trin. 21 Ed. 3: Ebor. and Northumlands.

berland, Rot. 191.

DRIFT OF THE FOREST, agitatio animalium in foresta.] A view or examination of what cattle are in the forest, that it may be known whether it be surcharged or not; and whose the beasts are, and whether they are commonable, &c. certain times in the year by the officers of been made upon the same land by the person the forest; when all the cattle of the forest bringing such writ or action if his right of are driven into some pound or place enclosed, for the purposes aforementioned, and to the end it may be discovered whether any cattle Ships of great burden, men-of-war. Walsing. of strangers be there, which ought not to com. Anno 1292: Mat. Paris, sub. ann. 1191. mon. Manw. par. 2. c. 15: Stat. 32 H. 8. c. 13. 4 Inst. 309. See tit. Forest.

drinklean.] A contribution of tenants in the householders, and to be licensed, but that part

steward.

or woody place, where cattle were kept; and tit. Cattle.

δ 3. limits the time for bringing any action the keeper of them was called drofman.

DROFLAND, or DRYFLAND, Saxon, l A tribute or yearly payment made by some tenants to the king, or their landlords, for driving their cattle through a manor to fairs

or markets. Cowel.

DROIT, right.] Is the highest writ of all greatest respect, and the most assured and final judgment; and therefore is called a writ of right, and in the old books droit. Co. Lit. DRAW-LATCHES, were thieves and rob. 158. There are divers of these writs used in

> DROIT DE ADVOWSON. DROIT DE DOWER. DROIT DE GARDE. DROIT PATENT. DROITE RATIONABILI PARTE. DROIT SUR DISCLAIMER.

As to all which several writs of right, and their various uses, see Recto and Writs; and the several titles to which these writs belong.

DROIT DE ENTRIE, right of entry is, when one seised of land in fee is thereof disseised, he hath right to enter into the land, and may

By 3 and 4 W. 4. § 26. no writ of right, or real or mixed action (except a writ of right of dower, or writ of dower unde nihil habet, a quare impedit, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for free-bench or dower), shall be brought after the 31st December, 1834; which time, by § 37. is prolonged till the 1st June, 1835, in cases where persons not having a right of entry are entitled to maintain any such writ or action in respect of any

Provided (§ 38) that when any person, whose right of entry to any land, shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such writ or action, such writ or action may be brought after the 1st June, 1833, but only within the period during which, by virtue of These drifts are made at the provisions of this act, an entry might have entry had not been so taken away.

DROMOES, DROMOS, DROMUNDA.

DROVERS. Those that buy cattle in one place to sell in another. Willes, 590. By 5 DRINKLEAN, in some records potura Eliz. c. 12. they are to be married men and time of the Saxons, towards a potation, or of the statute directing them to be married ale, provided to entertain the lord, or his and householders is totally disregarded. They are now subject to the bankrupt laws, not be-DROFDENN. Among the Saxons a grove ing excepted in the 6 G. 4, c. 16. See further DRUGGERIA. A place of drugs, or drug-

ster's shop.

DRUNKENNESS, is an offence for which a man may be punished in the Ecclesiastical Court, as well as by justices of peace, by statute.

By stats. 4 Jac. 1. c. 5: 21 Jac. 1. c. 7. any person convicted of drunkenness before a justice, on view, confession, or oath of one witness, shall forfeit five shillings for the first offence, to be levied by distress and sale of his goods; and, for want of a distress, shall sit in the stocks six hours; and for the second offence be bound with two sureties in ten pounds each to be of good behaviour.

Tippling is a species of drunkenness. stat. I Jac. 1. c. 9. § 2, 3: 7 Jac. 1. c. 10: 21 Jac. 1. c. 7. § 4: 1 Car. 1. c. 4. if any inn. keeper, victualler, or alchouse-keeper, shall suffer any person (except persons invited by travellers, labouring-people at their dinner hour, or workmen following their employment in any city, &c., and lodging at any inn) to continue drinking or tippling in his house, he shall forfeit 10s. to the poor, to be recovered by distress, &c., or be committed till payment; and be disabled to keep an alehouse for three years.

By stats. 4 Jac. 1. c. 5. § 4: 1 Jac. 1. c. 9: 21 Jac. 1. c. 7: 1 Car. 1. c. 4. the persons tippling shall forfeit 3s. 4d., or be set in the

stocks for four hours.

He who is guilty of any crime, through his own voluntary drunkenness, shall be punished for it as if he had been sober. Co. Lit. 247: 1 Hawk. P. C. 3: 2 Coke Rep. 573. It. has been held that drunkenness is a sufficient cause to remove a magistrate: and the prosecution for this offence, by stat. 4 Jac. 1. c. 5. was to be, and still may be, before justices of peace in their sessions, by way of indictment, &c.

bond, &c. given by a man when drunk, unless the drunkenness is occasioned through the management or contrivance of him to whom it is given. 3 P. Wil. 130. in n.: 1
Inst. 247: Plowd. 19: 18 Ves. 12. 1 Ves. &
Bea. 30. But Lord Ellenborough held mere intoxication good evidence on a plea of non est factum to a bond. 3 Camp. 34. And see 1 Bligh. 160: and observations of Sir Wil. liam Grant, 18 Ves. 16. And this is accord. a sudden quarrel, was master of his temper ing to the Scotch law. 3 Camp. 35. And at the time, he is guilty of murder; as if see this Dict. tits. Bond, Fraud, Chancery.

DRY EXCHANGE, cambium siccum.] A term invented in former times for the disguising and covering of usury; in which not convenient for fighting; or that his shoes something was pretended to pass on both sides, whereas in truth nothing passed but Kel. 56: 1 Lev. 180. on one side, in which respect it was called If one challenge

dry. Stat. 3. H. 7. c. 5. See Cowel.

paid to a mill, whether the payers grind or then the challenger meets him on the road, not. Scotch Dict.

clause of distress. See Rent-Seck.

Vol. I -- 75

DUCES TECUM, bring with thee.] Is a writ commanding a person to appear at a certain day in the Court of Chancery, and to bring with him some writings, evidences, or other things, which the court would view. Reg. Orig. Subpanas duces tecum are also often sued out at common law, to compel witnesses to produce, on trials at Nisi Prius, deeds, bonds, bills, notes, books, or memorandums, &c. which are in their custody or power, and relate to the issue in question. But if they are in the possession or power of the adverse party or his attorney, it is sufficient to give a notice to produce. A court will compel a party to produce the documents required, unless their production will expose him to a criminal prosecution, or to some kind of forfeiture. 2 Taunt. 115. If not produced parol evidence may be given of the contents. See tits. Evidence, Trial.

DUCES TECUM LICET LANGUIDUS. directed to the sheriff, upon a return that he cannot bring his prisoner without danger of death, he being adeo languidus; then the court grants a habeas corpus in the nature of a duces tecum licet languidus. Book Entr. But this is now out of use: and where the person's life would be endangered by removal, the law will not admit it to be done.

DUCHY-COURT OF LANCASTER. See tits. Chancellor of the Duchy of Lancas-

ter, Counties-Palatine.

DUCKING.STOOL. See Castigatory. DUEL, duellum.] In our ancient law is a fight between persons in a doubtful case for the trial of the truth. Fleta. See tit. Battel. But this kind of duel is disused; and what is now called a duel is a fight between two persons upon some quarrel precedent; wherein if either be killed, the other principal and the their sessions, by way of indictment, &c. seconds are guilty of murder, and whether Equity will not in general relieve against a the seconds fight or not. H. P. C. 47.51.

If two persons quarrel over-night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon: or such a considerable time after, by which it may be presumed the blood was cooled; and then they meet and fight a duel, and one kill the other, it is murder. 3 Inst. 52: H. P. C. 48: Kel. 56. And whenever it appear that he who kills another in a duel, or fighting on after the quarrel, he fall into another discourse, and talk calmly thereon; or allege that the place where the quarrel happens is are too high if he should fight at present, &c.

If one challenge another, who refuses to meet him, but tells him that he shall go the DRY MULTURES. Quantities of corn next day to such a place about business, and and assaults the other; if the other in this DRY RENT. A rent reserved without case kill him, it will be only manslaughter; for there is no acceptance of the challenge or

lenged refuseth to meet the challenger, but the nonage of both of them, the wife, at her tells him that he wears a sword, and is always ready to defend himself, if then the challenger have a writ of dum fuit infra ctatem. M.14 attack him and is killed by the other, it is Ed. 3. By this writ to the sheriff he shall neither murder nor manslaughter, if necessary

in his own defence. Kel. 56.

If one kill another in a deliberate duel under provocation of charges against his he saith, or into which the said A. hath not character and conduct, however grievous, it is murder in him and his second: and therefore the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence; ensue thereon against the peace. 3 East's

Rep. 581.

An endeavour to provoke another to commit the misdemeanor of sending a challenge to fight, is itself an indictable misdemeanor, particularly where such provocation is given by a writing, containing libellous matter, and alleged to have been done with intent to do the party bodily harm, and to break the king's peace: the sending such writing being an act done towards procuring the commission of the misdemeanor meant to be accomplished. 6 East's Rep. 464.

See further tits. Murder, Challenge to Fight. DUES, ecclesiastical, non-payment of. Various dues to the clergy are cognizable in the Spiritual Court; which makes decrees for their actual payment. Offerings, oblations, and obventions, not exceeding the value of 40s. may, by stat. 7 and 8 W. 3. c. 6. be recovered in a summary way before two

justices of peace.

DUKE, Lat. dux, Fr. duc. d ducendo.] Signified among the ancient Romans ducforem exercitus, such as led their armies; since which they were called duces, and were governors of provinces, &c. In some nations the sovereigns of the country are called by this name; as the Duke of Savoy, &c. England the title of duke is the next dignity to the Prince of Wales: and the first duke DUPLE we had in England was Edward the Black siastical. Prince, so famed in our English histories for heroic actions, who was created Duke of Cornwall, in the 11th year of King Edward III. A. D. 1337. After which there were more made in such manner as that their titles descended to their posterity. They are created with solemnity, per cincturum gladii, cappæ et circuli anrei, in capite impositionem. Cambd. Brit. p. 166. See tit. Peer. DUM FUIT INFRA ÆTATEM, while

he was within age.] A writ whereby one who had made a feoffment of his lands while an infant, when he came of full age, might recover those lands and tenements which were so aliened; and, within age, he might enter into the land, and take it back again, and by his entry he should be remitted to his ancestor's right. Nat. Br. 426. And after the death of the infant his heir might have had this writ. until his return. See this Diet. tit. Executor. F. N. B. 192. G. 1: Co. Lit. 217, b. If the

agreement to fight; and if the person chal- husband and wife alien the wife's land during command A., that he render to B., who is of full age, two messuages and lands, &c. which B. demised to him while he was within age, as entered but by C., to whom the said B. the same demised; and unless, &c. F. N. B. 477. See tit. Infant.

DUM FUIT IN PRISONA, while he was in prison.] Is a writ of entry that lay to restore a man to his lands who had aliened them under duress of imprisonment. 2 Inst. 482.

DUM NON FUIT COMPOS MENTIS, while he was not of sound mind.] that lay where a man, not of sound memory, aliened any lands or tenements, against the alience. And he shall allege that he was not of sane memory, but, being visited by infirmity, lost his discretion for a time, so as not to be capable of making a grant, &c. New Nat. Brit. 449. See F. N. B. 202; and tits. Disability, Lunatic.

The above writs are among those which, by the 3 and 4 W. 4. c. 27. § 36. were abolished

after the 1st December, 1834.

DUN, down, which termination is now varied into don. It signifies a mountain or high open place; so that the names of those towns which end in dun, or don, as Ashdon, &c., were either built on hills, or near them in open places. Domes-day.

DUNSETTS. Those who dwell on hills or

mountains.

A down or DUNUM, Duna, dunnarium. Chart. MSS.

DUODENA. A jury of twelve men. Walsing. 256.

DUODENA MANU. Twelve witnesses to purge a criminal of an offence: See tits. Jurare Duodecima Manu; Wager of Law.

DUPLEX QUERELA. A process eccle-See tits. Double Quarrel, Quare

Impedit.

DUPLICATE, is used for the second letters-patent, granted by the lord chancellor, in a case wherein he had before done the same, whice were therefore thought void. Cromp. Jurisd. fol. 215. But it is more commonly a copy or transcript of any deed or writing, account, &c. or a second letter, written and sent to the same party and purpose as a former, or a copy of dispatches, for fear of a miscarriage of the first, or for other reasons. See stat. 4 Car. 2. c. 10. See also tits. Insolvent, Pawnbrokers.

See tits. DUPLICITY, in pleading.

Double Plea, Pleading.

DURANTE ABSENTIA, during absence.] An administration granted when the executor is out of the realm, to continue in force DURANTE MINORE ATTATE, during minority.] An administration granted during | fence have made him his own protector. 4 the minority of an infant executor, or infant next of kin. See tits. Executor, Infant.

DURDEN. A thicket of wood in a valley.

Cowel.

DURESS, durities, constraint.] Whatever is done by a man to save either life or limb is looked upon as done by the highest necessity and compulsion. Therefore, if a man, through fear of death or mayhem, is prevailed upon to execute a deed, or do any other legal act, these, though accompanied with all other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his avoid the deed. 2 Danv. Abr. 686. If a perlimbs, in case of non-compliance. 2 Inst. 483. And the same is also a sufficient excuse for the commission of many misdemeanors. The constraint a man is under in these cirthere are two sorts, duress of imprisonment, where a man actually loses his liberty; and duress per minas (by threats), where the hardship is only threatened and impending.

If a man is under duress of imprisonment or illegal restraint of liberty, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or deed, this is not by duress of imprisonment, and he is not at liberty to avoid

2 Inst. 482.

Duress per minas, is either for fear of loss of life, or else for fear of mayhem or loss of limb. And this fear must be upon sufficient reason: non suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem. Bract. 1. 2. c. 5. A fear of battery (or being beaten) though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb. 2 Inst. 483. See 1 Comm. 131-6.

As to criminal cases.-In time of war or rebellion a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in time of peace. 1 Hal. P. C. 50. This, however, seems only, or at least principally, to hold as to positive crimes, so created by the laws of society, and which, therefore, society may excuse, but not as to natural offences so declared by the laws of God. Therefore, though a man may be violently assaulted, avoided, as taken by duress. Cro. El. 646: and hath no other possible means of escaping 4 Inst. 97: Allen, 92. death but by killing an innocent person, this fear and force shall not acquit him of murder, dita querela, because it was made by duress for he ought rather to die himself than escape or imprisonment. A will shall be avoided by by such means. 1 Hal. P. C. 51. But in duress or menace of imprisonment. A feoffsuch a case he is permitted to kill the assail- ment made by duress is voidable, but not void. ant; for there the law of nature and self-de- But no averment shall be taken against a deed

Comm. 30. See this Dict. tits. Baron and Feme, Felony, Murder, &c.

By the acts 37 G. 3. c. 123: 50 G. 3. c. 102: and 52 G. 3. c. 104. persons compelled to take unlawful oaths are declared not to be justified or excused, unless they declare the same (within fourteen days in England, and ten in Ireland) to some justice of the peace. See

Oaths, unlawful.

Further as to civil cases .- It has been adjudged, that if a man make a deed by duress done to him, by taking of his cattle, though there be no duress to his person, yet this shall son threaten another to make a deed to a third person, it is by duress, and void, as if such third person had made the threatening. 2 Inst. 482: 3 Inst. 92: 4 Inst. 97. And where cumstances is called in law duress; of which a man is imprisoned until he makes a bond at another place; if afterwards he doth it when at large, the bond is by duress, and

If a person be arrested upon an action at the suit of another, and the cause of action is not good, if he make a bond to a stranger, it is not duress, though if he make it to the plaintiff it is; and, being sued upon the bond, he may plead it was made by duress, and so avoid it; also the party shall have an action for the false imprisonment itself. 1 Rep. 119: Perk. § 16: Cromp. Jur. 296: 1 Lil. Abr. 494. If the arrest is under colour of legal process, the action must be a special action on the case, not an action of trespass vi et armis.

If one imprisoned make an obligation by duress, and after he is at large takes a defeasance upon it, this will estop him to say it was made per duress. And where A. and B., by duress to B., seal a bond or deed, it may be good as to A., that was never threatened. 3 H. 16: Bro. 17: Mich. 7 Jac. 1. See 43 Ed.

3. c. 13: 2 Danv. 686.

A man shall not avoid a deed by duress of a stranger; for it hath been held that none shall avoid his own bond for the imprisonment or danger of any other than of himself only. Cro. Jac. 187. Yet a son shall avoid his deed by duress of the father, and the husband shall avoid a deed made by duress of the wife; though a servant shall not avoid a deed made by duress of his master, or the master the deed sealed by duress of his servant. Danv. 686. If a man is taken by virtue of a process issuing out of a court that hath not power to grant it, or in custody on a false charge of felony, &c. and for his enlargement and discharge gives bond, &c. this may be

A statute merchant may be avoided by au-

Abr. 862: 2 Danv. 685. A marriage had by which, Chester and Lancaster, are now united duress is voidable: and by stat. 31 H. 6. c. 9. to the crown, and the two latter, Durham and obligations, statutes, &c. obtained of women by force, to marry the persons to whom made, or otherwise, unless for a just debt, are declared void. If a person executes a deed by duress, he cannot plead non est factum, because it is his deed, though he may avoid it usual commissions under the great seal of by special pleading, and judgment si actio, &c. 5 Rep. 119. But see Mr. Fraser's note to this place, in his edition of the Reports. Records may not regularly be said to be made by duress, and therefore shall not be avoided by this plea or pretence. 2 Shep. Abr. 319. claimed the privilege. 6 Term Rep. 71.

In an action by the indorsee against the drawer of a bill, if it appear that the defendant drew the bill without consideration, and under duress, it is incumbent on the plaintiff to show that he gave value for it, although it was indorsed to him before it became due. Duncan v. Scott, 1 Camp. 100. See further,

this Dict. tits. Fraud, Fine, &c.

DURHAM. The bishopric of Durham was dissolved, and the king to have all the lands, &c. by a stat. 7 Ed. 6. not printed. But this act was afterwards repealed by stat. 1 Mary, st. 3. c. 3. and the bishopric newly erected, with all jurisdiction ecclesiastical and temporal, annexed to the county-palatine. The justices of the county-palatine of Durham might levy fines of lands in the county: and writs upon proclamation, &c., were to be directed to the bishop. Stats. 5 Eliz. c. 27: 31 Eliz. c. 2. Writs to elect members of parliament in the county-palatine of Durham shall go to the bishop or his chancellor, and be returned by the sheriff, &c. Stat. 25 Car. 2. c. 9. See further, tit. Counties-Palatine. As to the courts of which three counties, and the royal franchise of Ely, we may here insert what was there omitted. They are a species of private courts of a limited local jurisdiction, and having at the same time an exclusive cognizance of pleas in matters both of law and equity. 4 Inst. 213. 8: Finch. R. 452. In all these, as in the principality of Wales, the king's ordinary writs issuing under the great seal out of Chancery do not run; that is, they are of no force. For as, originally, all jura regalia were granted to the lords of these counties-palatine, they had of course the sole administration of justice by their own judges, appointed by themselves, and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. But when the privileges of these counties palatine were abridged by stat. 27 H. 8. c. 24. it was also enacted, that all writs and process should be made in the king's name, but should be tested or witnessed in the name of the owner of the franchise. Wherefore all writs whereon actions are founded, and which have current authority here, must be under the seal of their

enrolled, that it was made by duress. 1 Rol. respective franchises; the two former of Ely, under the government of their several bishops. And the judges of assise who sit therein sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof, and not by the England. 3 Comm. 78.

A bail-bond given to the sheriff of Durham. under a writ issued immediately from the Court of K. B. to him, is not void, though the

Where goods were seized on a pone per vadios out of the Court of Durham, the case was held not within the 8 Anne, c. 14; and therefore the sheriff was not bound to pay the landlord half a year's rent then due before he removed the goods. 6 Barn. & Cres. 467.

But by an act passed in the 11 G. 4. and W. 4. c. 11. the provisions of the 8 Anne, c. 14. are extended to cases of goods attached by virtue of any writ of pone per vadios, or of any writ of extract thereon, issued out of the Court of Durham.

DURHAM, CITY OF, is now the seat of a university, founded by the dean and chapter, who, by an act of the 2 and 3 W. 4. obtained leave to appropriate a part of the property of their church for its institution and support.

DURSLEY. Signifies blows without wounding or bloodshed, vulgo dry blows. Blount. DUSTY-FOOT. See Court of Piepowder.

DUTIES of persons. Allegiance is the duty of the people, protection the duty of the magistrate; yet they are reciprocally the rights, as well as duties of each other. Allegiance is the right of the magistrate and protection the right of the people. 1 Comm. 123.

DUTY. Any thing that is known to be due by law, and thereby recoverable, is a duty before it is recovered, because the party interested in the same hath power to recover it.

1 Lil. 495.

DWELLING-HOUSE. A man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. 1 Hal. P. C. 547: 4 Comm. 224.

By 7 and 8 G. 4. c. 29. § 11. 12 burglary; housebreaking and stealing to any amount; stealing in a dwelling-house, any person being put in fear; or stealing therein to the

value of 5l. are capital felonies.

By 7 and 8 G. 4. c. 30. § 2. 8. setting fire to, or riotously demolishing, or beginning to demolish, any dwelling-house are the like.

By 2 and 3 W. 4. c. 62. the punishment of death for stealing to the value of 5l. in a dwelling-house is abolished, and transportation for life substituted.

See tits. Burglary, Damages, Hundred, Riot.

DWINED. comes the word dwindle.

DYEING. Persons stealing any cultivated root or plant used for dying, growing in any land not being a garden, orchard, or nursery ground, are punishable summarily by one magistrate, by 7 and 8 G. 4. c. 29. § 43. See tit. Gardens.

DYERS. By stat. 23 G. 3. c. 15. several penalties are inflicted on dyers who dye any cloths, deceitfully, and not throughout with woad, indico, and mather; dying blue with logwood to forfeit 201. Dyers in London are subject to the inspection of the Dyer's Company, who may appoint searchers; and out of their limits justices of the peace in sessions to appoint them: opposing the searchers since, our kings have made earls of counties, incurs 10l. penalty. See this Dict. tits. La. bourers, Lien, Manufacturers.

DYKE-REED, rather DYKE-REVE. An officer that hath the care and oversight of the dykes and drains in fenny countries; as of

DYRGE, or DIRGE. A mournful song over the dead, from the Teutonic dyrke, lawdare, to praise and extol; whence it is a laudatory song. Cowel.

DYRENUM. A ditty or song. Venire

home. Paroch. Antig. 320.

E.

EALDING. See Adeling.

EALDERMAN, or ealdorman.] Among the Saxons was as much as earl with the Danes. Camb. Brit. 107. Also an elder, senator, &c. Ealdermen, or aldermen, are now those that are associated to the mayor or chief officer in the common council of a city or borough-town. Stat. 24 H. 8. c. 13. See tits. Aldermen: Squire's Ang. Sax. Gov. 107. 161. 220. n. 257. n.; and Lord Lytt. Hist. H. 2. v. 215.

EALEHUS, from the Sax. eale, cervisia, and hus, domus.] An alchouse. In the laws of King Alfred we often find this word.

EARLHORDA. The privilege of assisting and selling ale and beer. It is mentioned in a charter of King Hen. II. to the abbot of

Glastonbury.

EARL, Sax. eorle, Lat. comes.] This it is said was a great title among the Saxons, and is the most ancient of the English peerage, there being no title of honour used by our present nobility that was likewise in use by such like. Kitch. 105. A person may prethe Saxons, except this of earl, which was scribe to an easement in the freehold of anusually applied to the first in the royal line. other, as belonging to some ancient house, or Verstegan deriveth this word from the Dutch to land, &c. And a way over the land of ear, i. e. honour, and ethel, which signifies another, a gateway, water-course, or washingnoble. But whencesoever it is derived, the place, on another's ground may be claimed by title earl was at length given to those who prescription as easements. But a multitude were associates to the king in his council and of persons cannot prescribe, though for an

Consumed; from whence martial actions; and the method of investiture into that dignity was per cincturam gladii, without any formal charter of creation. Dugdale's Warwicksh. 302. William the First, called the Conqueror, gave this dignity in fee to his nobles, annexing it to this or that county or province, and allotting them for the maintenance of it a certain portion of money arising from the prince's profits, for the pleadings and forfeitures of the provinces. Camd. And formerly one earl had divers shires under his government, and had lieutenants under him in every shire, such as are now sheriffs, as appears by divers of our old statutes. Cowel.

But about the reign of King John, and ever &c. by charter, giving them no authority over the county, nor any part of the profits arising out of it, only some times they have had an annual fee out of the Exchequer, &c. An earl, comes, was heretofore correlative with Deeping fens, &c. mentioned in stat. 16 and comitatus; and anciently there was no earl but had a shire or county for his earldom; but of late times, the number of earls very much increasing, several of them have chosen for their titles some eminent part of a county, considerable town, village, or their own seats, &c. Besides these local earls, there are some cum toto ac pleno dyreno; to sing harvest personal and honorary, as earl marshal of England; see tits. Constable, Court of Chivalry; and others nominal, who derive their titles from the names of their families. Lez Constitutionis, p. 78. Their place is next to a marquis, and before a viscount, and as in very ancient times those who were created counts or earls were of the blood royal, our British monarchs to this day call them in all public writings, "Our most dear cousin." also originally did, and still may, use the style of Nos. See tits. County, Peers of the Realm, Sheriff.

EARNEST. Money paid in part of a large sum, or part of the goods delivered, on any contract, &c., which being done by way of earnest, the property of the goods is absolutely bound by it; and the buyer may recover the goods by action, as well as the vendor may the price of them. And by the statute of frauds, stat. 29 Car. 2. c. 3. no contract for sale of goods, to the value of 10l. or more, to be valid, unless such earnest is made or

given. See tit. Frauds.

EASEMENT, aisiamentum, from the Fr. aise commoditas.] Is defined to be a service or convenience which one neighbour hath of another, by charter or prescription, without profit; a way through his land, a sink, or

easement they may plead custom. Cro. Jac. 170: 3 Leon. 254: 3 Mod. 294: Lil. Abr. 496.

After non-use of an easement, as a right of way, &c. for twenty years, a release or surrender of the right will be presumed. 12 Ves. 265: Per. Abbott, C. J. 2 B. & A. 791: Per. Littledale, J. 3 B. & C. 339: and see 3

Camp. 514.

An easement being an incorporeal right, can only be created by deed. 4 East. 107: 5 B. & C. 229. But a mere liceuse to enjoy a privilege in land may be granted without deed, and even without writing, notwithstanding the statute of frauds. Say. 3: Palm. 81: 8 East, 310: 7 Bing. 682: and see tit. Liceuse.

Previous to the late act of the 2 and 3 W. 4. c. 71. twenty years' peaceable enjoyment of any easement unexplained, conferred a presumptive title thereto, the law assuming that the privilege originated in a sufficient grant. That statute, however, has introduced several alterations with respect to the periods within which the right to easements may be acquired, and has placed lights on a different footing from ways and watercourses. Its provisions will be found under the heads to which they relate. See tits. Lights, Prescription, Water-course, Way.

EASTER. The name of a goddess which the Saxons worshipped in the month of April, and so called, because she was the goddess of the East. Blount. In our church it is the feast of the Passover, in commemoration of

the sufferings of our Saviour.

EASTER DAY. By a general rule made by the judges in E. T. 2 W. 4. the days between Thursday next before, and the Wednesday next after, Easter Day shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial and of inquiry, in the courts of law at Westminster. But they may be return days. Hall v. Welchham, E. T. 2 W. 4. Excheq. MS. Jervis's Rules, App. 18.

EASTER TERM. See tit. Terms.

EAST INDIA COMPANY.

This company formerly bore the designation of "The United Company of Merchants of England trading to the East Indies," first given to it by the 6 Anne. c. 17. It has, however, for many years been termed "The East India Company," and has been so described in various acts. And by § 101. of the recent statute it is henceforth to be called by that name.

 The Formation and History of the Company, down to the passing of the 3 and 4 W. 4.c. 85.

II. The Alterations introduced with respect to the Possessions, Property, and Privileges of the Company, by the 3 and 4 W. 4. c. 85.

- III. The Home Government of India.
- IV. The Local Government of India. V. The Administration of Justice.
- VI. The Provisions for Religion.
 VII. The Provisions for the Appointment,
 Promotion, Education, &c. of the
 Civil Servants of the Company.
- VIII. Who may trade to India, and under what Restrictions.
 - IX. Who may settle in India, and in what Places.
 - X. The Provisions for the Benefit and Protection of the Natives of India.

The Formation and History of the Company, down to the passing of the 3 and 4 W. 4. c. 85 .- The first association for trading between England and India was formed in London in 1599. Its capital was divided into 101 shares, and amounted to 30,000l. On the 31st of December in the following year it procured a charter of privileges, to last for fifteen years, constituting the adventurers a body politic and corporate, by the name of "The Governor and Company of Merchants of London trading to the East Indies." The proprietors, thus incorporated, appointed a committee of twenty-four of their number, and a chairman, who were to be chosen annually for the management of their affairs. In the prosecution of their object five ships were provided, which sailed from Torbay on the 2d of May, 1601, with cargoes of bullion and merchandize; the total expense of their equipment and lading amounted to 75,000%. The difference between the sum and the amount brought forward by the original subscribers was furnished by persons who adventured their money upon the result of this one voyage, so that the trading of the Company was conducted on the term of a regulated, rather than a joint-stock company.

In 1609 the Company obtained a renewal of its charter for an indefinite period, subject, however to its being dissolved by government upon three years' notice being given. About two years after this time, permission was granted to the Company to establish factories at Surat, Ahmedabad, Cambaya, and Goga, upon its agreeing to pay a duty of 3½ per cent. upon all shipments of merchandize.

The system of subscriptions in order to provide the funds needed for the prosecution of each voyage, was discontinued in 1612, when the association assumed the character of a joint-stock Company. Capital was now raised amounting to 429,000l., which was embarked in four separate adventures or voyages, prosecuted in as many successive years. Although the result of these adventures was not equally profitable with those previously prosecuted by individuals under the regulation of the directors, the advantages derived (87½ per cent.) were sufficiently encouraging to produce a second set of subscriptions; and in the year 1617-18, a new

fund of 1,600,000l. was raised. This, although with India. This body assumed the name of employed under the management of the same the Merchant Adventurers, and its concerns directors, appears to have been kept distinct were managed by a committee. from the former capital, and the profits separately accounted for to the subscribers.

the Company, that in 1624 it obtained from and this occasion was embraced for bringing the king authority to punish its servants into one common stock all the various funds in abroad by municipal as well as by martial the hands of the directors, to a proprietorship law. It does not appear that the authority of in which claims were made by subscribers to parliament was deemed necessary for giving each of the joint-stock funds previously raised. to a private corporation the unlimited power The directors, who had now only one distinct of life and death over British subjects, in a interest to pursue, were thus relieved from situation where the temptation to its abuse much confusion and embarrasment in their was strongest, owing to the distance by which the Company's officers were removed from any restraining authority.

the subscriptions to which amounted to with any prince or people, not being Chris-420,700l. The system of management tians, as well as to seize all unlicensed persons

this amount of capital also.

In 1636, a license to trade with India was granted by the king to a body of adventurers wholly distinct from the existing corporation, of the marriage portion of the Princess Catheof whose rights this was deemed to be an in- rine, was granted by the king to the Company vasion. The utmost efforts of the directors "in free and common soccage, as of the manor were unavailing, however, to procure the of East Greenwich, at an annual rent of 10t. recal of the license thus granted, until 1640, in gold, on the 30th of Sept. in each year." when, upon the promise of its annulment, the corporation was required to raise a new joint the Company, under which it was required to stock, in order to carry on the trade upon augment its capital stock, then 756,000l. to sufficiently extensive scale.

It was probably owing to the competition between the Company and its licensed rivals, that the profits on its transactions had fallen so low as to hold out poor inducements to any new adventurers; and accordingly we find that the whole sum subscribed to its fourth joint-stock fund amounted to no more than 22,500l.; and the efforts of the directors were consequently feeble and unproductive. Three years after this the subscription was advanced to the still inadequate sum of 105,000l.

It may have been the political troubles of that period which prevented the engagement to withdraw the license of the rival Company from being fulfilled. Both associations seem, ceedings threatened the old Company with however, to have become aware of the disadvantages resulting from competition, so that in 1650, their interests were joined, and new subscriptions obtained, under the denomination of "the United Joint Stock."

Company's political power in India, was Company. In this negotiation the directors obtained in 1652. Upon the payment of a would probably have succeeded, had not their very inconsiderable sum, it procured from the rivals, improving upon the suggestion, offered government of Bengal, an unlimited right of to lend the larger sum of 2,000,000l. at 8 per trading throughout the province, without cent interest, on condition that they should

by the directors appears to have been so stock, or on the terms of a regulated company, unsatisfactory to a body of its proprietors, as they should see fit.
that they obtained from the Protector, in The larger bribe prevailed. An act passed

In little more than two years from the date of their commission, the Merchant Adven-It forms an important era in the history of turers formed a coalition with the Company; proceedings.

A new charter was obtained by the Company in 1661, confirming its former privileges A third joint stock was created in 1632, and giving authority to make peace and war already explained was adopted in regard to found within the limits to which its trade extended, and to send them to England.

In 1668, the island of Bombay, which had been ceded by Portugal to Charles II., as part

In 1693 the king granted a new charter to 1,500,000l., and to export in every year British produce to the value of 100,000l. This charter was to have had effect for twenty-one years, but the power of the Crown to grant such exclusive privileges was questioned by the Commons, who passed a resolution declaring "that it is the right of all Englishmen to trade to the East Indies, or any part of the world, unless prohibited by act of parliament."

Under the sanction of the declaration of the House of Commons, to which no reply was attempted on the part of the crown, many new adventurers began to trade with India, and a powerful opposition was raised up by an association of merchants, whose prodestruction. With the view of retrieving their affairs, the directors took advantage of the necessities of the government, and offered to lend the sum of 700,000l. at 4 per cent. interest, on condition that their charter should The first of those peculiar privileges to be confirmed, and the exclusive right of which must be ascribed the growth of the trading with India secured to the original being subjected to the payment of any duties. be invested with the monopoly, and allowed The management of the Company's affairs to manage their capital, whether as a joint-

1655, a commission to fit out ships for trading authorizing the association to raise the sum of

2,000,000l. by subscription, for the service of of the privileges enjoyed by the United East government, at the above rate of interest India Company. The exclusive privilege of The subscribers were incorporated by the trading eastward of the Cape of Good Hope name of "The General Society," and author- to the Straits of Magellan, granted by the 9 ized severally to trade with India, each to the and 10 W. 3. to "the General Society" was amount of his individual subscription, such as desired it being allowed to join their stock and trade together. The old Company was ment until 1794. entitled to three years' notice before its trade could be stopped. It had also acted upon the that on receiving the three years' notice clause in the new act, which allowed corpo-already mentioned, and repayment of the General Society, to which it accordingly contobe a corporation. In 1730, however, the tributed the sum of 315,000l.

The charter of incorporation of the General Society was speedily followed by another, uniting the greater part of its subscribers, who desired to trade on a joint-stock. This ing the debt due to the Company should be corporation was distinguished as "The Eng-redeemed, it should continue to be a body lish Company Trading to the East Indies.' The means of the new adventurers were so succession, and a common seal. crippled by the loan of its subscribed capital to government, that their commercial exertions 1698 of the towns of Chuttanuttee, Govindwere but feeble, and not at all commensurate with those of the old Company, the members of which had influence enough to procure an act of parliament continuing them a corporation, and entitling them to trade on their own account in respect of the stock which they

held in the new Company.

The rivalship of these two Companies was productive of much inconvenience both com- Companies had shown much anxiety respectmercial and political, so that in the beginning ing the claim which government might make of 1701, when the three years' notice to the old Company was about expiring, an union was effected between them. On the 22d July, 1702, an indenture passed under the great seal-the queen being made a party to the instrument in order to give full legal of the Company for the term of two years. effect to the arrangement—and the two corporations took the common name of "The United Company of Merchants Trading to the East Indies." Seven years were allowed during which each association was to manage separately the stocks actually engaged, and to wind up its affairs, after which the union was to be complete and final. When this period arrived an act (6 Anne, c. 17.) was passed, obliging the United Company to advance to government the sum of 1,200,000l. without interest, which, when added to the former loan of 2,000,000l. at 8 per cent., raised the amount to 3,200,000l. and reduced the rate of interest to 5 per cent. upon the whole advance. In return for this stipulation, the Company was empowered to raise 1,500,000l. either on its common seal, or by contributions from its members, and to add the 1,200,000 to its capital stock. The charter under the previous act might have been appointed by the crown. It determined the terminated in 1711, but was continued by mode of electing directors, and the qualifica-this arrangement until after a notice of three tion of voters. It restricted the amount of years, which could not be given earlier than annual dividend upon the stock to six per March, 1726, and further until the money borrowed should be repaid to the Company.

thereby confirmed to the United Company, and continued by successive acts of parlia-

The above act of 6 Anne, c. 17. provided Company, by the payment of 200,000l. to the public, obtained an enactment (3 G. 2. c. 14. confirmed by 17 G. 2. c. 17. and 21 G. 3.c. 65.) by which it was declared, that notwithstandpolitic and corporate, and have perpetual

The old Company had obtained a grant in pore, and Calcutta, with leave to exercise jurisdiction over the inhabitants of the district, and to erect fortifications. A fortification, which they speedily constructed, received the name of Fort William, in compliment to the reigning king of England.

From the period of their first acquisition of territory in India, the directors of the different to its sovereignty. In 1767 an agreement was entered into between the public and the United Company to the effect, that in consideration of an annual payment of 400,000l. the territory should remain in the possession years more from the 1st of February, 1769. The sums paid to the public by the Company under these two acts amounted to 2,169,398i. 18s. 2d.

The revenues of the Company in India proving inadequate to defray the expenses of its government, and the large annual payment reserved to the public, a petition was presented to parliament in 1773, praying relief: in consequence, the sum of 1,400,0001. was lent to the Company for four years.

Parliament availed itself of this occasion to assume a general regulation of the Company's affairs, and to effect a complete change in its constitution. It appointed a governorgeneral to reside in Bengal, to which station the other Indian presidencies were made subordinate. A supreme court of judicature was likewise established in Calcutta, with judges cent, foregoing the annual payment of 400,000l. until the debt, incurred under the This act of parliament was the foundation arrangement, should be discharged. It insisted upon the exhibition to the government service of the Company: This loan was liquiof all correspondence between the directors dated by annual payments, and was finally and their officers which related to territorial discharged in 1822. affairs; and required half yearly statements to be rendered to the Treasury of the profits and loss upon the Company's trade and revenucs, and of its debts in England.

In return for these exactions, parliament, besides advancing the sum above-mentioned, and foregoing for a time the annual payment of 400,000L, confirmed to the Company its territorial possessions until the expiration of

its then existing charter.

The act passed in 1781, for renewing the charter until March, 1794, continued the territorial acquisitions and revenues in the Company for a period terminating upon three years' notice, to be given after March, 1791. Under this act the Company paid to the public 400,000l. in satisfaction of all claims, the loan of

by which the possession of the British territories in India, together with the right of exclusive trading thither, were, under certain limitations, continued to the Company for the charter was again renewed for twenty years. India was thrown open to the public under certain regulations; while that to China and the trade in tea generally was reserved exclusively to the Company.

The capital stock of the Com-

pany, which in 1708 amounted to the sum of Was increased under the authority of successive enactments as

follows :-

In 1786 · In 1789 In 1794

Making its capital stock amount to 6,000,000 were subscribed at rates exceeding the nominal amount. The sum actually subscribed in 1794 was 2,027,295l.; and the whole the 22d April, 1834, the territorial acquisiamount paid, into the Company's treasury for capital stock has been 7,780,000l.

Under the provisions of the act of 1793 the Company engaged to pay to the public the sum of 500,000l. annually, unless prevented by war expenditure: but owing to the period over which the engagement extended being one of continued hostilities, no more than two payments of 250,000l. each, in the years 1793-4 and 1794-5 were made.

On two occasions subsequently to 1793, the Company obtained pecuniary assistance from the public, under the authority of the legislature; once, in 1810, when 1,500,000l. was advanced in Exchequer bills, and repaid soon whatsoever, which the said Company shall be after he advances made for the mulie comice

The alterations introduced with respect to the Possessions, Property, and Privileges, of the Company, by the 3 and 4 W. 4. c. 85 .-The important changes intended to be effected by this act may be gathered from the preamble. After stating that by the 53 G. 3. c. 155. the possession and government of the British territories in India were continued in the Company for a term therein mentioned, it proceeds: "And whereas the said Company are entitled to or claim the lordships and islands of St. Helena and Bombay under grants from the crown, and other property to a large amount in value, and also certain rights and privileges not affected by determination of the term granted by the said recited 1,400,000l. having been previously discharged. act: and whereas the said Company have con-In 1793 the act 33 G. 3. c. 52. was passed, sented that all their rights and interests to or in the said territories, and all their territorial and commercial, real and personal assets and property whatsoever, shall, subject to the debts and liabilities now affecting the same, further term of twenty years. In 1813 the be placed at the disposal of parliament in consideration of certain provisions hereinafter By this last act (53 G. 3. c. 155.) the trade to mentioned, and have also consented that their right to trade for their own profit in common. with other his Majesty's subjects be suspended during such time as the government of the said territories shall be confided to them; and whereas it is expedient that the said territories now under the government of the said £3,200,000 Company be continued under such government but in trust for the crown of the United Kingdom of Great Britain and Ireland, and discharged of all claims of the said Company 800,000 to any profit therefrom to their own use, ex-1,000,000 cept the dividend hereinafter secured to them, 1,000,000 and that the property of the said Company be continued in their possession and at their disposal, in trust for the crown, for the service Some portions of the capital thus raised of the said government, and other purposes in this act meutioned."

By § 1. it is enacted, that from and after tions and revenues mentioned in the act of the 53d year of G. 3., together with the port and island of Bombay, and all other territories now in the possession and under the government of the Company, except the island of St. Helena, shall continue under such government, until the 30th April, 1854; and that all the lands, hereditaments, revenues, merchandize, real and personal estate whatsoever, of the Company, except the island of St. Helena, and the stores and property thereon, subject to the debts and liabilities now affecting the same, and the benefit of all contracts, and all rights to forfeitures, and other emoluments entitled unto on the 22d April, 1834, shall ... main vested in, and be held, by the Compain trust for his Majesty, his heirs and

of India, discharged of all claims of the Company to any profit or advantage therefrom to their own use, except the dividend on their capital stock, secured to them as after-mentioned, subject to such powers for control over the acts and concerns of the Company, as have been already provided by any acts of parliament, or are provided by this act.

By § 112. the island of St. Helena, and all forts, factories, public edifices, and hereditaments in the island, and all stores and property thereon, fit or used for the service of the government thereof, shall be vested in his Majesty, his heirs and successors, and the said island shall be governed by such orders

as his Majesty in council shall issue.

By § 2. all privileges, franchises, abilities, capacities, powers, whether military or civil, rights, remedies, forfeitures, disabilities, provisions, matters, and things, granted to or continued in the Company by the act of 53 G. 3. during the term limited thereby, and all other the enactments and provisions therein day shall be lawfully incurred on account of contained, or in any other act whatsoever, the government of the said territories, and all which are limited or may be construed to be payments by the act directed to be made, limited to continue for the term granted to shall be charged upon the revenues of the the Company by such act, so far as the same said territories; and that neither any stock or or any of them are in force, and not repealed effects which the Company may hereafter by or repugnant to the enactments hereinaf- have to their own use, nor the dividend by the ter contained, and all powers of alienation act secured to them, nor the directors or proand disposition, rights, franchises, and immu-nities, which the Company now have, shall continue in force, and may be exercised and enjoyed, against all persons whomsoever, subject to the control hereinbefore mentioned, until the 30th April, 1854.

By § 3. from and after the said 22d April, 1834, the exclusive right of trading with the dominions of the Emperor of China, and of trading in tea, continued to the said Company

by the 53 G. 3. shall cease.

And § 114. repeals all enactments directing the Company to provide for keeping a

stock of tea.

By § 4. the Company shall, with all convenient speed after the 22d April, 1834, close their commercial business, and make sale of all their merchandize, stores, and effects at home and abroad, distinguished in their account books as commercial assets, and all their warehouses, lands, tenements, hereditaments, and property whatsoever which may not be retained for the purposes of the government of the said territories, and get in all debts due to them on account of the commercial branch of their affairs, and reduce their commercial establishments as the same shall become necessary, and abstain from all commercial business which shall not be incident to the closing of their actual concerns, and to the conversion into money of the property hereinbefore directed to be sold, or which shall not be carried on for the purposes of the said government.

§ 5. provides that nothing herein contained within three years after such demand.

successors, for the service of the government shall prevent the Company from selling, at the sales of their own goods and merchandize by this act directed to be made, such goods and merchandize the property of other persons as they may now lawfully sell at their public sales.

By § 6, the Board of Commissioners for the affairs of India are to have full power to superintend and control the sale of the property directed to be disposed of, and to determine, until it be converted into money, what parts of the commercial establishments shall be con-

tinued and reduced.

By § 9. from and after the said 22d April, 1834, the bond debt in Great Britain, the territorial debt in India, and all other debts which shall on that day be owing by the Company, and all sums of money, costs, charges, and expenses, which, after the 22d April, 1834, may become payable by the Company, by reason of any covenants, contracts, or liabilities then existing, and all debts, expenses, and liabilities whatever which after the same

And by § 10. so long as the possession and government of the said territories shall be continued to the Company, all persons and bodies politic shall have the same suits, remedies, and proceedings, legal and equitable, against the Company, in respect to such debts and liabilities as aforesaid, and the property vested in the Company in trust as aforesaid shall be subject to the same judgments and executions, in the same manner as if it were continued to the Company to their own use.

By § 11. that out of the revenues of the said territories there shall be paid to or retained by the Company, to their own use, a yearly dividend after the rate of ten pounds ten shillings per cent. per annum on the present amount of their capital stock; the said dividend to be payable in Great Britain, by equal half-yearly payments, on the 6th of January and the 6th of July in every year; the first half-yearly payment to be made on the

6th of July, 1834. § 12. enacts that the dividend shall be subject to redemption by parliament at any time after April, 1874, on payment of 2001. for 1001. stock, and giving twelve months' notice of the intention to redeem. Provided (§ 13) if, after April, 1854, the Company shall be deprived of the possession and government of India, they may within one year thereafter demand such redemption, which shall be made By § 14. the Company are to pay the com-missioners for the reduction of the national debt, 2,000,000l., which sum, with the divi-dends thereon arising, is to be invested question, except in cases of elections to in public securities until it amounts to offices, where there shall be more than one 12,000,000 l., and to form a security fund candidate; which, in the event of an equality for the redemption of the dividend of the Company.

By § 15. the same commissioners are, upon the requisition of the Court of Directors, to raise money in the manner therein mentioned, for payment of the Company's dividend, in case of failure, or delay in remitting the pro-

per funds for that purpose.

By § 16. the dividends of the security fund, after it shall amount to 12,000,000l., and until it shall be applied in redemption of the Company's dividend, and also so much of the fund as shall remain after such redemption, are to be applied in aid of the revenues of the territories.

By § 17. the dividend of the Company's capital stock is to be paid out of the revenues transmitted to Great Britain, in preference to all other charges; and the said sum of 2,000,000l. is, after the 22d of April, 1832, to have priority of payment out of any sums due from the public, and any government stock then belonging to the Company subject to such payments; the revenues and moneys then belonging to the Company, and all moneys to be received by them in respect of the property and rights vested in them in trust, are to be applied to the service of the government of India, and in defraying the affairs of the Company, subject to the supercharges created by the act.

III. The Home Government of India .-The home government of India is formed of-1. The Court of Proprietors; 2. The Court of Directors; 3. The Commissioners for the affairs of India, commonly called the

Board of Control.

1. The Court of Proprietors is composed of all the members of the Company who are possessed of a certain amount of stock. Previous to the 13 G. 3. c. 63. the holder of 500l. stock was entitled to a vote, but by § 3 of that statute, the qualification for a single vote is raised to 1000l. stock. By § 4. the possessor of 3000l. stock is privileged to give two votes at any election of directors, or any ballot of the Company; of 6000l. three votes; of 10,000l. four votes; which is the greatest number allowed to any one member. By § 6. an oath or affirmation that he holds the stock in his own right, and has been possessed of it for twelve months, except in the cases therein mentioned, is required of every proprietor before he is permitted to vote.

of the 9 and 10 W. 3. it was appointed that committees, which are designated by the in all cases of an equality of votes in any particular duties allotted to them, as the general Court of Proprietors or Court of Di- committee of correspondence, &c. And by

of votes, are to be decided by lot as before. By § 27. of the 3 and 4 W. 4. c. 85., any proprietor resident in the United Kingdom, may vote by attorney on the election of directors, making an affidavit or affirmation before a justice of the peace to the like effect as the oath or affirmation taken by proprietors voting upon ballots at any general court.

The proprietors elect the directors, and formerly declared the dividends. They may make bye-laws which were binding where no act of parliament existed to the contrary. Proceedings in parliament affecting the interests of the Company, and all gratuities to any civil or military officer exceeding 600l. must have their sanction, as well as the confirmation of the Board of Control. They have not, however, any generally controlling power over the Court of Directors, neither can they (24 G. 3. c. 25. § 29.) revoke or rescind any of its orders after they have been approved by the Board of Control. The number of proprietors recently entitled to vote were 1956; of whom 54 possessed four votes, 50 three votes, 370 two votes, and 1502

one vote each.

2. The Court of Directors consists of twenty-four proprietors, who manage the intendence of the Board of Control. They are chosen at a general Court of Proprietors, held annually on the second Wednesday in April (17 G. 3. c. 8), and each must possess a qualification of 2000l. stock. Formerly they were elected in a body for one year only, but under the provisions of the 13 G. 3. c. 63 § 1. they now hold their offices for four years, six going out annually by rotation. After the expiration of a year, they are again eligible and are generally re-chosen; thirteen from a court. The appointment of a chairman and deputy chairman rests with the directors, and takes place once a year, By § 27. of the 3 and 4 W. 4. c. 85. so much of the 13 G. 3. c. 63. as restricted any person who had been employed, either in a civil or a military capacity in India, from being chosen a director until he had resided two years in England, is repealed, except in the cases therein mentioned.

The meetings of the Court of Directors are to be held at least once a week, but frequently take place at a shorter interval, being summoned as occasion requires. For the dispatch By the charter granted under the authority of business, the court divides itself into rectors, the matter should be determined by 3 and 4 W. 4. c. 85. § 35. the Court of Directors. But by § 77. of the 53 G. 3. c. 155. no tors are from time to time to appoint a secret

committee, to consist of any number of directors not exceeding three, for the purposes specified in the statute, who, before they act, are to administer to each other and

take the oath therein mentioned.

3. The Board of Control was first established by Mr. Pitt's celebrated India; Bill (24 G. 3. sess. 2. c. 25.) By that act the king was authorized to appoint six commissioners for the affairs of India from among his privy councillors; of whom, one of the secretaries of state, and the Chancellor of the Exchequer for the time being, were to be two; three commissioners to form a board, whereof the said secretary of state, or, in his absence, the Chancellor of the Exchequer, or, in the absence of both, the senior commissioner was to be president, who, in case of the board ceeding of all courts of proprietors, or courts being at any time equally divided in opi- of directors, within eight days after such nion, was to have two voices, or the casting | courts are held, and also copies of all material

By the 33 G. 3. c. 52. the constitution of or any committee of directors. the board was altered. The person first named in the king's commission was to be the president, and the two principal secretaries of state and the Chancellor of the Exchequer were always to form three of the commissioners whose number was rendered indefinite. The king might also add to the list two members who were not of the privy

council.

further change. It is no longer necessary for the commissioners to be privy councillors. The Lord President of the Council, the Lord Privy Seal, the First Lord of the Treasury, the principal Secretaries of State, and the Chancellor of the Exchequer, for the time being, are ex officio to be Commissioners for required by the board, neglect to prepare and the Affairs of India, in conjunction with the submit for its consideration any despatches or persons nominated in any commission issued under the great seal, and are to have the same powers as if they had been nominated in such commission in the above-mentioned order next after the commissioner first named therein. § 20 Two commissioners may form a board, whereof the commissioner first named in the commission, or, in his absence, the next in order is to be president (§21.), who is to have two voices or the casting vote when the commissioners present at any board shall be divided in opinion. § 22.

The board may appoint two secretaries and other officers, each of which secretaries is to have the same powers and privileges as by Court of Directors may send a special case to any acts are vested in the chief secretary of three or more of the judges of the King's the Board of Control. The president of the Bench, whose opinion shall be conclusive. board (but no other commissioner), secretary, and other officers, to be paid such salaries by the Company as his Majesty shall direct.

dia, shall continue so, with the same powers lors, to be styled, " The Governor-General in as if they had been appointed by the act, until Council." their appointments shall be revoked. § 26.

The board is to have full power to superintend or control all acts and concerns of the Company relating to the government or revenues of India, or the property by the act vested in them in trust, and all grants of salaries, gratuities, and allowances, and all other payments, out of such revenues and property. except as thereinafter mentioned. § 25.

By § 36. if the board are of opinion that any of their deliberations intended to be communicated in despatches to the governments in India require secrecy, they may send such despatches to the secret committee of directors appointed by § 35. who are, without dis-

closing, to transmit the same.

By § 29. the Court of Directors is to deliver to the board copies of all minutes and proletters and despatches received by the Court

By § 30. no orders or despatches (except such classes of communications as the board may allow) are to be sent or given by the Court or any committee of directors until approved by the board, and for that purpose copies thereof are to be laid before it, and returned within two months if approved; but if the board shall disapprove or alter any of such proposed orders or despatches, it is to give its The 3 and 4 W. 4. c. 85 has introduced a reasons in respect thereof in writing, together with its directions relating thereto, to the directors, who are to send the orders or despatches, in the form approved, to their proper destinations.

By § 31. whenever the Court of Directors shall, for the space of fourteen days after being communications, the latter may prepare and send the same, together with its directions relative thereto, to the directors, who are to transmit them to their destinations.

By § 33. the directors may, within fourteen days, make representations to the board touching directions received from it, which the latter is to take into consideration, and then to

give its final orders.

§ 34. If it appear to the Court of Directors that any orders or official communications (except such as pass through the secret committee) on which the board shall give directions, are contrary to law, the board and the

IV. The Local Government of India.-By 39. the superintendence, direction, and control of the whole civil and military govern-The persons who on the 22d April, 1834, ment of the territories and revenues in India shall be Commissioners for the Affairs of In-

By § 40. the council is to consist of four

ordinary members, three of whom are to be previous sanction of the Court of Directors, or duties. The fourth ordinary member is to Majesty's charters. be appointed from among persons not servants of the Company, by the Court of Directors; subject to the approbation of the crown; but rules for the procedure of the governor-genehe is not to be entitled to sit or vote in the ral in council in the discharge of all powers council, except at meetings for making laws and duties vested or to be vested in him: and regulations. The Court of Directors may which rules shall prescribe the modes of proappoint the commander-in-chief of the Com- mulgation of any laws to be made by, and of pany's forces in India: and if there be no the authentication of all acts of the governorsuch commander-in-chief, or his office and general in council; and such rules, when apthat of governor-general shall be vested in the proved by the board, shall be of the same same person, then the commander-in-chief of force as it inserted in this act, provided they the forces on the Bengal establishment, to be an extraordinary member of the council, who shall have precedence next after the governorgeneral.

shall have power to repeal or alter any laws or bers of council shall be assembled; all other regulations now or hereafter to be in force in functions of the governor-general in council the said territories, and to make laws for all may be exercised by him and one or more persons, British or native, foreigners or others, ordinary member or members of council; in and for all courts of justice, whether esta- every case of difference of opinion where blished by his Majesty's charters or otherwise, there shall be an equality of voices the goand the jurisdictions thereof, throughout the vernor-general shall have two votes or the whole of the said territories, and for all casting vote.

servants of the Company within the dominion § 49. When any measure shall be proposed of princes and states in alliance with the before the governor-general in council, where-Company; except the power of making any by the safety or interest of the British posses-laws which shall repeal or affect the provisions of this act, or of the acts for punishing governor-general, essentially affected, and he mutiny and desertion, or of any act hereafter shall be of opinion either that the measure so to be passed affecting the Company or the ter- proposed ought to be adopted, or should be ritories or the inhabitants thereof, or any suspended or rejected, and the majority in laws which shall affect any prerogative of the council then present shall dissent from such crown, or the authority of parliament, or the constitution or rights of the Company, or the unwritten laws or constitution of Great Britain other in writing, to be recorded on their secret and Ireland, whereon may depend the allegiance of any person to the crown of the United opinions; and if after considering the same Kingdom, or the sovereignty of the crown over the said territories.

§ 44. In case the Court of Directors, under such control as by this act is provided, shall signify to the governor-general in council execution, as he shall think fit. their disallowance of any laws by the governor-general in council made, upon receipt of notice of such disallowance, the governorgeneral in council shall repeal them.

§ 45. All laws made as aforesaid, so long as they remain unrepealed, shall be of the same force throughout the said territories as any act of parliament would be within the same territories, and shall be taken notice of council shall declare it expedient the goby all courts of justice within the same territories; and it shall not be necessary to register them in any court of justice.

Provided (§ 46.) it shall not be lawful for

chosen by the Court of Directors from among to make any law whereby power shall be persons who are, or have been, servants of the given to any courts of justice, other than the Company, and, at the time of appointment, courts of justice established by his Majesty's have been in its service for ten years. No one charters, to sentence to death any of his Main the military service is, during his continu- jesty's natural-born subjects born in Europe, ance in office as a member of council, to hold, or their children, or which shall abolish any or to be employed in, any military command of the courts of justice established by his

> § 47. The Court of Directors shall forthwith submit, for the approbation of the board, shall be laid before both houses of parliament in the session next after the approval thereof.

§ 48. All laws shall be made at some meeting of the council at which the governor-ge-By § 43. the governor-general in council neral and at least three of the ordinary mem-

> consultations, the grounds of their respective the governor-general and the majority in council still differ in opinion, the governorgeneral may suspend or reject the measure so proposed in part or in whole, or carry it into

> § 50. The council shall assemble at such places as shall be appointed by the governorgeneral in council within the said territories, and as often as it shall assemble within the presidencies of Fort Saint George, Bombay. or Agra, the governor of such presidency shall act as an extraordinary member.

§ 70. Whenever the governor-general in vernor-general should visit any part of India unaccompanied by the council, the governorgeneral in council may, previously to the departure of the governor-general, nominate the governor-general in council, without the some member of the council to be president, general, his powers in assemblies of the coun-ber of council of any presidency when no cil shall be reposed; and the governor-gene- person, provisionally or otherwise, appointed ral in council may authorize the governorgeneral alone to exercise all the powers which vacancy shall be supplied by the governor in might be exercised by the said governorgeneral in council, except the power of mak- cancy shall happen; and until a successor ing laws: provided that during the absence of shall arrive the person so nominated shall exthe governor-general, no law shall be made by the president and council without the assent

in writing of the governor general.

the right of parliament to make laws for the said territories, and the inhabitants thereof; and it is expressly declared that a full and constantly existing right is reserved to parliament to control all acts of the governor-general in council, and to repeal and alter at any time any law made by them, and to legislate for the said territories and the inhabitants government of India was administered at thereof in as ample a manner as if this act had not been passed; and to enable parliament to exercise such right, all laws made by the governor-general in council shall be transmitted to England, and laid before both houses district presidencies, one to be styled the preof parliament, in the manner now by law pro- sidency of Fort William in Bengal, and the vided concerning the regulations made by the other the presidency of Agra. several governments in India.

The governor-general of the presidency of Fort William in Bengal on the 22d April, 1834, shall be the first governor-general of India under this act, and members of councillors, to be styled 'the Governor in council of the same presidency on that day

constituted by this act.

6 52. All enactments and provisions relating to the governor-general of Fort William in Bengal in council, and the governor-general of Fort William in Bengal alone, respectively, in any other acts contained, so far as the same of the presidencies of Fort Saint George and are now in force, and not repealed by or repugnant to the provisions of this act, shall ral of India for the time being shall be gocontinue in force and be applicable to the governor general of India in council, and to the governor-general of India alone, respectively.

office of governor-general of India when no of Fort William in Bengal as exigencies may provisional or other successor shall be upon the spot, the ordinary member of council next in rank to the governor-general shall execute the office of governor-general of India and governor of the presidency of Fort William in Bengal until a successor shall arrive, or some other person be appointed thereto; and every such acting governor general shall exercise all the rights and powers of governorgeneral of India, and be entitled to receive the emoluments appertaining to the office, foregoing his salary of a member of council for the April, 1834, shall be governors of the presisame period.

§ 64. If any vacancy shall happen in the office of an ordinary member of council of India when no person provisionally or otherwise appointed to succeed thereto shall be on the spot, such vacancy shall be supplied by the governor-general in council; and if any the governors appointed under this act, and

in whom, during the absence of the governor- | vacancy shall happen in the office of a memto succeed thereto shall be on the spot, such council of the presidency in which such vaecute the office by him supplied, and have the powers thereof, and be entitled to the salary and emoluments appertaining thereto, forego-\$51. Nothing herein contained shall affect ing all salaries by him enjoyed at the time of his being appointed to such office: provided no person shall be appointed a temporary member of council who might not have been appointed by the said Court of Directors to fill the vacancy supplied by such temporary appointment.

Previous to the 3 and 4 W. 4. the executive three presidencies, Fort William in Bengal, Fort Saint George at Madras, and Bombay. But by § 38, of that statute, the presidency of Fort William in Bengal is divided into two

By § 56. the executive government of each of the presidencies of Fort William in Bengal, for Saint George, Bombay, and Agra, shall be administered by a governor and three Council of the said Presidencies of Fort Wilshall be respectively members of the council liam in Bengal, Fort St. George, Bombay, and Agra, respectively;' and the governor and councillors of each presidency shall have the same rights and voices in their assemblies, and observe the same order and course in their proceedings, as the governors in council Bombay now observe, and the governor-genevernor of the presidency of Fort William in Bengal.

§ 69. The governor-general in council may § 62. If any vacancy shall happen in the appoint a deputy governor of the presidency

require.

§ 57. The Court of Directors, under such control as is by this act provided, may revoke and suspend the appointment of councils in all or any of the presidencies, or reduce the number of councillors in the same, and during such time as a council shall not be appointed in any such presidency the executive government thereof shall be administered by a governor alone.

§ 58. The several persons who, on the 22d dencies of Fort Saint George and Bombay, shall be the first governors of the said presi-

dencies under this act.

§ 59. In the presidencies in which the appointment of a council shall be suspended under the provision herein-before contained, in the presidencies in which councils shall be | cil of the said presidencies of Fort William appointed, the said governors in their respect in Bengal, Fort Saint George, Bombay, and tive councils shall have the rights, powers, duties, functions, and immunities not repugnant to this act, which the governors of Fort Saint George and Bombay in their respective councils now have within their respective presidencies; and the governors and members of council of presidencies appointed under this act shall severally have the rights, powers, and immunities, not repugnant to this act, which the governors and members of council of the presidencies of Fort Saint George and Bombay now have in their respective presidencies; provided no governor or governor in council shall have the power of making or suspending any laws, unless in cases of urgent necessity, and then only until the decision of the governor-general of India in council shall be signified thereon; and provided also, no governor or governor in council shall have the power of creating any new office, or granting any salary, gratuity, or allowance, without the previous sanction of the governor-general of India in council.

6 63. If any vacancy shall happen in the office of governor of Fort Saint George, Bombay, or Agra, when no provisional or other successor shall be upon the spot, if there shall be a council in the presidency in which such vacancy shall happen, the member of such council next in rank to the governor, other than the commander-in-chief or officer commanding the forces of such presidency, and if there shall be no council, then the senior secretary of government of the said presidency, shall execute the office of governor until a successor shall arrive, or some other person be appointed thereto; and every such acting governor shall be entitled to the emoluments appertaining to the office, foregoing all salaries by him enjoyed at the time of his being called to supply such office.

§ 65. The governor-general in council shall have by virtue of this act full power to superintend and control the governors and governors in council of Fort William in Bengal, Fort Saint George, Bombay, and Agra, in all points relating to the civil or military administration of the said presidencies, and the said governors and governors in council shall be bound to obey the orders and instructions of the governor general in council in all

· § 66. The governors or governors in council of Fort William in Bengal, Fort Saint George, Bombay, and Agra, may propose to the governor-general in council drafts of any laws which they think expedient, together with their reasons for the same; and the governor-general in council is required to take the same and such reasons into consideration, and to communicate the resolutions thereon to the governor or governor in council by whom the same shall have been proposed.

§ 68. The governors and governors in coun- William in Bengal.

Agra respectively shall regularly transmit to the governor-general in council true copies of all such orders and acts of their governments, and also advice of all matters which come to their knowledge, and which they shall deem material to be communicated to the governorgeneral in council, or as the governor-general in council shall require.

§ 67. When the governor-general shall visit the presidencies of Fort Saint George, Bomhay, or Agra, the powers of the governors of those presidencies respectively shall not be

suspended.

§ 79. The departure from India with intent to return to Europe of any governor-general of India, governor, member of council, or commander-in-chief, shall be deemed in law a resignation of his office, and no other act of any governor-general, or governor, or member of council, except a declaration in writing under hand and seal, delivered to the secretary for the public department of the presidency wherein he shall be, in order to be recorded, shall be held a resignation or surrender of of-

The laws punishing mutiny or desertion of officers or soldiers in the service of the Company were consolidated and amended by the 4 G. 4. c. 81. which prescribes the manner in which court-martials are to be holden for the trial of offenders.

By 3 and W. 4 c. 85. § 72. for the purposes of the above act, the presidency of Fort William in Bengal is to be deemed entire, and not

divided into two presidencies.

By § 73. the governor-general in council may from time to time make articles of war for the government of the native officers and soldiers in the military service of the Company, and for the administration of justice by courtmartial to be holden on such officers and soldiers.

V. The Administration of Justice.—There exists in India two concurrent, and in some instances conflicting, systems of judicature; the Company's courts, and the king's or supreme courts.

In the Company's courts there are three grades of European judges-the district, the provisional, and the judges of the Sudder court. There are also two classes of native judges; Moorsifs, of whom several are stationed in every district-and Sudder ameens, established at the same stations with the European district judges. There are also magistrates, who exercise civil jurisdiction; and registrars, who decide such cases as may be referred to them by the judges.

By a charter granted to the Company, being dated the 8th January, 26 G. 2. courts of civil, criminal, and ecclesiastical jurisdiction were established at Madras, Bombay, and Fort

powered by charter or letters patent to erect a supreme court of judicature at Fort William, to consist of a chief justice and three other judges (reduced by 37 G. 3. c. 140. to two), being barristers of five years' standing, which court was to exercise all civil, criminal, admiralty, and ecclesiastical jurisdiction, and be a court of record, over and terminer, and gaol delivery, for the town of Calcutta and factory of Fort William, and the factories subordinate thereto.

By § 14. the court is to have jurisdiction ever all British subjects residing in the provinces of Bengal, Bahar, and Orissa, for the trial of any criminal offences committed against his Majesty's subjects, or of any civil action instituted against them, or any person who, at the time the cause of action arose, was in the service of the Company, or of his Majesty's subjects.

By § 15. the court shall not be competent to try any indictment against the governor-general, or any of his council, for any offence (not' being treason or felony) committed in

Bengal, Bahar, and Orissa.

By § 16. the Supreme Court may determine actions by British subjects against any inhabitant of India residing in Bengal, Bahar, or Orissa, upon contracts in writing, where the cause of action exceeds the sum of 500 current rupees, and such inhabitant shall have agreed that in case of dispute the matter shall be heard by the Supreme Court; and such actions may be brought before it either in the first instance, or by appeal from the courts established in those provinces.

By § 17. the governor-general, his council, judges are not to be arrested or imprisoned upon any action or proceeding in the

court.

§ 18. gives an appeal from the Supreme

Court to his Majesty in council.

By § 34. offences and misdemeanors in the Supreme Court are to be tried by a jury of British subjects resident in Calcutta.

By § 38. the governor-general and council at Fort William, as well as the judges of the Supreme Court, are empowered to act as justices of peace; and the governor-general and council are authorized to hold quarter sessions within the settlement of Fort William four times a-year; the same to be a court of re-

By § 39. any crimes or misdemeanors committed by the governor-general, governor, or council of any of the settlements in India, or by the judges of the Supreme Court, or of any other court in the Company's settlements, or by any other persons in their service in any civil or military capacity, may be tried in the Court of King's Bench.

By § 40, 41, and 42, the depositions of witnesses taken in the manner therein prescribed,

By 13 G. 3. c. 63. § 13. the crown was em- in cases of proceeding in parliament for of. tences in India. See tit. Deposition.

> Doubts having arisen as to the precise meaning of the provisions of the above act. which led to dissensions between the governor-general and his council, and the judges of the Supreme Court, as to the extent of the powers of the latter, the 21 G. 3. c. 70. was

> By & 1. the governor-general and council are not to be subject to the jurisdiction of the Supreme Court for acts done in their public

capacity.

And by § 2. persons impleaded in any civil or criminal case before the Supreme Court, for acts committed by order of the governorgeneral and council in writing, may plead the general issue, and give the order in evidence, which, with proof that the acts done were according to its purport, shall entitle them to an acquittal.

§ 3. provides that where the orders of the governor-general and council extend to British subjects the Supreme Court shall retain its

jurisdiction.

By § 5. complaints may be made to the court in writing, and upon oath of oppressions or injuries committed by the governorgeneral, or any member of his council, or by other persons acting under orders given them by the governor-general and council, on the party complaining entering into a bond with a responsible surety to the Company in such sum as the court shall appoint to prosecute his complaint in Great Britain within two years of the making thereof, or of the return to Europe of the parties against whom it is made; and in such case the court may compel the production of, and authenticate, the order of council complained of, and examine witnesses upon the matter of the complaint, whose depositions shall be taken and transmitted to this country, in the same manner as prescribed by the 13 G. 3. c. 63.

§ 6. Copies of orders of council so authenticated, and depositions so taken, are to be received in evidence in the courts of law or

equity at Westminster.

§ 7. limits the time for instituting any prosecution or suit against the governor-general or any member of his council, before any court in Great Britain (except the high court of parliament) to five years after the commission of the offence, or after his arrival in Eng-

By § 8. the Supreme Court is not to have any jurisdiction in matters concerning the

No person is to be subject to the jurisdiction of the court on account of his being a land-owner, or farmer of land, or land rent. § 9. And no person by reason of his being employed by the Company, or by a native, or a descendant of a native of Great Briare to be received on the trial of such crimes tain, is to be so subject in any matter of in-and misdemeanors in the King's Bench, and heritance to lands or goods, or in any matter of contract, except in actions for trespasses or any person), or the attorney-general, or the wrongs, or in any civil suit by agreement in Court of Directors, or the Court of Proprie-

tions against the inhabitants of Calcutta; such actions, where the parties are Mahome. dans, to be decided according to the Mahomedan laws; and where Gentoos, by the Gentoo laws; and where only one of the parties shall be a Mahomedan or Gentoo, by the laws of the defendant.

By \S 21. the governor-general and council, or some committee thereof, may hold a court to determine appeals from the provincial courts in civil suits of the value of 5000l. in the manner theretofore held, and the same shall names are again to be put into a box, to be be a court of record and the judgments therein given final, except on appeal to his Majesty.

§ 22. The same court shall determine all offences committed in the collection of the revenue, and inflict punishment thereon, provided they do not extend to death, maining,

or perpetual imprisonment.

§24. No action for wrong or injury shall lie in the Supreme Court against any person exercising a judicial office in the country courts for any judgment, &c., or against any person for acts done by the order of such courts.

§ 25. In case of an information against any such officer or magistrate, no rule shall issue until notice be given to him in writing; one month if residing within fifty miles; two months if residing beyond that distance; and three months if living one hundred miles from Calcutta; such notice to contain the cause of complaint, and to be proved on the trial.

§ 26. No magistrate to be lable in any such case to arrest or to put in bail, until he shall have declined to appear after notice and ser-

vice of process.

Delinquents having frequently escaped from their offences having been committed out of the jurisdiction of the courts in India, it was provided by the 24 G. 3. c. 25. § 44. that British subjects, as well servants of the Company as others, should be amenable to all courts (both in India and Great Britain) of competent jurisdiction to try offences in India, for crimes committed in the territories of native princes.

By § 45. the receiving of presents is declared to be extortion, and the gift is forfeited to his Majesty, unless (§ 46.) the court before whom the offence is tried shall order it to be returned, or the whole or any part of it given to the

informer.

ish, the misconduct of the Company's servants, several regulations were made by this statute for the discovery of their property on their return to England from India; but which William in causes of admiralty, is extended

By § 64. the coroner and attorney of the G. 3. c. 63. for constituting that court is cured. king in the King's Bench (at the instance of For increasing the number of magistrates

writing submitted to the decision of the court. tors, may exhibit an information against any person guilty of the crime of extortion, or By § 17. the court may determine all ac-other misdemeanors committed in the East Indies, after January 1, 1785, which information is to be tried by a special court of judica-

Some of the provisions of the 24 G. 3. c. 25. for the selection of the special commissioners who were to constitute this court, were varied by the 26 G. 3. c. 57. The two acts in substance direct as follows. The Lords are to ballot in the manner therein prescribed for twenty-six of their house, and the Commons for forty of their number; their drawn out by lot, in presence of three judges, (one of the Court of K. B., one of C. P. and one of the Exchequer,) and of the parties; and the defendant may peremptorily challenge thirteen peers and twenty commoners, and he, as well as the prosecutor may challenge as many as they please for cause shown. first five names of the peers, and the first seven names of the commoners, which shall be drawn without challenging, shall be returned by the three judges to the Lord Chancellor, to be inserted with those of the three judges in a special commission, for them, or any ten of them, of whom one of the judges shall always be one, to hear and determine every such information, and pronounce judgment thereon; such judgment to be enforced by the authority of the Court of K. B., and to be effectual and conclusive to all intents and purposes whatsoever.

The 26 G. 3. c. 57. § 25. provides that any such information may, at the desire of the attorney-general or other prosecutor, be determined in the Court of King's Bench.

By § 39. as well the servants of the Company as all other British subjects resident or to be resident in India are declared amenable to the courts in that country for felonies, misdemeanors, or offences committed in any of the countries within the limits of the exclu-

sive trade of the Company.

By § 30. the governor and council of Fort Saint George in their courts, and also the Mayor's Court, according to their respective judicatures, shall have jurisdiction, as well civil as criminal, over all British subjects resident on the coast of Coromandel, or in any other part of the Carnatic, or in the five norhern circars including those parts of the circars which lie within the province former.
With a view to prevent, or more easily pun. Soubah of the Deckan, the Nabob of Arcot, and the Rajah of Tanjore.

By the 33 G. 3. c. 52. § 156. the jurisdiction of the Supreme Court of judicature at Fort were all repealed by stat. 26 G. 3. c. 57. § 31. to the high seas, whereby a defect in stat. 13

Vol. I.-77

in Bengal, Madras, and Bombay, the Supreme tof the districts within which the offender or Court of judicture in Bengal is by the same debtor is resident in cases of assaults or other act to issue commissions of the peace, in pur- injuries accompanied by force, or of debts not suance of orders issued by the governor-gene-exceeding fifty rupees, committed on, or due ral in council; the justices so appointed may, to, natives of India, by British subjects. by order in council, sit also in the courts of, oyer and terminer, taking the oath of justices carrying on trade, or occupying immoveable in England (excepting the oath prescribed by property ten miles from the presidencies, the act of the 18 G. 2. relating to qualification shall be subject to the jurisdiction of the by estate). The proceedings and judgments courts within whose districts they are so reof justices may be removed to the court of siding, &c., in civil actions and matters relatoyer and terminer by certiorari, but cannot ing to the revenue, with such right of appeal be set aside for want of form, but on the as therein mentioned, unless plaintiffs shall merits only. The justices may likewise associate with the governor-general in council, 'Recorder's Court at Bombay.

exercise the same powers as coroners in Eng. pany, or British subjects, in criminal and civil

land.

By 37 G. 3. c. 142. his Majesty was empowered to erect courts of judicature at Mad- and Nizamut Adawlut, or other provincial ras and Bombay, and to appoint a recorder to

preside over each.

The former of these courts was abolished by the 39 and 40 G. 3. c. 79, which authorized his Majesty to establish a supreme court of judicature at Madras, to consist of the like number of persons, and to be invested with visions for the punishment of larceny, forgery, the like jurisdiction, powers, and authorities, as were possessed by the Supreme Court of judicature at Fort William in Bengal.

By § 17. the respective governors and council of Fort William and Fort Saint George at Bombay is abolished, and his Majesty aumay order in what manner the courts of requests within those settlements shall in future of judicature, consisting of the like number be formed, and to what amount (not exceed- of persons, and to be invested with the like

extend.

Court of Fort William in Bengal extended thereto, as the Supreme Court of judicature over the province of Benares, and all places to be hereafter annexed to that presidency.

By 47 G. 3. st. 2. c. 68. the governor and council at Madras and Bombay were empowered to make rules and orders for the better government of those settlements, by sions, of the judges of the several courts of appointing justices of the peace, &c.

By 55 G. 3. c. 155. § 102. his Majesty's courts within the several presidencies of the Company are to sit at least four times in the year, at such intervals as the judges thereof 6 G. 4. c. 85. his Majesty is empowered by shall appoint for trying criminal offences.

mitted by British subjects more than 100 miles from a presidency, ex officio informations may be filed in the supreme courts at judicature was constituted by letters patent

corder's Court at Bombay.

Previous to this act British subjects resid-judge, called the recorder.

g without the towns of Calcutta, Madras,

By 7 G. 4. c. 27. the provision of the 13 G. ing without the towns of Calcutta, Madras, and the town and island of Bombay, were 3. c. 63. § 34. restricting the juries in crimiexempted from the jurisdiction of the Com- nal cases tried before the Supreme Court at pany's courts, to which all other persons, na Fort William in Bengal, to British subjects, tives or others' were amenable; but by § 105, is altered; and all persons resident within 106. jurisdiction is given to the magistrates the limits of the towns of Calcutta, Madras,

And by § 137. British subjects residing or elect to sue in the supreme courts, or in the

§ 109. gives a concurrent jurisdiction to

cases.

By § 110. the Sudder, Dewanny Adawlut, courts exercising the highest jurisdiction within the limits of the several presidencies, may execute process of arrest, either civil or criminal, in the towns of Calcutta and Madras, and the town and island of Bombay.

The above act contains various other procoining, and other offences, and for the transportation of criminals sentenced to that pun-

ishment.

By the 4 G. 4. c. 71. the Recorder's Court thorized to erect in its stead a supreme court ing 400 sica rupees) their jurisdiction shall jurisdiction, powers, and authorities, within the town and island of Bombay, and the ter-By § 20. the jurisdiction of the Supreme ritories now or hereafter to be subordinate at Fort William in Bengal possesses.

By 4 G. 4. c. 81. § 2. persons accused of capital crimes above 120 miles from the presidencies, may be tried by a court-martial.

As to the salaries, passage-money, and pen-Calcutta, Madras, and Bombay, see 4 G. 4. c. 71. § 12; 6 G. 4. c. 85. A recorder's court was established at Prince of Wales's Island by letters patent of 25 March, 1807. By the letters patent to make other provisions for the By § 103. in case of misdemeanors com- administration of justice in that island, Singapore, and Malacca; and accordingly, in 1825, on the petition of the Company, a court of Fort William and Madras, and in the Re- for those settlements, consisting of the governor, the resident councillor, and one other

and Bombay, and not being the subjects of the Bishop of Calcutta to admit persons to any foreign state, and possessing such qualifications as the courts of judicature in those presidencies shall require, are made eligible to

serve on grand or petit juries.

By § 3. grand juries in all cases, and petit juries for the trial of offenders professing the Christian religion, were to consist of persons professing that religion; but by 2 and 3 W.

4. c. 117. this section is repealed.

By 2 and 3 W. 4. c. 117. the governors in council of Calcutta, Madras, and Bombay, are authorized to appoint any persons to act as justices of the peace within those towns under the existing qualifications, whether such persons are British inhabitants or not.

By the 3 and 4 W. 4. c. 85. power is given to the governor-general in council to legislate for India, and to alter the laws now in force, and to make regulations for all courts of jus-

tice. See ante, IV.

§ 115. Any courts of justice established by his Majesty's charters in the said territories, may admit persons as barristers, advocates, and attorneys in such courts without any licence from the Company; and the being entitled to practice as an advocate in the principal courts of Scotland is to be a qualification for admission as an advocate in any court in India equal to that of having been called to or-general in council from granting from the bar in England or Ireland.

pointed to inquire into the jurisdiction, &c. of the Affairs of India, to any sect, persuasion, the existing courts of justice and police es-tablishments in India, and into the nature and operation of all laws now in force. The reports from time to time made are to be considered by the governor-general in council, and transmitted, with the resolutions thereon, to the Court of Directors, to be laid before

parliament.

VI. The Provisions for Religion.—By 53 G. 3. c. 155. § 49-54. after reciting that no sufficient provision hath hitherto been made for the maintenance and support of a church establishment in the British territories in the East Indies, and other parts within the limits of the Company's charter, it was enacted that the king should erect one bishopric for the whole of the British territories in the East Indies, &c. and three arch-deaconries for the three presidencies of Fort William in Bengal, Fort St. George on the coast of Coromandel, and Bombay: the salaries of such bishop and archdeacons to be paid by the Company; the jurisdiction of the bishop to be ascertained by his patent; and after fifteen years' residence, the king to grant them pensions payable by the Company. By 4 G. 4. c. 71. § 3. the crown may, after ten years' service instead of fifteen, grant the pensions provided by the 53 G. 3. c. 155. By § 5. the house of residence, and the expenses of visitations of the bishop, are to be defrayed nine years for one of 3000l.; and twelve years by the Company. By § 6. a power is given to for one of 4000l.; and by § 56. no one is to

deacon's and priest's orders.

By 3 and 4 W. 4. c. 85. § 89. 94. his Majesty may constitute two other bishoprics, to be styled the bishoprics of Madras and Bombay, the bishops whereof shall be subordinate to the Bishop of Calcutta as their metropolitan, with such salaries as therein mentioned; and by letters patent may assign the limits of the dioceses of the three bishoprics, and grant to the bishops within their dioceses the exercise of such episcopal functions and ecclesiastical jurisdiction as he may think necessary for the good government of the ministers

By § 100, the expenses of visitations by the Bishops of Madras and Bombay are to be

paid by the Company.

The king may grant to any bishop of Madras and Bombay who has exercised his office for fifteen years a pension not exceeding 800l. per annum, to be paid quarterly by the

Company. § 96.

By § 102. it is enacted, that of the chaplains maintained by the Company at each of the presidencies, two shall be ministers of the church of Scotland, with the same salary as the military chaplains. Provided that nothing herein contained shall prevent the governtime to time, with the sanction of the Court By § 53, 54. a law commission is to be apoof Directors and of the Commissioners for or community of christians not being of the united church of England and Ireland, or of the church of Scotland, such sums of money as may be expedient for the purpose of instruction, or for the maintenance of places of worship.

> VII. The provisions for the Appointment, Promotion, Education, &c. of the Civil and Military Servants of the Company.—By 24 G. 3. c. 25. § 43. no writer or cadet is to be appointed by the Company whose age shall be under fifteen or exceed twenty-two years, unless in the case of persons who have been in the king's service as commissioned officers or cadets for a year; who may be appointed cadets if not more than twenty-five years old.

> All officers and servants of the Company, under the degree of councillors and commanders-in-chief, are to be promoted according to seniority of appointment, unless on urgent oc-

casions. § 42

But by § 87. civil servants of the Company may, by special order, take precedence at any board, &c. to which they are appointed, according to the seniority of their nomination thereto, and not of their appointment to the

Company's service.

By 33 G. 3. c. 52. § 57. three years' service is required to qualify a civil servant to hold a place of 500l. a year; six years one of 1500l.; take two offices of which the joint salaries provisional appointments, subject to the apshall exceed the prescribed sum. Two years probation of the crown, where the provisional of the time spent at the Company's college in appointment shall be to the offices of governor-England shall be reckoned as time spent in general, governor of a presidency, and the India. 47 G. 3. st. 2. c. 68, § 7.

vant of the Company (under the degree of a servants of the Company. y 61. member of council, or commander-in-chief; after five years' absence, can return to India any person holding any office or commission, with their rank, or serve again, unless detain- civil or military, under the Company in India, ed by sickness, or unless it be by leave of the or may vacate any appointment or commis-Company, on a ballot of three parts in four of sion to any such office or employment. § 35 a general court of proprietors. In case of sickness in the civil service, the directors are to remove or dismiss any officers or servants the judges; and in the military, the directors of the Company, except such as shall have and the board of control jointly. This is qualified by § 81 of 53 G. 3, c. 155, as to generals and colonels commanding regiments, who, by the joint permission of the directors and board of control, may return after five years. By § 85 of that act, restored civil servants shall the Court of Directors of any civil or military rank only according to their seniority at the time of their departure from India.

By the 53 G. 3. c. 155. § 42, the colleges es. tablished by the Company at Calcutta and the consent of the Board of Control. Madras, and all seminaries which may be established by the government of India, are made subject to the control of the Board of Commissioners.

By § 44. after reciting that the Company had lately established in England a college for the education of young men designed for their civil service in India, and also a military seminary for the education of young men designed for their military service in India, it was enacted, that such college and seminary should be continued for the term thereby granted to the Company, and the Court of Directors, with the approbation of the Board of Control, were empowered to make laws and regulations for the same.

By § 46. the Court of Directors are not to nominate or send to the presidencies any person as a writer, unless he shall have been entered and resided four terms at such college, and shall produce a certificate from the principal thereof.

All vacancies in the offices of governor-general of India, or of the governors of the presi- no one of whom shall be under the age of dencies of Fort Saint George, Bombay, and seventeen or above the age of twenty years, Agra, are to be filled up by the Court of Dibe nominated, and no more than one student rectors, subject to the approbation of the admitted for every such expected vacancy in crown. 3 and 4 W. 4. c. 85. 55 42. 58. And the said civil establishments, according to by 55 G, 3. c. 155. § 70. all vacancies in the such estimate or reduced estimate as aforeoffices of commander-in-chief, or of any pro- said; and the Court of Directors shall vincial commander-in-chief, are to be filled up nominate the number of candidates for adby the Court of Directors, subject to the like mission to the college mentioned in the approbation. Neither is the Board of Control certificate of the board; and if the Court to have the power of appointing any of the of Directors shall not within one month servants of the Company, or of interfering with | nominate the whole number, the Board of the officers employed in its home establish- Commissioners may nominate so many as ment. 3 and 4 W. 4. c. 85. § 34. But if the court of Directors neglect for two months to supply the vacancy in any office or employ- the number of students in the college, by

member of conneil of India, directed by the By 33 G. 3. c. 52. no military or civil ser- act to be nominated from among persons not

By § 71. the crown may remove or dismiss preserves to the Court of Directors the power of appointment by the court, who shall not be removed or dismissed without the crown's approbation.

By 53 G. 3. c. 185. § 83. no restoration by servant, who shall have been suspended or removed by the Company's governments or presidencies in India, shall be valid without

By 3 and 4 W.4. c. 85. § 103. the governorgeneral of India in council shall, after the first day of January in every year, make and transmit to the Court of Directors a prospective estimate of the number of persons who will be necessary, in addition to those already in India or likely to return from Europe, to supply the expected vacancies in the civil establishments of the governments in India in such one of the subsequent years as shall be fixed in the rules and regulations hereinafter mentioned. The Board of Commissioners may reduce such estimate, so that the reasons for such reduction be given to the said Court of Directors, and in the month of June in every year, or within one month after such estimate shall have been received, the Board shall certify to the Court of Directors what number of persons shall be nominated as candidates for admission, and what number of students admitted to the college of the Company at Haileybury in the then current year, but so that at least four such candidates,

ment in India, the crown may fill it up. § 60. death, expulsion, or resignation, the Board of The Court of Directors may, however, make Commissioners may add in respect of every

such vacancy one to the number of students | breach of trust, by officers or servants of the to be admitted, and four to the number of Company in India, is to be deemed a misdecandidates for admission, to be nominated by

the Court in the following year.

§ 105. The candidates for admission shall be subjected to an examination in such branches of knowledge and by such examiners as the said board shall direct, and be classed in a list prepared by the examiners, and the candidates whose names stand highest in such list shall be admitted by the said court as students until the number to be admitted for that year, according to the certificate of the board, be supplied.

§ 106. "The board may form such rules and regulations for the guidance of the governor-general in council in the formation of the estimate hereinbefore mentioned, and carry on trade with any countries beyond for the good government of the college, as in the Cape of Good Hope to the Streights their judgment appear best adapted to secure fit candidates, and for the examination and qualifications of such candidates, and of the at any place under the government of the students of the college, after they shall have Company, shall deliver to the principal officer completed their residence there, and for the of the Customs a list, specifying the names appointment and remuneration of proper ex- and description of all persons on board such aminers; and such rules and regulations shall

his revision and approbation.

§ 107. The students who have a certificate from the college of good conduct during their residence therein shall be subjected to an examination in the studies prosecuted in the college, and so many as appear duly qualified shall be classed according to merit in a list prepared by the examiners, and shall be nominated to supply the vacancies in the civil establishments in India, and have seniority therein according to their priority in the list; and if there shall be vacancies in the establishments of more than one of the presidencies, the students on the list, shall, according to such priority, have the right of electing to which of the establishments they will be appointed.

until approved by the Board of Commis-

sioners.

servant in such presidency during the time the process thereof; and grant such salaries

Company

§ 78. The Court of Directors, with the approbation of the Board of Commissioners, shall make regulations for the distribution of or for the benefit of other persons. the patronage in the said territories, and the neral in council, governor-general, governors collect from any ship or vessel belonging to in council, governors, commander-in-chief, the subjects of his Majesty entering any port and other commanding officers appointed or to be appointed under this act.

meanor, and may be punished as such by virtue of this act.

VIII. Who may trade to India and China, and under what Restrictions .- By 3 and 4 W. 4. c. 93. so much of the 4 G. 4. c. 80. as regulated the trading of British subjects within the limits of the charter of the East India Company is repealed; as also the 6 G. 4. c. 107., and 6 G. 4. c. 114. which prohibited the importation of tea and goods from China into the United Kingdom, or into our colonies in America, unless by the East India Company, or with their license.

By § 2. any of his Majesty's subjects may

of Magellan.

§ 3. The commander of any vessel arriving vessel, under a penalty of 100l. in case of be submitted to his Majesty in council for neglect, to be recovered as therein mentioned.

§ 5. After reciting it is expedient for the objects of trade and amicable intercourse with the dominions of the Emperor of China, that provision be made for the establishment of a British authority in the said dominions, authorizes his Majesty to appoint not exceeding three superintendents of the trade of his Majesty's subjects to and from the said

dominions, with assistant officers.

§ 6. His Majesty may give to the said superintendents powers and authorities over the trade and commerce of his Majesty's subjects within the said dominions; and issue regulations touching the said trade and commerce and for the government of his Majesty's subjects within the said dominions; and impose penalties, forfeitures, or imprisonments § 108. No appointment of any professor for the breach of such regulations; and create or teacher at the college shall be valid a court of justice with criminal and admiralty for the breach of such regulations; and create jurisdiction for the trial of offences committed by his Majesty's subjects within the said § 113. Every supercargo and other civil dominions, and the ports and havens thereof, servant of the Company at Canton or Saint and on the high seas within one hundred Helcna, shall be capable of holding office in miles of the coast of China; and appoint one any presidency which he would have been of the superintendents to be the officer to hold capable of holding if he had been a civil such court, and other officers for executing he shall have been in the service of the to such officers as to his Majesty in council shall appear reasonable.

§ 7. No superintendent shall accept any gift, or engage in trade for his own benefit,

§ 8. His Majesty, with the advice of his privy presidencies thereof, among the governor-ge- council, may impose and empower persons to or place where the said superintendents shall be stationed, a duty on tonnage and goods not § 80. Every disobedience of orders, and exceeding in respect of tonnage five shillings

shillings for every one hundred pounds of the any term of years, in such parts of the said value of the same, towards defraying the territories as he shall be so authorized to expenses of the establishments by this act reside in; provided that nothing herein conauthorized within the said dominions.

any thing done in pursuance of the act to wise, subjects of his Majesty to acquire or six months after the fact committed, except in the cases therein mentioned. Defendants are to have the like notice and privilege of tendering amends as are given to justices of the peace by the 24 G. 2. c. 44.: may plead the general issue, and offer the special matter in evidence; and may recover treble costs, should the plaintiffs fail in or abandon their proceedings.

The duties on tea are now imposed and regulated by the 3 and 4 W. 4. c. 101.

IX. Who may settle in India, and in what Places.—Previous to the 3 and 4 W. 4. c. 81. no one could settle in India without a license | vested in the Board of Control. from the Court of Directors or the Board of Control, and all persons were liable to arbitrary deportation without trial; but by § 81 of that act, any natural-born subjects of his Majesty may proceed by sea to any port having a custom-house establishment within ed, that the governor-general in council shall the said territories, and reside thereat, or pro- by laws provide for the protection of the naceed to and reside in or pass through such of tives of the said territories from insult and the said territories as were under the govern- outrage in their persons, religions, or opinions. ment of the Company on the 1st of January, 1800, and any part of the countries ceded by natural-born subject of his majesty resident the Nabob of the Carnatic, of the province of therein, shall by reason only of his religion, Cuttack, and of the settlements of Singapore and Malacca, without any license whatever; provided on their arrival they make known in writing their names, places of destination and objects of pursuit in India, to the chief officer forthwith take into consideration the means of the customs at such port.

§ 82. No subject of his Majesty except the servants of the Company and others now lawfully authorized to reside in the said terriritories, shall enter the same by land, or proceed to or reside in such parts of the said territories not hereinbefore mentioned, without license from the Board of Commissioners, or the Court of Directors, or the governorgeneral in council, or a governor, or governor in council of the presidencies; provided that no license given to reside in parts of the territories not open to all British subjects shall the same shall not be put in force without the be revoked unless in accordance with some previous consent of the court. The court

express clause therein contained.

with the approbation of the Court of Direc- houses a report of the drafts of such regulators, may declare any places within the said tions as have been received by them, and of territories open to all his Majesty's natural- their resolutions thereon. born subjects without any license whatever.

§ 84. The governor-general in council shall make laws for the prevention or punishment of illicit entrance into or residence in the said of the formation of the Company is princiterritories.

§ 86. Any natural-born subject of his Majesty authorized to reside in the said erly coast or country; also the east street, east territories may acquire and hold lands, or any side of a river, &c. Leg. K. Ed. 1.

for every ton, and in respect of goods ten right, interest, or profit in or out of lands, for tained shall prevent the governor-general in § 9. limits the time for bringing actions for council from enabling, by any laws, or otherhold lands, or rights, interest, or profits in or out of lands in any part of the said territories.

> The Provisions for the Benefit and Protection of the Natives of India.-By 53 G. 3. c. 155. § 43. a sum of not less than a lac of rupees in each year is to be set apart out of the surplus revenues by the governorgeneral in council for the improvement of literature and the encouragement of the learned natives of India, and the promotion of the sciences; all schools, &c. founded for such purposes are to be regulated by the governorgeneral in council, subject to the power

> By 3 and 4 W. 4. c. 85. § 85. after reciting the removal of restrictions on the intercourse of Europeans with the said territories will render it necessary to provide against any dangers that may arise therefrom, it is enact-

> § 87. No native of the said territories, or any place of birth, descent, colour, or any of them, be disabled from holding any place, office, or

employment under the Company.

§ 88. The governor-general in council shall of ameliorating the condition of slaves, and of extinguishing slavery throughout the said territories so soon as such extinction shall be practicable and safe, and transmit to the Court of Directors drafts of laws for the purposes aforesaid; in preparing such drafts due regard shall be had to the laws of marriage, and the rights and authorities of fathers and heads of families; such drafts shall be taken into Consideration by the Court of Directors, who shall communicate to the governor-general in council their instructions thereon, but shall, within fourteen days after the meeting 83. The governor-general in council, of parliament in every year, lay before both

> See further as to the history of the Company, Mill's British India, and Companion to the Newspaper, No. 3. from which the account pally taken.

> EASTINUS, Sax. East-Tyne.] An east-

EASTLAND COMPANY. This com- law proceedings, according to Fitzherbert. pany subsisted under a charter granted by this word intends a parsonage; for so he ex-Queen Elizabeth in 1579, for regulating the presses it in a question, whether a benefice commerce into the east country, a name anciently given, and still continued by mercantile people, to the ports of the Baltic sea, more particularly those of Prussia and Livonia. They were by this charter to enjoy the sole trade, through the Sound, into Norway, Sweden, Poland, Lithuania (excepting Narva, which was within the charter of the Russian Company), Prussia, and also Pomerania, from the river Oder, eastward, Dantzic, Elbing, and Koningsburgh: also to Copenhagen and Elsinore, and to Finland, Gothland, Bornholm, and Oeland. This charter was confirmed by another from Charles I. in 1629.

By the stat. 25 Car. 2. c. 7. the following provisions were made for laying open a very considerable part of this trade: it was declared lawful for any native or foreigner, at all times, to have free liberty to trade into and from Sweden, Denmark, and Norway, notwithstanding the charter to the Eastland merchants, or any other charter. And further, that every person, being a subject of this realm, might be admitted into the fellowship of merchants of Eastland on paying 40s. and no more. § 5, 6. Which latter provision made the trade to the other parts within the limits of the charter easily acces-

sible.

EAT INDE SINE DIE. Words used on the acquittal, &c. of a defendant, &c. that he may go without delay, i. e. be dismissed. See

tit. Judgment.

under walls or windows, or the eaves of a house, to hearken after discourse, and there- subsequently have obtained possession on the upon to frame slanderous and mischievous presentation of the party claiming, or of some tales, are a common nuisance, and presentable at the court-leet; or are indictable at the sessions, and punishable by fine, and finding sureties for good behaviour. 2 Hawk. P. C. c. 10. § 58: Kitch. of Courts, 20: 4 Comm. See tit. Good Beheviour.

EBDOMADARIUS. An ebdomadary or officer, appointed weekly in cathedral churches, to supervise the regular performance of divine service, and prescribe the particular duties of each person attending in the choir, as to reading, singing, praying, &c. To which purpose the ebdomadary, at the beginning of his week, drew, in form, a bill or writing of the respective persons, and their several offices, called tabula, whereupon the persons there entered were styled intabulati. This is manifested in the statutes of the cathedral church of St. Paul, digested by Dr. Ralph Baldock, dean of St. Paul's, anno 1295. MSS.

EBEREMORTH, EBEREMORS, EBE-REMURDER, Sax.] Bare or downright murder. Leg. H. 1. c. 12. See tit. Aberemurder.

ECCLESIA, Lat.] The place where God period of sixty years. is served, commonly called a church; but in

was ecclesia sive capella, &c. F. N. B. 32: 2 Inst. 363.

ECCLESIÆ SCULPTURA. The image or sculpture of a church in ancient times, which was often cut out or cast in plate or other metal, and preserved as a religious treasure or relic, and to perpetuate the memory of some famous churches. Mon. Ang. tom. 3. p. 309.

ECCLESIASTICAL, denotes something belonging to, or set apart for the church, as distinguished from civil or secular, with re-

gard to the world.

ECCLESIASTICAL BENEFICE. Although the law relating to livings has already been treated of under the titles Advowson and Benefice, the present head is introduced for the purpose of noticing the recent act of the 3 and 4 W. 4. c. 27.

By § 30. no advowson can be recovered after adverse possession during three incumben-

cies, or sixty years.

§ 31. Incumbencies by reason of a lapse are to be deemed fresh incumbencies, but not incumbencies in consequence of promotion to bishoprics.

§ 32. Persons claiming ecclesiastical benefices in remainder after an estate tail shall be deemed to claim, through the party entitled to such estate tail, and their right to bring any quare impedit action or suit limited accordingly.

Judgment.

By § 33. no advowson shall be recovered after 100 years from the commencement of the adverse possession, unless a clerk shall

person through whom he claims.

§ 34. extinguishes the right to any advowson after the determination of the period limited by the act for bringing any quare impedit, or other action or suit for the recovery

ECCLESIASTICAL CORPORATIONS, are where the members that compose it are spiritual persons. They were created for the furtherance of religion, and perpetuating the rights of the church. See tit. Corporation.

By 3 and 4 W. 4. c. 27. § 2. no person (which word by § 1. extends "to a body politic, corporate, or collegiate,") shall make an entry or distress, or bring an action to recover any land or rent but within twenty years

after his right accrued.

§ 29. The time within which an ecclesias. tical or eleemosynary corporation sole can recover any lands or rents is limited to two incumbences, and six years if they shall amount to sixty years, and if not, then to such incumbencies and term and such an additional number of years as will make up the

By the 2 and 3 W. 4. c. 80. (extending to

England and Wales), archbishops, bishops, deans, and chapters, and other ecclesiastical corporations, aggregate or sole, may enter into agreements or deeds of reference with or penalty imposed by the old English laws their lessees, to ascertain unknown or dis- for the shedding of blood; which the king puted boundaries, or quantities of manors and land; and the referees may make surveys and maps, summon and examine witnesses on abbot of Glastonbury. Cartular. MSS. oath, and call for all deeds, &c. in the custody of the parties to the reference, or of other called Gypsies .- These are a strange kind of persons, and may make awards with maps thereto, on parchment or vellum, which are to ing impostors and jugglers, who made their be laid before the parties to the reference, who shall sign and seal their appaobation ning of the sixteenth century, and have since thereof on such awards, which shall after- spread themselves all over Europe and Asia. wards be binding and conclusive on all parties as to the matters therein contained.

maps, are to be deposited in the registry of the archbishop, &c., and are to be produced for inspection, and copies to be furnished to they lived by rapine and plunder, and freevery person interested in the subject matter quently came down into the plains of Egypt,

of such awards.

ECCLESIASTICAL COURTS. See tits. Courts Ecclesiastical.

ECCLESIASTICAL JURISDICTION. By stat. 37 H. 8. c. 17. the doctors of the civil law, although they be laymen, &c., may exercise ecclesiastical jurisdiction.

ECCLESIASTICAL LAWS. See tits. Canon

Law. Courts Ecclesiastical.

ECCLESIASTICAL PERSONS, OF ECCLESIASTICS. Ecclesiastici. Churchmen, persons whose functions consist in performing the service, and keeping up the discipline of the church. See tit. Clergy.

From Ædes, used in some old EDESTIA.

charters for buildings.

EDIA. Aid or help. Thus Du Fresne interprets it; but Cowel says it signifies ease. EDICT, edictum.] An ordnance or com-

mand; a statute. Lat. Law Dict.

EDICTAL CITATION. In Scotch law, a citation against a foreigner not within Scotland, but who has a landed estate there, or cised by Tamerlane on his celebrated invasion against a native who is out of Scotland. The of the Hindus, in the years 1408 and 1409; citation is published at the market cross of Edinburgh, and pier and shore of Leith, and derers in Egypt as elsewhere, and there, as is authorised partly by necessity, partly by the idea that whoever is possessed of property there, will have left a warrant with some one to attend to his interest in that court where the Coptic or ancient Egyptian is also adalone any question in relation to it can be tried. duced as a proof of this theory.

EEL-FARES. A fry or brood of eels.

Stat. 25 H. 8.

in Scotland. See stat. 33 G 3. c. 74 § 11.

EFFEERERS (or Afferers.) Persons appointed to set and assess fines in courts-leet, Sec.

to military force. Mat. Paris, anno 1213.

EFFRACTORES, Lat.] Breakers; applied to burglars that break open houses to disguised like them.

EFTERS, Sax.] Ways, walks, or hedges. Blount.

EFFUSIO SANGUINIS. The mulct, fine, granted to many lords of manors. And this privilege, among others, was granted to the

EGYPTIANS, Egyptiani.] Commonly commonwealth among themselves, of wanderfirst appearance in Germany about the begin-They were originally called Zinganees by the Turks, from their captain Zinganeus, who, By § 4. the deeds of reference, awards, and when Sultan Selim conquered Egypt, about the year 1517, refused to submit to the Turk. ish yoke, and retired into the deserts, where committing great outrages in the towns upon the Nile, under the dominion of the Turks. But being at length subdued, and banished from Egypt, they dispersed themselves in small parties into every country in the known world; and as they were natives of Egypt, a country where the occult sciences, or black art, as it was called, was supposed to arrive to great perfection, and which in that credulous age was in great vogue with persons of all religions and persuasions, they found the people wherever they came very easily imposed on. Mod. Univ. Hist. vol. 3. p. 271. See tits. Fortune-tellers, Vagrants.

In an historical survey of the customs, habits, and present state of the Gypsies (by J. Hoyland, York, 1816), it is suggested that India, in the first instance, was the country which sent forth these wandering tribes; and that they consisted of the lowest castes of the Hindus, who emigrated in great multitudes, in order to avoid the excessive cruelties exerthat they were as much strangers and wanin other countries, formed a distinct people. The similarity of the Gypsey language to the Hindustain, and its total dissimilarity to

They have been called Zigenners, Sziganys, Cygernis, Tschingenes, all seeming in EFFECTUAL ADJUDICATION. A legal se-some measure derivable from the ancient curity for a debt on the estate of the creditor German Zichegan or Vagrant. The Scotch act, 1690, relating to Egyptians, c. 13. is understood to be still in force.

By 1 and 2 P. & M. c. 4. and 5 Eliz. c. 20. it was declared felony without benefit of clergy EFFORCIALITER. Forcibly; as applied | for any Egyptians to remain a month in the kingdom, and also for persons above fourteen years old to be found in their fellowship, or

Sir Matthew Hale informs us, that at one

Suffolk assizes no less than thirteen gypsies therefore necessary to delineate its history, statutes only a few years before the restora- whereon it is grounded. tion. The act of Elizabeth was repealed by the 23 G. S. c. 51; but that of Philip and contract contained in the lease for years, was Mary remained in force till 1 G. 4. c. 116. anciently the only specific remedy for recover-Gypsies are now only punishable as vagrants, ing against the lessor a term from which he under the 5 G. 4. c. 88. § 4.

EIA, from Sax. Fig.] An island. Mat.

Paris, anno 883. See Ey.

EJECTA. A woman ravished or deflowered; or cast forth from the virtuous. Ejectus,

a whoremonger. Blount.

EJECTIONE CUSTODIÆ, ejectment de garde.] Was a writ which lay against him covenant against the lessor, for non-performthat cast out the guardian from any land ance of his contract or lease, yet he could not during the minority of the heir. Reg. Orig. 162: F. N. B. 139. There were two other writs not unlike this; the one termed ravishment de gard, and the other droit de gard. See tit. Guardian.

EJECTMENT.

Ejectment is, strictly speaking, an action at law, whereby a person ousted or amoved from an estate for years may recover possession thereof; but by means of a series of fictions it has long been used for trying disputed titles to corporcal hereditaments; and under the provisions of the 2 and 3 W. 4. c. 27. for the abolition of real and mixed actions, it will shortly be the only legal mode by which such titles can be determined.

I. The Nature and Origin of the modern Action of Ejectment.

II. For what Things Ejectment will not lie.
III. For what Things Ejectment will lie.

IV. The Description required of the Pre-

V. Who may maintain or Defend an Eject-

VI. Within what Time the Action must be brought.

VII. Of the Declaration and subsequent Proceedings.

I. The Nature and Origin of the modern Action of Ejectment.—The following account of this action is taken from 3 Comm. 199.

pass in ejectment, ligth where lands and tenements are let for a term of years, and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. F. N. B. 220. In this case he shall have his writ of ejection or ejectment, to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him. And by this writ the plaintiff shall recover back his term or the remainder of it, with

trying the title to lands or tenements. It is by law he may) a formal entry on the premi-

were condemned and executed upon these the manner of its process, and the principles

The writ of covenant, for breach of the had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger claiming under a title superior to that of the lessor, or by a grantor of the reversion (who might at any time by a common recovery have destroyed the term), though the lessee might still maintain an action of by any means recover the term itself. F. N. B. 145. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed, by a real action recover possession of the freehold, but the leseee had no other remedy against the ejector but in damages, by a writ of ejectione firmæ, for the trespass committed in ejecting him from his farm. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment introduced a species of remedy warranted by the original writ, nor prayed by the declaration (which are calculated for damages merely, and are silent as to any restitution), viz. a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of Edward IV., though it hath been said to have first begun under Henry VII., because it probably was then first applied to its present principal use, that of trying the title of the land. Bro. Ab. F. N. B. 220.

The better to apprehend the contrivance,

whereby this end is effected, it is to be recollected that the remedy by ejectment is, in its original, an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant A writ of ejectione firma, or action of tres- do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law maintenance, to convey a title to another, when the grantor is not in possession of the land: and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. 1 Ch. Rep. Ap. 39.

When, therefore, a person, who hath a right of entry into lands, determines to ac-Since the disuse of real actions, this mixed quire that possession, which is wrongfully proceeding is become the common method of withheld by the present tenant, he makes (as

Vol. I.-78

ses, and being so in the possession of the soil, him who claims title, to the plaintiff who he there, upon the land, seals and delivers a brings the action; as by John Rogers to Richlease for years to some third person or lessee; and Smith, which plaintiff ought to be some and, having thus given him entry, leaves him real person, and not merely an ideal fictitious in possession of the premises. This lessee is one, who had no existence, as is frequently, to stay upon the land, till the prior tenant, or though unwarrantably practised. 6 Mod. 209. he who had the previous possession, enters It is also stated, that Smith, the lessee, enterthereon afresh and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant; or his casual ejector, sual ejector, or defendant, sends a written nowhichever it was that ousted him, to recover tice to the tenant in possession of the lands, back his term and damages. But where this e. g. George Saunders, informing him of the action is brought against such a casual ejector; action brought by Smith, and transmitting as is before mentioned, and not against the him a copy of the declaration; withal assurvery tenant in possession, the court will not ing him that he, Stiles, the defendant, has no suffer the tenant to lose his possession without title at all to the premises, and shall make no an opportunity to defend it. Wherefore it is defence; and therefore advising the tenant to a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector without notice given to the tenant in, possession (if any there be), and making him | the actual tenant, Saunders, will inevitably be a defendant if he pleases. And, in order to turned out of possession. On receipt of this maintain the action, the plaintiff must, in case of any defence, make out four points before the court; viz. title, lease, entry, and ouster. First, he must show a good title in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being ejector, Saunders, the real tenant, will be seised or possessed by virtue of such title, did turned out of possession by the sheriff. make him the lease for the present term: thirdly, that he, the lessee, or plaintiff, did enter or take possession in consequence of such lease; and then, lastly, that the defendant to contess, at the trial of the cause, three of custed, or ejected him. Whereupon he shall the four requisites for the maintenance of the have judgment to recover his term and damages; and shall, in consequence, have a writ of possession, which the sheriff is to execute by delivering him the undisturbed and peaceable | defendant instead of Stiles: which requisites possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness (save only as to the notice to the tenant), whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented by the lord chief justice Rolle. Styl. Pract. Reg. 108. (edit. 1657.)

This new method entirely depends upon a string of legal fictions; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant, but all are merely ideal, for the sole purpose of trying the title. lord or tenant, or both, after entering into the To this end, in the proceedings, a lease for a common rule, fail to appear at the trial and to term of years is stated to have been made, by confess lease, entry, and ouster, the plaintiff

ed, and that the defendant William Stiles, who is called the casual ejector, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, Stiles, the caappear in court and defend his own title; otherwise he, the casual ejector, will suffer judgment to be had against him, and thereby caution, if the tenant in possession does not, within a limited time, apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles, the casual

But if the tenant in possession applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court, plaintiff's action; viz. the lease of Rogers the lessor, the entry of Smith, the plaintiff, and his ouster by Saunders himself, now made the being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence; but by such stipulated confession of lease, entry, and ouster, the trial will now stand upon the

merits of the title only.

This done, the declaration is altered by inserting the name of George Saunders (the tenant) instead of William Stiles; and the cause goes down to trial under the name of Smith (the plaintiff) on the demise of Rogers (the lessor) against Saunders, the now defendant. And herein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have posses. sion of the land for the term supposed to be granted. But if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Smith, the nominal plaintiff, who, by his trial, has proved the right of Rogers, his supposed lessor.

But if the new defendants, whether land-

Smith must indeed be there nonsuited for want of proving those requisites: but judgment will in the end be entered against the casual ejector, Stiles; for the condition on which Saunders (the tenant), or his landlord, was admitted a defendant, is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out the tenant Saunders, and delivered possession to Smith, the plaintiff. The same process, therefore, as would have been had, provided no conditional rule had ever been made, must now be pursued as soon as the condition is broken.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) merely nominal, as Is. In order, therefore, to complete the remedy, when the possession has been long detained from him that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession: whether he be made party to the ejectment, or suffers judgment to go by default. In this case, the judgment in ejectment is conclusive evidence against the defendant, for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sues for any antecedent profits, the defendant may make a new defence. 4 Burr. 668.

Such is the modern way of obliquely bring. ing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principles as the ancient writ of assize, being calculated to try the mere possessory title to an estate; and hath succeeded to those real actions, as being infinitely more convenient for attaining the ends of justice; because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. writ of ejectment and its nominal parties (as was resolved by all the judges) are judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession; invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side. 4 Burr. 668. See also 3 Burr. 1294, 6.

The practice reprobated by Blackstone of making an ideal person the plaintiff is now invariably adopted: and there is no longer any objection to it, as the lessor of the plaintiff, by the consent rule undertakes to pay the defendant's costs in case the plaintiff fails in the action. A party before he is let in to defend must now also specify in the consent rule for what premises he means to defend, and thereby agree to confess upon the trial, that he (if he defends as tenant, or, in case he defends as landlord, that his tenant) was at the time of the service of the declaration of the premises therein mentioned; should he not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff cannot further prosecute his action, no costs are allowed to him, but he is compelled to pay costs to the plaintiff. Regula Generalis, K. B. 4 B. & A. 196. Like rule in C. P. 2 B. & B. 470: Exchequer, 9 Price, 299.

It has been already observed, that in the case of a vacant possession, the ancient practice of entering upon the premises, and making a lease thereof to a third person, must be pursued. As to what is a vacant possession, and the proceedings thereon, see Roscoe, 546.

II. For what things Ejectments will not lie.

—By the common law this action cannot be brought for any thing whereon an entry may not be made, or of which the sheriff cannot deliver possession.

Therefore an ejectment will not lie for an advowson, a rent, a common, or other incorporeal hereditaments which pass by grant; Brownl. 129: Cro. Car. 492: Str. 54; except for tithes in the hands of lay appropriators, by the express purview of stat 32 H. 8. c. 7. which doctrine has since been extended by analogy to tithes in the hand of the clergy. Cro. Car. 301: 2 Ld. Raym. 789.

III. For what things Ejectment will lie.— Ejectment in general lies only for corporeal hereditaments. It was formerly held it did not lie for a chapel, because it was res sacra, and therefore not demisable; but this doctrine was overruled, though in point of form a chapel should be demanded as a messuage. If Co. 25. b.: Styles, 101. Ejectment also lies for a church; as of a house called the parish church of, &c. And a church is a messuage, by which name it may be recovered; and the declaration is to be served on the parson who performs divine service. 11 Rep. 25: 1 Salk. 256.

And it was said in one case in argument, that after collation it lies for a prebendal stall. 1 Wills, 11—14.

It will lie for a moiety or a third part of a manor or messuage, &c. And for a chamber or room of a house well set forth. 11 Rep. 55. 59: 3 Leon. 210.

Land forming a part of the king's highway may be recovered in ejectment, subject to the public easement under the name of land. messuage, renders it uncertain what is 1 Burr. 133.

A common appendant or appurtenant may be recovered in an ejectment brought for the lands to which it is appendant or appurtenant, provided it be mentioned in the description of And in a more recent case, where an ejectthe premises. Cas. Temp. Hard, 127: Strange, ment had been brought for a messuage and An ejectment will also lie for a boilary of salt. Sid. 161 : S. C. 1 Lev. And for a coal the plaintiff, the Court of K. B. held, on writ mine. Cro. Jac. 150. But a person who has of error, that there was no ground for rea mere license to dig and search for minerals cannot maintain ejectment. 2 B. & A. 724.

rivulet; but where the soil over which the the other, the damages shall be referred to water runs is the property of the claimant,

Whether this action can be maintained for a fishery seems to depend upon the nature called the "Black Swan," is good; for the thereof. If it be merely a common of piscary, it is only profit d prendre, and ejectment will not lie for it. Cro. Jac. 144: Cro. Car. 492. But if it be a several fishery, or if the lessor of the plaintiff claim under the grant of a fishery generally, which seems to imply a right to the soil, ejectment appears maintainable. 1 T. R. 358.

An ejectment may be brought pro prima tonsurd, where a man has a grant of the first Ld. Raym. 1470; "a stable;" 1 Lev. 58; "a grass which grows on the land every year: Cro. Car. 362: 11 East 366: as also for hay-cornmills," without expressing whether they grass and aftermath. Hard. 330: 2 T. R. 451. are windmills or watermills; 1 Mod. 90: "un-A right to the herbage is sufficient to support derwood;" 2 Rol. Rep. 485; and for "an an ejectment, because he who has a grant of orchard," Cro. Eliz. 854. the herbage has an interest in the soil, In ejectment for land the species should be although by such grant the soil itself does mentioned, whether pasture, &c.; for land in not pass; but the ejectment should be for the its legal sense signifies arable land. Ejectherbage of the land and not for the land ments for "fifty acres of gorze and furze, and itself. Hard. 330. Ejectment will likewise hity acres of turze and heath," without specilie for pasture for a hundred sheep. 2. fying the quantity of each, have been held Dal. 95.

mises .- At first as much certainty was third or other part of a close, or a piece of required in describing the premises as was requisite in a pracipe. 1 Bro. 142: 2 Roll. Owen. 18: Cro. Car. 573: Cro. Eliz. 339: 1 Rep. 166. But this strictness was soon greatly relaxed. However it was still considered that the description must be so certain as to ena- cover it by that name, although part of a house ble the sheriff to deliver possession without further information from the lessor of the plaintiff. 2 Raym. 1470. At length it became the practice for the sheriff to deliver possession of the premises recovered under the for so many acres of "alder carr" in Nordirections of the claimant, who acts at his own peril; 1 Burr. 629: 5 Burr. 2673: 2 B. & A. 660; so that the accuracy formerly in Yorkshire, per Lee, J. ibid.; for a "beastdemanded is no longer necessary.

An ejectment will not lie for a tenement, because many incorporeal hereditaments are been held good. included in that designation; Strange, 834: Ld. Raym. 191; or for a messuage or tene-brought in Durham "for coal mines in Gatement; Styl. 364: 3 Wils. 23; or for a side," without specifying the number, the messuage and tenement; 2 Strange 834: judgment was affirmed, it appearing that 1 East. 441; for the word tenement being of more extensive signification than the word that county. 4 Mod, S. C. Salk. 255.

demanded. But after verdict the court will allow the verdict to be entered for the messuage only, without obliging the lessor of the plaintiff to release the damages. 8 East, 357. tenement, and judgment entered generally for versing the judgment, as it is a settled rule, that if the same count contains two demands, Ejectment will not he for a watercourse or for one of which the action lies, and not for the good cause of action, although it would be it may be recovered as "so many acres of otherwise if they were in separate counts, land covered with water." Yelv. 143.

An ejectment for a messuage or tenement addition reduces it to the certainty of a dwelling-house. 1 Sid. 295. So also an ejectment for a messuage or burgage. Hard. 173: Pop. 203. A messuage may be recovered in an ejectment, though not in a precipe, by the name of a house. Cro. Jac. 654. So an ejectment is sufficiently certain for "a cottage;" Cro. Eliz. 818; "a chamber or room;" 3 Leon. 210; "a passage room;" 2 place called the vestry;" 3 Lev. 96; "four

good on error. 1 Mod. 90: 5 Burr. 2672. An ejectment will not lie for a close; 11 Co. IV. The Description required of the Pre. 55: I Rol. Rep. 55: Salk. 254; or for the land, unless the number of acres are set forth. Lev. 213.

If a person be ejected from land, he may rehas since been built upon it. 1 Burr. 144.

It is sufficient if land be described by the provincial term whereby it is known in the county where it is situate. Thus ejectments folk, the term signifying there land covered with alders; 2 Str. 1063; for "cattlegates" gate" in Suffolk, which imports land and common for one beast; 2 Str. 1084; have

So also on a writ of error on an ejectment

should be specified, as hay, &c., or the decla- without a license from the lord. See cases in ration will be bad for uncertainty. 11 Co. 25. Gilb. Ten. 214. 215. But since the introduc-(b.): 1 Rol. Rep. 65. 68. But the precise tion of the modern practice this objection is quantity of each species need not be men-obviated, and the usual consent rule is suffitioned, it being enough to say "certain tithes of wool, &c. Dyer, 116. (b.)

Who may Maintain or Defend an Action of Ejectment .- 1. Who may maintain .-A claimant to support this action must possess a legal title. 6. T. R. 289: 7 T. R. 43. 47: 8 T. R. 2. An equitable title will not avail. So fixed is this principle that a trustee may maintain an ejectment against his cestui

que trust. 8 T. R. 118, 123.

The claimant must also have a right of entry at the time of the demise in the declaration. This right of entry or possession could formerly be barred in six different ways, viz. by a descent cast, by a discontinuance, by a fine levied with proclamations, by warranty, by a deforcement, and by the statute of limitations. 21 Jac. 1. c. 16. The four former bars have been abolished by the 3 and 4 W. 4. c. 27. §39. and 3 and 4 W. 4. c. 74. § 2. See tits. Discontinuance, Entry, Fine, and Warranty. The 3 and 4 W. 4. c. 27. has in many respects altered the 21 Jac. 1. c. 16. and will be shortly referred to under the next head.

The party claiming in ejectment must recover on the strength of his own title, and not on the weakness of that of the defendant; for the possession of the latter gives him a right against every one who cannot establish a good title in himself; and it is sufficient for such defendant if he can show the real title of the land to be out of the lessor of the plain-tiff. 4 Burr. 2487: 2 T. R. 749: 4 T. R. 682: 5 T. R. 110: 3 M. & S. 516.

A rector may recover in ejectment against his lessee, on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the 13 Eliz. c. 20. and the lease to the defendant, describing him as a doctor in divinity, produced by him at the trial in support of his title, is primâ facie evidence of his being such as he is therein described to be, so as to avoid the lease under stat. 21 H. 8. c. 13. § 3. 2 East's Rep. 467.

A presentation being rendered void by having been made in consideration of a simoniacal bond to resign, an incumbent presented by the king, and properly inducted, may maintain ejectment against the clerk simoniacally presented. It was objected that quare impedit was the proper remedy; but it was answered, that the church was vacant until the induction of the king's clerk, and that quare impedit was the proper remedy when the church was full. 8 B. & C. 25.

When the practice of requiring an actual lease of the premises prevailed, it was holden ed by the overseers; the pauper disposed of it

In ejectment for tithes the kind demanded upon a demise for a longer term than a year cient evidence of the lease. 3 T. R. 17.

> The heir of a copyholder can maintain the action before admittance. 2 Wils. 13: 3 T. R. 169. As also the grantee of the reversion of a copyhold from the lord; 2 B. & A. 453; but a surrenderee cannot. Cro. Eliz. 349. It is sufficient, however, if he be admitted before the trial; for in that case the admittance shall, as against all persons but the lord, relate back to the time of the surrender. 1 T. R. 600: 16 East.

> A guardian in socage (Ld. Raym. 130), or a testamentary guardian, appointed pursuant to the 12 Car. 2. c. 24. § 8. may bring ejectment for the lands in ward. Vaugh. 137: 2 Wils. 129. An infant may make a lease to try in his title in ejectment 3 Burr. 1794: 2 T. R. 159.

> An assignee of a bankrupt (1 Wils. 276), conusee of a statute merchant, or staple (2 Salk. 563), tenant by elegit (3 T. R. 295 6: 6 Taunt. 202), grantee of a rent charge (1 Saund. 112), assignee of a reversion within the 32 H. S. c. 34, upon a right of re-rentry for condition broken (2 B. & A. 105), can maintain the action.

A corporation, either aggregate or sole, may make a lease to try a title in ejectment. Buls. 119: 1 And. 248.

Where a devise is of a freehold interest, the devisee may immediately, and without any possession, recover in ejectment. Co. Lit. 240. b. But if it be a legacy of a term of years, he must first obtain the consent of the executor to the bequest. Strange 70.

When a person is in possession under a lease granted prior to a mortgage, the mortgage is bound by it; 8 T. R. 2; but it is otherwise of a lease made by the mortgagor subsequent to the mortgage, without the pri-

vity of the mortgagee. Doug. 21.

A mortgagee may maintain ejectment against the mortgagor without giving notice to quit, or demanding possession. 8 Barn. & C. 767: 7 Bing. 421. In ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor on his tenant was in lawful possession of the premises till the time when the receipt of interest took place, and therefore is no defence to the action. 2 Barn. & Adol. 473. And see 7 Bing. 322: Adams on ejectment, 60.

Where a pauper had been put into possession of a cottage forty years before by the then overseers, and had continued in the parish pay, and the cottage had at times been repaira copyholder could not maintain ejectment and went away: held, that the existing over-

East's Rep. 488.

Where the wife of the tenant continued in possession after his death, but never took out adminstration, and having married again, remained in possession, paying rent until her death: held, that the personal representative of the first husband, taking out administration, was entitled to maintain ejectment against the second husband without any notice to quit. and Lady-day: held, that notice to quit, de-2 D. & R. 706.

If a sheriff sell a term under a fi. fa., which is afterwards set aside, and the produce of the sale directed to be returned to the termor, he cannot maintain ejectment to recover his term against the vendee under the sheriff. 1 Maul.

& Selw. Rep. 425.

A landlord may maintain the action for the recovery of premises demised, either on the expiration of the tenancy by the effluxion of time, on its determination by notice to quit, or by some act of forfeiture on the part of the tenant. See further on these points, tit. Lease,

and supra.

Where an ejectment is brought against a tenant, for the purpose of turning him out of Old Lady-day. Doe v. Benson, 4 Barn. & Ald. his farm, &c., and the tenant actually holds 588. the premises of the lessor of the plaintiff, it is sometimes necessary to give him notice to term, the tenant continuing in possession is quit possession, in order to maintain an eject- deemed a trespasser; and therefore an eject-Here we may observe, that demises, where no certain term is mentioned, are held to be tenancies from year to year, which neither party can determine without reasonable notice to the other. This notice is in most counties six months, and it must in all such cases expire at that part of the year when the tenancy commenced; and therefore it hath been holden, that half a year's notice to quit possession must be given to such tenant; before the end of which time the landlord cannot maintain an ejectment, unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant, in which case no notice is necessary; and the same law will apply to the executor of such a tenant. Wils. 25. See 1 Term. Rep. 160: 4 Term Rep. 361.

A landlord gave notice to quit different parts of a farm at different times, which the tenant neglected to do in part; in consequence of which, the landlord commenced an ejectment, and before the last period mentioned in the notice was expired, the landlord, fearing that the witness by whom he was to prove the notice would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment: held,

2 East's Rep. 237.

the arable lands, from Candlemas, and as to negligence of the mortgagors; thirdly, to the rest of the farm from May-day, the rent render the possession of the landlord secure, being payable at Michaelmas and Lady-day, after he has recovered the lands; and, fourthly, and notice to quit was given six months before to take from the court the discretionary power May-day, and not six months before Candle- they formerly exercised of staying the pro-

seers could not maintain ejectment for it. 14 mas; the plaintiff was nonsuited. See 2 East's

Rep. 384.

Under an agreement by a tenant of a farm "to enter on the tillage-land at Candlemas, and on the house and all other the premises at Lady-day following, and that when he left the farm he should quit the same according to the times of entry as aforesaid;" and the rent was reserved half-yearly at Michaelmas livered half a year before Lady-day, but less than half a year before Candlemas, was good: the taking being, in substance, from Ladyday, with a privilege for the incoming tenant to enter on the arable land at Candlemas, for the sake of ploughing, &c. 6 East's Rep. 120. And see 7 East, 551.

Where a lease of lands by deed is made. since the New Style, to hold from the feast of St. Michael, it must be taken to mean New Michaelmas, and cannot be shown by extrinsic evidence to mean Old Michaelmas. Doe v. Lea, 11 East, 312. But if the demise is by parol, evidence is admissible to show that by the custom of the country Lady-day means

After the expiration of a lease for a certain ment, which is an action of trespass, may be brought without any notice to quit.

But in ejectment by a landlord against a tenant, whose lease is expired, the latter is not barred from showing that his landlord's title is expired. 4 T. R. 682: 3 M. & S. 516:

8 B. & C. 471.

The action of ejectment is rendered a very easy and expeditious remedy to landlords whose tenants are in arrear, by stat. 4 G. 2. c. 28., which enacts that every landlord who hath by his lease a right of re-entry, in case of non-payment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same upon some notorious part of the premises, which will be valid, without any formal re-entry, or previous demand of rent; and a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

The legislature appear to have four different objects in view in the enactments of this sta-First, to abolish the idle form of a tute. demand of rent, where no sufficient distress can be found upon the premises to answer the second notice was no waiver of the first. that demand; secondly, in cases of beneficial leases which may have been mortgaged, to Where a defendant in ejectment held, as to protect the mortgagees against the fraud or

ceedings at any stage of them, upon payment | pass for the plaintiff, to give plaintiff a judgof the rent in arrear and costs. The first of ment of the term preceding the trial, and these objects is effected by permitting the enter into a recognisance by himself, and two landlord to bring his ejectment without pre-sureties, to pay plaintiff the damages and viously demanding the rent; the second, by costs which shall be recovered in the action. permitting a mortgagee not in possession to As to the decisions on this statute, see Tidd's recover back the premises at any time within Prac. 1222. Where a tenant holds from year six months after execution executed, by pay- to year without writing, it is not within the ing all the rent in arrear, damages, and costs, statute; 3 B. & A. 770; nor a tenancy for of the lessor, and performing all the covenants three months certain by writing. Id. 766. A of the lease; the third, by limiting the time tenant who has surrendered his term, but for the lessee or his assigns to make an applirefuses to quit the premises, cannot be cation to a court of equity for relief, to six compelled to enter into the recognisance. calendar months after execution executed; prescribed by the above statute. 2 B. & Ad. and the fourth, by limiting the application of 922. the lessee to stay proceedings, upon the payment of the rent in arrear and costs, to the time remedy the inconvenience of landlords not anterior to the trial, and making it compulbeing able to try their ejectments at the next

ejectment at common law unless he demand serve a declaration in ejectment, entitled of the rent on the day on which it becomes due, nor under the last mentioned statute (§ 2), if such a declaration, with a notice requiring there be a sufficient distress upon the premises. 7 T. R. 117. But if there is no sufficient distress, the landlord may bring an ejectment without a demand, although the lease provide that the rent shall be lawfully demanded. 2 Maule & S. 525. Lord Ellenborough, C. J. dissent. As to the provision of stat. 11 G. 2. c. 19. § 16. and 57 G. 3. c. 52. in cases of tenants at rack-rent being in arrear, and deserting the premises, see this Dict. tit. Rent. Two justices of peace, may in this case, put the landlord in possession.

In ejectment by landlord against tenant, the stat. 1 G. 4. c. 87. provides that where the term or instrument of any tenant holding under lease or agreement in writing, shall have expired or been determined by notice, and such tenant shall refuse to give up possession, after demand in writing, signed by the landlord and his agent, and the landlord shall proceed to ejectment, it shall be lawful for him, at foot of the declaration, to address a notice to such tenant, &c. requiring him to appear in the court in which such action shall be commenced on the first day of the following term, to be made defendant, and find bail, if ordered by the court. And on the appearance of the party at the day prescribed in the notice, or, in case of non-appearance, claimed, died just after having first obtained a on making the usual affidavit of service of the similar rule. 4 Term Rep. 122. So a mortdeclaration and notice, the landlord may, on gagee. Comberb. 399. As to a cestui que producing the lease or agreement, or counter-trust, see 3 Term Rep. 783: 4 Term Rep. part, and proving the execution of the same 122 by affidavit; and on affidavit that the premises

By 1 W. 4. c. 70. § 36. provision is made to sory upon the court to grant the application assizes, where their right of entering occurred when properly made.

In such Where a landlord has a right to re-enter cases the act provides that the lessor may, for non-payment of rent, he cannot recover in within ten days after the tenancy expires, the day next after the day of the demise in the tenant to appear in ten days; and such proceeding shall be had as if the declaration had been served before the preceding term, provided that no judgment shall be signed till default of appearance and plea within such ten days, and at least six days' clear notice of trial shall be given.

Where the title of the landlord accrued during Hilary Term, and the property was in Middlesex, held, the above statute did not apply. 1 D. P. C. 547.

Who may defend the Action.-In ejectment for a chapel, a parson claiming a right to enter and perform divine service, has been held not to have a sufficient title to be admitted a defendant. Str. 914. Notwithstanding 1 Salk. 250. no man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been in possession, or received rent, and not a mere stranger. Comb. 209.

He who claims title shall be joined as a defendant, though the plaintiff opposes it. Salk. 256. And, therefore, even the wife of the lessor. 1 Salk. 257.

The court permitted an heir, who had never been in possession, to come in and defend the The father, under whom he ejectment.

To prevent fraudulent recoveries of the have been actually enjoyed under it, and that possession, by collusion with the tenant of the the interest of the tenant has expired or been land, all tenants are obliged by stat. 11 G. 2. determined, and possession lawfully demanded, c. 19. on pain of forseiting three years' rent, move the court for a rule to show cause why the tenant, besides entering into the common are served with any declaration in ejectment: rule and giving the common undertaking, and any landlord may, by leave of the court, should not undertake in case a verdict shall be made a co-defendant to the action, in case makes default, though judgment must be then whom his tenants had concealed the ejectsigned against the casual ejector, yet execu- ment. 4. Taunt. 820. tion shall be stayed, in case the landlord applies to be made a defendant, and enters into fue. pos. executed, and let in a landlord to try the common rule; a right which, indeed, the an ejectment, on suggestion of collusion. 5 landlord had long before the provision of statute (Styl. Pract. Reg. 180. 111. 265: 7 Mod. 70: Salk. 257: Burr. 1301.), in like manner as made defendant in order to render his title ad-(previous to the statute of West 2. c. 3.) if, in missible in evidence, for he may, with the the real action, the tenant of the freehold made default, the remainder-man or rever- name. And where a lessor of the plaintiff sioner had a right to come in and defend the possession, lest, if judgment were had against ed, obtained from the tenant a retraxit of the the tenant, the estate of those behind should plea, and a cognovit of the action, the court be turned to a naked right. Bract. lib. 5. c. set the judgment aside. 7 Taunt. 9. 10. § 14.

Demise of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other The tenant fraudulently lands not demised. concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention the mines at all, but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had only liberty to dig; the court held that though the latter could not be recovered under the declaration in ejectment, still, that the tenant, by his own act, had stopped himself from taking that objection, and that in an action for the value of three years' improved rents under stat. 11 G.2. c. 19. the landlord might recover the treble rent, in respect not only of the demised premises, but out of the mines in which the tenant had only a liberty to dig. 2 B. & A. 652.

The improved or rack rent mentioned in § 12. of the above statute is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on at the time of delivering the declaration in ejectment in case the premises were to be let. Ibid.

A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the stat. 11 G. 2. 1

Term. Rep. 647.

Where a person claims in opposition to the title of the tenant, he cannot be considered as a landlord within the above statute. 3 Burr. 1295.

A third person cannot defend as landlord upon the trial of an ejectment, where it appears that the tenant in possession came in as any archbishop, &c., or other spiritual or electenant to the lessor of the plaintiff, and paid rent to him under an agreement that has ex-Doe, d. Knight v. Smythe (Lady), Term Rep. R. B. Mic. 56 G. 3. 347.

The court will not, after a plaintiff has obtained judgment and possession in an undefended ejectment without collusion, and has of entry shall be deemed to have first accrued sold part of the premises, and transferred the at the last time when rent was received,

the tenant himself appears to it, or if he possession, let in a landlord to defend, from

But the court will set aside a writ of hab. Taunt. 205.

It is not necessary for the landlord to be tenant's consent, defend the ejectment in his having knowledge of a suit being so defend-

VI. Within what Time the Action must be brought.—The statute 21 Jac. 1. c. 16. § 1. enacted no person should make an entry upon lands but within twenty years next after his right or title descended or accrued. By § 2. infants, married women, persons non compos mentis, imprisoned, or beyond seas, at the time of the right or title to lands descended or accrued to them, were allowed ten years after the removal of their disabilities to bring their action, or make their entry, notwith-

standing twenty years had expired. This act did not extend to ecclesiastical persons, and only operated in cases of adverse

possessions.

By 3 and 4 W. 4. c. 27. § 2. no person (which word by § 1. extends to a body politic, corporate, or collegiate) shall bring an action to recover any land (which by § 1. extends to all corporeal hereditaments, and to any interest therein, whether of a freehold, copyhold, or chattel nature, and to all tithes, other than such as belong to a spiritual or eleemosynary corporation sole), but within twenty years next after his right, or the right of the person through whom he claims, accrued.

§ 3. fixes the time at which the right shall be deemed to have first accrued in the cases

therein enumerated.

By § 16. if any person shall be under disability of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, at the time when his right shall first accrue, he, or the person claiming through him, may, notwithstanding twenty years shall have expired make an entry or bring an action to recover land within ten years after the cessa-tion of any such disability, or the death of the party to whom the right first accrued.

By § 29. no lands are to be recovered by mosynary corporation sole, after two incumbencies and six years, or sixty years.

Previous to the above act non-payment of rent alone did not render the possession of a tenant adverse to his landlord; but by § 3. it is declared, among other things, that a right

which will have the effect of making twenty is usual to enumerate the whole as lying in years' possession, without payment of rent, or any written acknowledgment of right in the landlord a bar to any ejectment, which stating them to be within the other; but it seems sufficient to describe them as lying in the latter may bring. See further as to the parishes of A. and B. See 2 Chitty Prac. provisions of this act, tit. Limitation of Actions.

VII. Of the Declaration and subsequent Proceedings .- The declaration is the first process in an ejectment, founded on a sup-

posed original writ or bill.

Title. The declaration should regularly be entitled of the term it is delivered, or, if delivered in vacation, of the preceding term; but if it be not entitled of any term, the omission is not material, provided the tenant has sufficient notice therein given him to appear to the action. Adams on Eject. 181. 2d. edit.

By the 11 G. 4. and 1 W. 4 c. 70. § 36. where a right of entry accrues to a landlord in or after Hilary or Trinity Term, he may at any time within ten days afterwards serve a declaration in ejectment, specially entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant in possession to appear and plead thereto within ten days. This is confined to issuable terms. 2 C. & I.

Venue. In ejectment is local. 3 W. B.

1070: Cowp. 176.

Demise. The demise must be laid after the title of the lessor of the plaintiff accrued, trial may order the record to be amended in Bull. N. P. 105: 2 Str. 1087: and as the record in ejectment is evidence in an action for the case. See further tit. Amendment. mesne profits, it is customary to lay the day of the demise as far back as possible. Bull. N. P. 87. Joint tenants and parceners may either join or sever in demising; 1 Show.: 1 Wils.; but tenants in common, not being seised per mie et per tout, must make several demises; 2 Wils. 232; but each demise may be alleged to be of the whole premises; for under a demise of the whole, an undivided moiety may be recovered. 1 Esp. 330.

When any doubt exists as to the party in whom the legal title is vested, or as to the day when such title accrued, it is usual to declare upon distinct demises by the persons concerned in interest, and to lay them on different days, according to the circumstances of the case. But if a party is made a lessor without his authority, he may, before appearance, move to have his name struck out of the

declaration. 2. Chitty Rep. 171.

Situation of the Premises, &c. It is sufficient to mention the place where the premises are situate, without describing it by the name of its civil or ecclesiastical division. 4 Taunt. 1049.

671.

any parish, the description must be correct; of the declaration, whether it be an issuable for a variance will be fatal. 2 Camp. 274. term or not. R. E. 2 G. 4. K. B.: 4 B. & When they are situate in different parishes, it A. 539: 2 B. & B. 705: 9 Price, 299.

The number of messages, &c. mentioned in the demise need not correspond with the number claimed, and the practice is to double the amount of acres, &c. demanded; because, although a party may declare for more than he is entitled to, and recover less, the reverse will not hold. Cro. Eliz. 13: 1 Burr. 396.

Entry and Ouster. The plaintiff is stated to enter upon the premises by virtue of the demise; and it is usual, though not necessary, to allege a day. Nor is it essential to mentain the day of the ouster, if it appear it took place after the commencement of the term and before action brought. Cro. Jac. 311: 4 Burr. 2447. Where there are several demises on the same day, the practice is to lay one entry and one ouster; but otherwise, there ought to be as many entries and ousters as there are demises. 1 Tidd. 581. 8th edit.

Amending. The declaration may be amended in the day of the demise; 4 Burr. 2447; but not to a day subsequent to the service of the declaration. Foxlow v. Jeffries, M. S.: Adam's eject. 200. It may also be amended by enlarging the term; Black. 940; and even by adding a new count in a fresh demise. 1 D. & R. 173. And by 9 G. 4. c. 15. and 3 and 4. W. 4. § 23. the judge in the any particulars not material to the merits of

Notice to appear. The notice, if given by the casual ejector, is for the tenant to appear and be made defendant in his stead; if by a landlord, under the 1 G. 4. c. 87. for the tenant to appear and enter into recognisances, &c.

The Christian and surname of the tenant in possession should be prefixed to the notice. 1 Chitty Rep. 573. Where there are several tenants, it is usual to prefix all their names to the notice; but it is sufficient to prefix the name of each to the notice accompanying the declaration with which he is served.

A notice directed to a wrong person, though served on the tenant in possession is not good.

When the premises are situate in London or Middlesex, the notice (in ordinary cases, not between landlord and tenant, but signed in the name of the casual ejector) should require the tenant to appear on the first day in full term, or within the first four days of the term, and not on the essoin day. 2 Strange,

In country ejectments the notice should be But if the premises are stated as lying in to appear in the next term after the delivery

Vol. I.-79

the rule that declarations in ejectment should different courts. be served before the essoin day of each day of each term; but by one of the general rules sidered under the head, who may defend the made by the judges in T. R. 1 W. 4 c. 11. action. In addition to what is there laid " declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the essoin, or first general return day."

The declaration must be served by delivering a copy of it, and the notice thereunder written, to the tenant in possession, or his Where there are several tenants in possession of different parts of the premises, and one of them appears and confesses lease, a copy must be served on each to entitle the lessee of the plaintiff to judgment against the casual ejector for the whole. 1 Chitty Rep. 141: 3 Moore, 578. And it would seem, that where a house is let out in lodgings a copy should be served on every lodger, 1 Tidd. 526. 8th ed.; but where several persons are in possession of the same premises as joint tenants, service on one is a sufficient service on all. 1 Chitty R. 141: 1 B. & P. 369: 3 Tyr. 84.

If the tenant keep out of the way to avoid being served, and neither he nor his wife can be met with, a copy of the declaration should be delivered to his child, relation or servant, or other person on the premises, and another copy should be affixed to the door, or some conspicuous part of the premises; and if it appear on affidavit of the facts that the tenant absconded to avoid being served, the court will grant a rule nisi, that such service shall be good, and direct how the rule shall be served. 2 Wils .: 2 Chitty Rep. 176, 177: Roscoe, 558.

The tenant himself may be served anywhere; 2 Str. 1064; but service on his wife should be either on the premises, or at his dwelling-house. 6 T.R. 765: 2 B. & P. 55. And in the latter case it should appear that she and the tenant live together as man and wife. 1 B. & P. N. R. 308. Service on any other relation, or on a servant, must be upon the premises. 1 Tidd. 527.

If there should be no one on the premises on whom the declaration can be served, a copy should be affixed on the most conspicuous part of the premises, and an application made to the court on affidavit of the circumstances, that such service may be deemed sufficient. 1 N. R. 293: 2 Chitty Rep.

178.

In every case the notices should be read over to the person served, and the intent and meaning of the declaration and notices and

such service explained.

Judgment against the casual ejector. The time for the defendant's appearance, and, in case of his default, the time for moving for judgment against the casual ejector, (which is a motion of course only requiring counsel's signature), are governed by the locality

Service of Declaration. It was formerly of the premises, and by the practice of the

Who may appear. Has already been condown with respect to landlord and tenant, it may be stated that the latter may appear alone, or jointly with the former.

In ejectment where there are divers defendants, and the freeholds are several, no defendant may defend for more than is in his own possession; and the plaintiff may take judgment against his ejector for what remains. 1 Vent. 355: 2 Keb. 524, 531.

If there be two defendants in ejectment, entry, and ouster, but the other does not appear, in that case the plaintiff may enter a non-pros, or retraxit, against him, and go to trial, and have judgment against the other defendant. 1 Lord Raym. 717, 718. Also if an ejectment be brought against two persons, and after issue joined one dies, and a venire is awarded as to the two defendants, and a verdict against two; here, upon suggestion of the death of one of them upon the roll, judgment shall be given for the plaintiff against the other for the whole: for it is said this action is grounded upon torts, which are several in their nature, and one may be found guilty and the other acquitted. Ibid.

The consent rule. Has also been already mentioned. Where a landlord is admitted to defend without the tenant, judgment must be assigned against the casual ejector according to the conditions of the consent rule. The reason for this practice is, to enable the claimant to obtain possession of the premises in case the verdict be in his favour; because, as the landlord is not in possession, no writ of possession could issue upon a judgment

against him.

The only case in which it is necessary to produce the consent rule at the trial is, when the plaintiff directs his proof to certain premises, and the other party contends he does not defend for such premises. 1 M. & M. 237; 2 B. & A. 948.

Of the plea and issue. The general issue in ejectment is not guilty, and is the only plea ever pleaded in modern practice; for under it, any thing showing the plaintiff has not a right to recover, as that he is barred by the statutes of limitation, may be given in evidence. Should, however, the circumstances of the case require it, the court will allow the defendant to plead specially. Carth. 180.

Of the trial. Should the defendant not appear on the trial, or refuse to confess lease, &c. pursuant to the consent rule, the practice is to call the plaintiff and nonsuit him; after which, at his instance, the cause of the nonsuit is indorsed on the postea, which entitles him to judgment against the casual ejector. 1 Salk. 259: 2 Tidd, 918. 8th edit.

But in ejectment by a landlord against a

tenant on the statute 4. G. 4. c. 87. § 2. when many different ways. An ejectment howit appears the tenant or his attorney has had ever, though in its nature not final at law, due notice of trial, the plaintiff shall not be is capable of being made so in equity; nonsuited for default of the defendant's apand the Court of Chancery will, on proper pearance, or of confession of lease, &c., but the production of the consent rule shall be sufficient evidence of the lease, &c.; and the plaintiff is to be permitted, after proof of his right, to recover the whole or any part of the premises, to go into evidence of the mesne profits thereof from the determination or expiration of the tenant's interest therein down to the time of the verdict, or of some day therein mentioned; and the jury, finding for the plaintiff, may give their verdict both for the recovery of the whole or part of the pre-mises, and for the damages for such mesne

In case it appears to the judge that the finding is contrary to evidence, and the damages are excessive, he may order execution to be stayed till the fifth day of the following term, which order the judge shall in all other cases make on the requisition of the defendant, upon his undertaking to find and entering into such security as therein mentioned, not to commit, waste, or sell, or carry off, any standing crops, hay, &c. upon the premises, from the day of the verdict, to the day whereon the ejection shall be finally made on

the judgment, or set aside.

Of the judgment. The judgment in ejectment is, that the plaintiff recover his term yet to come and unexpired in the lands demanded; and the effect of it is to give the lessor of the plaintiff possession of the lands, but not to invest him with any title thereto, except such as he previously had.

A new trial, may, upon proper grounds, be granted in ejectment as well as in other

cases. 2 Str. 1105: 4 Burr. 2224.

If there be a verdict and judgment against the plaintiff, he may bring another ejectment for the land, the action being only to recover the possession, &c., wherein judgment is not final; and it is not like a writ of right, &c. where the title alone is tried. Wood's Inst. 547.: Trin. 23. Car. B. R.

And the verdict in an ejectment is not evidence in a subsequent action, even between

the same parties. 1 Mod. 10.

The reason of an ejectment being never final is not laid down in the general books on this subject; but in the notes to Euro-mus, vol. iv. p. 189, it is thus ingeniously stated:-The reason why it is not or cannot be final, seems to be this,—that it is impossi-ble from the structure of the record in this action, to plead a former, in bar of another ejectment brought. Because 1. The plaintiff and defendant are nominal, and exist in most cases on record only, and, consequently, may be changed in a new action. But the identity both of plaintiff and defendant must be averred in pleading a former action in bar. 2. The term demised may be laid execution may be issued thereon for the costs,

and the Court of Chancery will, on proper grounds, grant a perpetual injunction, and not permit the possession of lands to be disturbed by a vain incessant litigation of the same question. See 2 Eq. Ab. 171. c. 1; 243. c. 11; 222. c. 1.: Parl. Cases (8vo.), tit. Injunction, ca. 1. 3: 2 Stra. 404.

Of the execution. In real actions, where the freehold is recovered, the demandant has execution by the writ of habere facias seisinam; in ejectment, therefore, it is but just that a similar remedy shall be permitted to the plaintiff, who, as he now has judgment to recover the possession of the land, may put the sentence of the law in execution by virtue of a writ of habere facias possessionem, directing the sheriff to give actual possession to the plaintiff of the land recovered.

This writ may be sued out though the lessor of the plaintiff be dead, if tested the last day of the preceding term. 4 Burr. 1970. The legal relation to the day of the teste is proper to be supported in maintenance of a writ of possession on a judgment in eject-

ment. Ibid.

By 1 W. 4. c. 70. § 38. in all cases of trials of ejectments at Nisi Prius, where a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, &c., it shall be lawful for the judge before whom the cause shall be tried to certify his opinion on the back of the record, that a writ of possession ought to issue immediately, and upon such certificate a writ of possession may be issued forthwith, and the costs may be taxed, and judgment signed and executed afterwards, at the usual time, as if no writ had issued.

Formerly a pracipe was required in the King's Bench, but not in the Common Pleas; but now by one of the general rules, H. T. 2 W. 4. r. 76. a writ of habere facias possessionem may be sued out without lodging a præcipe with the officer of the court, and by

r. 75. it need not be signed.

Of the costs. If the action be undefended, and judgment is entered against the casual ejection, the only means the lessor of the plaintiff has of obtaining his costs is by an action for mesne profits, wherein they are re-

coverable as special damages.

Where the tenant appears, and enters into the consent rule, and at the trial refuses to confess, the lessor of the plaintiff cannot take out execution against him for his costs, because the judgment is against the casual ejector. Barn. 182. But the tenant is liable to the costs under the consent rule, and he may

as in ordinary cases; and the lessor may have non pros pending the ejectment. 5 B. & A. a ca. sa. or a fi. fa. for the same, and a habere facias possessionem for the possession, sepa
Releasing the action. As the plaintiff in

out the tenant, the judgment to recover the possession is against the casual ejection; but, nevertheless, as there is a judgment in existence against the landlord, execution may be taken out thereon for the costs. Adams' Skinn. 247. But according to the old practice. Eject. 298.

If a verdict pass for the defendant, or the plaintiff be nonsuited for any other cause than the lessor of the plaintiff in ejectment cannot the refusal of the defendant to confess, the release the action. For though in every other latter may recover his costs by attachment respect the court will look upon the lessor as against the lessor of the plaintiff. 2 Tidd. the party interested, they consider the nomi-1028.

Where there are several defendants who 4 M. & S. 300. succeed in the action, the lessor may pay costs to which of them he pleases. 1 Str. On the other hand, each defendant is answerable for the costs; and where they defend severally, and at the trial some appear and confess, but the others do not, the whole costs may be taxed against each. Bull, N. P. 335.

In all cases wherein a landlord shall elect to proceed under the 1 G. 4. c. 87. and the tenant shall have found bail, as ordered by the to wit. \ Newbury, in the said county, Gencourt, the former is liable to double costs tleman, was attached, to answer Richard Smith, should be be nonsuited, or a verdict pass of a plea, wherefore with force and arms he against him, on the merits at the trial.

the courts will stay the proceedings in ejectment, either for a time or finally; as until the plaintiff deliver particulars of the lands he pired, and ejected him from his said farm, and seeks to recover; 6 T. R. 597: 7 T. R. 332; other wrongs to him did, to the great damage of or until security for costs is given, as where the said Richard, and against the peace of the the lessor of the plaintiff is an infant; I Str., Lord the King, &c. And whereupon the said 693: 2 Str. 932: Cowp. 138; or is abroad; Richard, by Robert Martin, his attorney, com-2 Burr. 1177; or is dead, 2 Str. 1056. But plains, that whereas the said John Rogers, on the poverty of the lessor is no ground for such the 1st day of October, in the twenty-ninth an application. Ca. Pr. C. P. 15.

the same premises, in different courts, the same Richard the tenement aforesaid, with the proceedings in one will be staid until the other action is determined. Andr. 297: 1 Tidd, nement, with the appurtenances, to the said 572. 8th edit.

a new ejectment until the costs of a former the end and term of five years from thence next cjectment between the same parties, and also following, and fully to be complete and ended; the costs of an action for mesne profits de- by virtue of which demise the said Richard enpendant thereon, are paid; 4 East, 585; yet tered into the said tenement, with the appurtethey will not extend the rule to include the nances, and was possessed thereof; and the damages in the action for the mesne profits, said Richard being so possessed thereof, the however vexatious the proceedings of the les- said William afterwards, that is to say, on the sors of the plaintiff may have been. 15 East's said 1st day of October, in the said twenty-ninth Rep. 233.

the action is brought by a third person, or for said tenement, with the appurtenances, in the different premises, if the title be the same. possession of the said Richard, which the said 1 Tidd. Prac. 583. S. P.: 6 T. R. 740: and John Rogers demised to the said Richard in see 4 D. & R. 145.

costs of a former ejectment were paid, the out of his said farm, and other wrongs to him court will not permit the defendant, in case did, to the great damage of the said Richard, those costs are not paid by a given day, to and against the peace of the said Lord the

rately or in one writ. 2 Tidd, 1027. 8th edit. ejectment is a mere nominal person, and a When the landlord is made defendant with trustee for the lessor, if he release the action, tice, the release would certainly have been a good defence to the action. Adams, 274. And nal plaintiff as the real plaintiff on the record.

> FORM of the DECLARATION in EJECTMENT, by Original, against the Casual Ejector, who gives Notice thereupon to the Tenant in Possession.

> Michaelmas, the 29th of King George the Third.

WILLIAM STILES, late of BERKS / entered into one messuage, with the appurte-Of staying proceedings. In certain cases nances, in Sutton, in the county aforesaid, which John Rogers, Esq. demised to the said Richard Smith, for a term which is not yet exyear of the reign of the Lord the King that Where a party brings two ejectments for now is, at Sutton aforesaid, had demised to the appurtenances, to have and to hold the said te-Richard and his assigns, from the feast of Though the court will stay proceedings in Saint Michael the Archangel then last past, to year, with force and arms, that is to say, with And the court will so interpose even though swords, staves, and knives, entered into the form aforesaid, for the term aforesaid, which is But upon a rule to stay proceedings till the not yet expired, and ejected the said Richard King. Whereby the said Richard saith, that and 2: Brit. o. 2: Cromp. Jurisd. 156: he is injured and damaged to the value of 201. Manw. par. 1. p. 121. See tit. Justice in And thereupon he brings suit, &c. Eyre.

Martin, for the plaintiff, Peters, for the defendant. Pledges of ' John Doe. Prosecution, Richard Roe.

Mr. George Saunders,

[Date]

I am informed that you are in possession of, or claim title to, the premises mentioned in this agent, by the payment of the one or delivery declaration of ejectment, or to some part there- of the other. Co. Lit. 144. And if A. coveof : and I, being sued in this action as a casual nant to pay B. a pound of pepper or sugar, ejector, and having no claim or title to the before Easter, it is at the election of A., at all same, do advise you to appear next Hilary term, times before Easter, which of them he will in his Majesty's Court of King's Bench where- pay; but if he pay it not before the said feast, soever he shall then be in England, by some at- then afterwards it is at the election of B. to torney at that court, and then and there by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

> Your loving friend, ... William Stiles.

The form of the declaration by bill does not differ very materially from the above.

For further matter relating to this title, see Bull. Ni. Pri. and Adams and Roscoe on ejectment.

EJECTMENT OF WARD. See Ward.

EJECTUM, ejectus maris quod è mare ejicitur; jet, jetsom, wreck, &c. See, tit. Wreck.

EIGNE, Fr. aisné. Eldest or first born; as bastard eigne, and mulier puisne are words used in our law for the elder a bastard, and the younger lawful born. See tit Bastard.

EIK, to a reversion. An additional loan to a mortgagor who is the reversioner of the mortgaged estate. Bell's Scotch Dict.

Eik, to a testament. An addition to an inventory made up by an executor. Scotch Dict.

EINECIA, from the Fr. aisné, i. e. primogenitus.] Eldership. Stat. of Ireland, 14 Hen. 3. See Esnecy.

EIRE, or EYRE, Fr. eire, viz. iter.]. Is eyre are those whom Bracton in many places calls justiciarios itinerantes. These justices, in ancient time, were sent with a general and the first election by one binds the other. Bench, if the cause were too high for the that he shall have the fee in the other acre. 2 once in seven years. Bract. lib. 3. c. 11: is descendible; and election of a tenant in Horn's Mirror, lib. 2. The eyre of the forest tail may prejudice his issue. He, in remainis the justice seat; which, by an ancient cus. der, may make an election after the death of tom, was held every three years by the justenant for life; but if the tenant for life do tices of the forest, journeying up and down make election, the remainder-man is conclufor that purpose. Bract. lib. 3. tract. 2. c. 1. ded. Moor, Ca. 247. 832.

ELECTION, electio.] In law, is when a man is left to his own free will, to take or do one thing or an other, which he pleases. And if it be given of several things, he who is the first agent, and ought to do the first act, shall have the election; as if a person make a lease, rendering rent, or a garment, &c., the lessee shall have the election, as being the first demand and have which he pleaseth. Dyer,

18: 5 Rep. 59: 11 Rep. 51.

If I give you one of my horses in my stable, there you shall have the election; for you shall be the first agent, by taking or seizure Co. Lit. 145. If things of one of them. granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before; but it is otherwise when to be performed at once. Ibid. When nothing passes to the feoffee or grantee before election, to have the one thing or the other, the election ought to be made in the life of the parties, and the heir or executor cannot make the election; but where an estate or interest passes immediately to the feoffee, donce, &c., there election may be made by them or their heirs or executors. 2 Rep. 36, 37. And when one and the same thing passeth to the donce or grantee, and such donce or grantee hath election in what manner he will take it, there the interest passeth immediately, and the party, his heirs, &c., may make election when they will. Co. Lit. 145: 2 Danv. Abr.

Where the election creates the interest, nothing passes till election; and if no election can be made, no interest will arise. Hob. 174. If the election is given to several persons, there the first election made by any of the persons shall stand; as if a man leases two the court of justices itinerant, and justices in acres to A. for life, remainder of one acre to B. and of the other acre to C. Now B. or C. may elect which of the acres he will have, commission into divers counties to hear such Co. Lit. 145: 2 Rep. 36. If a man leases two causes as were termed pleas of the crown; acres for life, the remainder of one in fee to and this was done for the ease of the people, the same person, and, after, licenses the leswho must else have been hurried to the King's see to cut trees in one acre, this is an election county court; it is said they were sent but Danv. 762. A real election concerning lands called N., and there are two closes called by the election of the grantee; but after the death that name, one containing nine acres, and the other but three acres; the grantee shall not, in this case, choose which of the said closes he will have, but the grantor shall have election which close shall pass. 1 Leon. 268. But if one grants an acre of land out of a waste or common, and doth not say in what part, or how to be bounded, the grantee may make his election where he will. 1 Leon. 30. If a man hath three daughters, and he covenants with another that he shall have one of them to dispose of in marriage, it is at the covenantor's election which of his daughters the covenantee shall have, and, after request, she is to be delivered to him. Moor, 72: 2 Danv. 762. Where there are three coparceners of lands, upon partition the eldest sister shall have the election; though if she herself make the partition she loseth it, and shall take last of all. Co. Lit. 166. See tit. Eswey.

In consideration that a person had sold another certain goods, he promised to deliver him the value in such pipes of wine as he should choose; the plaintiff must make his election before he brings his action. Style, 49. An election which of two things shall be done, ought not to be made merely by bringing an action, but before, that the defendant may know which he is to do; and it is said he is not bound to tender either before the lessee, or his assignee for rent, if he accepts plaintiff hath made his choice which will be the rent of the assignee, he hath determined accepted. 1 Mod. 217: 1 Nels. Abr. 697.

A condition of a bond is, that the obligor shall pay 30l., or twenty kine, at the obligee's election, within such a time; the obligee, at of them at that day, his election is gone; and his peril, is to make his election within the where a grant is made of two acres of land, time limited. 1 Leon. 69. Though in debt the one for life, the other in fee, or in tail, and upon bond to pay 10l. on such a day, or four before any election the feoffee makes a feoffcows at the then election of the obligee, it ment of both; in this case the election will be was adjudged, that it was not enough for the gone, and the feoffor may enter upon which defendant to plead that he was always ready, he will for the forfeiture. 2 Rep. 37. If &c. if the obligee had made his election; for money on a mortgage be to be paid to a man, he ought to tender both at the day, by reason his heirs, or executors, the mortgagor hath the word then relates to the day of payment. Moor, 246: 1 Nels. 694, 695.

things, and he cannot by any default of a stranger, or of himself, or the obligee, or by feoffee, &c. Co. Lit. 210. the act of God, do the one, he must at his pe-

ril do the other. 1 Lil. Abr. 506.

to recover his right, it is at his election to well us of things. Dyer, 204. 207. A man bring which he pleaseth; and when a man's act may work two ways, both arising out of money, and dies; the obligee may choose to his interest, he hath election given him to use it either way. Dyer, 20: 2 Rol. Abr. 787. Action of trespass upon the case, or action of trespass vi et armis, may be brought against one that rescues a prisoner, at the election of the party damnified by the rescous. And an an elegit, and hath no fruit by it, he may action on the case, or on assize, lies against him that surcharges a common, at the election be entered on record. Hob. 57: Dyer, 60, of him that is injured thereby. 1 Lil. 504, 369. 505. Also for a rent charge out of lands, There is no election against the king in his

A person grants a manor, except one close there may be a writ of annuity or distress, at of the grantor, if the heir be not charged, the election to bring annuity ceaseth. Duer. 344. And a man in many cases has an election of action. If a bailee of goods injures or loses them, the bailor may elect to sue either in assumpsit on the implied promise to take care of them, or in case for the breach of duty as bailee. So if he has sold and converted them, the bailor may sue in trover for the tort, or may waive the tort, and sue in contract for money had and received.

A man was indicted of felony for entering a house and taking away money, and found guilty, and burnt in the hand; after which the person who lost the money brought an action of trespass against the other for breaking his house, and taking away his money; and it was held that the action would lie; for though it was at his election at first, either to prefer an indictment or bring an action, yet by the indictment he had made no election, because that was not the prosecution of the party, but of the crown. Style, 347.

If a bargain and sale be made of lands, which is inrolled, and at the same time the bargainor levies a fine thereof to the bargainee, he hath his election to take by one or

the other. 4 Rep. 72.

When a lessor hath election to charge the

his election. 3 Rep. 24.

If a person hath election to pay or perform one of two things at a day, and he do neither electon to pay it to either; and if in a feoffment it be to pay to the feoffee, his heirs, or If a man hath an election to do one of two assigns, and he enfeoff another, the feoffor may pay the money to the first or second

In some cases, where one hath cause of suit, he may sue one person or another at his Where the law allows the man two actions election; for there is an election of persons as by deed binds himself and his heirs to pay sue the heir, or the executors, although both of them have assets. Poph. 151. One may have election, when he hath recovered a debt, to have his execution by elegit, fieri facias, or capias ad satisfaciendum; but where he takes

void will determine an election. Hob. 152.

A wife hath her election which to take, of a jointure made after marriage, or her dower, on the death of the husband, and not before.

Dyer, 358.

Formerly a wife had frequently to elect between her dower and a devise to her by her husband out of his real or personal estate. The 3 and 4 W.4. c. 105. has, however, taken away her election, and declared in what cases she shall retain, and when she shall be precluded of dower. See tit. Dower, IV.

According to the doctrine of election, fully established in courts of equity, a party cannot take a benefit under a will or deed, and also in contravention of the will or deed, but must make his election: If a testator devises an estate, the property of Titius, to which the testator has of course no right, and by his will also gives Titius a legacy, Titius cannot hold the estate and also claim the legacy. He shall not take the benefit under the will unless he suffers the whole instrument to take effect. It is immaterial (though once held not so) whether the testator thought he had a right to dispose of the estate of Titius, or whether he meant, by an arbitrary exertion of power, to exceed his authority. If Titius will avail himself of the testator's bounty, he shall not disturb his will. See Bac. Ab. Election (E.) (ed. by Gwillim and Dodd, and the Addenda.) The question has arisen, and has given rise to much discussion, whether a party electing to retain his property against a will forfeits all the benefits of a devise in his favour under the will, or whether he only gives up so much as to compensate devisees disappointed by his election. It would rather seem that he forfeits the benefit in toto, and that if there is any surplus beyond compen-sating disappointed devisees, it goes to the heir at law. See Bac. Ab. Election (E.), Addenda (ed. by Gwillim and Dodd.) And see 1 Swanston, 442: 1 Roper, Husb. & W. 566. for learned notes by Mr. Swanston and Mr. Jacob.

As to election with respect to one action or another, see 1 Com. Dig. tit. Action; and this

Dict. tits. Condition, Agreement.

ELECTION OF A CLERK OF STATUTES-MER-CHANT. A writ that lies for the choice of a clerk assigned to take bonds called statutesmerchant, and is granted out of the Chancery, upon suggestions that the clerk formerly assigned is gone to dwell at another place, or is under some impediment to attend the duty of his office, or hath not lands sufficient to answer his transgressions, if he should act amiss, &c. F. N. B. 164.

is to be a free election for the dignities of the a moiety of the party's land, and all his goods, church. Stat. 9 Ed. 2. c. 14. And none shall beasts of the plough excepted. And the credisturb any person from making free election, ditor shall hold the said moiety of the land so on pain of great forfeiture. If any persons delivered unto him until his whole debt and

grants, &c. 1 Leon. 30. An act becoming for an election in any church, college, school, &c. the election shall be void; and if any of such societies resign their places to others for reward, they incur a forfeiture of double the sum; and the party giving it, and the party taking it, is incapable of such place. Stat. 31 Eliz. c. 6. See further tits. Bishops, Deans.

ELECTION OF MEMBERS OF PARLIAMENT, AND ELECTION COMMITTEES THEREON.

tit. Parliament.

ELECTION OF A VERDEROR OF THE FOREST, electione viridariorum forestæ.] A writ which lies for the choice of a verderor, where any of the verderors of the forest are dead, or removed from their offices, &c. It is directed to the sheriff; as appears by the ancient writs of this kind, the verderor is to be elected by the freeholders of the county, in the same manner as coroners. New Nat. Br. 366. See tit. Forest.

ELEEMOSYNA. Alms: dare in puram et perpetuam eleemosynam, to give in pure and perpetual alms, or frank-almoigne; as lands were commonly given in ancient times to religious uses. Cowel. See tits. Frank-almoigne, Tenure.

ELEEMOSYNÆ. The possessions belonging to the churches. Blount. ELEEMOSYNÆ.

ELEEMOSYNA REGIS, or ELEEMO-SYNA ARATRI. A penny which King Ethelred ordered to be paid for every plough in England towards the support of the poor; it was called Eleemosyna Regis, because it was first appointed by the king. Leg. Ethelred, c. 1.

ELEEMOSÝNARIA. The place in a religious house where the common alms were deposited, and thence by the almoner distri-

buted to the poor.

ELEEMOSYNARIUS. The almoner or peculiar officer who received the eleemosynary rents and gifts, and in due method distributed them to pious and charitable uses. There was such a chief officer in all the religious houses; and the greatest of our English bishops had anciently their almoners, as now the king hath. Lindwood's Provincial, lib. 1. tit. 12. See tit. Almoner.

ELEEMOSYNARY CORPORATIONS. Corporate bodies constituted for the perpetual distribution of the free alms or bounty of the

founder of them. See tit. Corporation.

ELEGIT, from the words in the writ elegit sibi liberari, because the plaintiff hath chosen this writ of execution. See 3 Comm. 418.] A writ of execution founded on the stat. Westm. 2. (3 Ed. 1.) c. 18. that lies for him who hath recovered debt or damages, or upon a recognisance in any court against one not able in his goods to satisfy the same, directed to the ELECTION OF ECCLESIASTICAL PERSONS. There sheriff, commanding him to make delivery of that have a voice in elections take any reward | damages are paid and satisfied; and during

that term he is tenant by elegit. Reg. Orig. | particularly in the former, should find the com-299: Co. Lit. 289.

Upon this writ the sheriff is to empanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to ap- what is found in the inquisition; and therefore, praise the same, and also to inquire as to his lands and tenements; and upon such inquire the inquisition, as to the commencement sition the sheriff is to deliver all the goods thereof, the sale is void. 4 Rep. 74. and chattels (except the beasts of the plough), and a moiety of the lands, to the party, and must return his writ in order to record such inquisition in that court out of which the elegit issued; and when the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety thereof to the plaintiff by metes and bounds. Cro. Car. 319.

Besides the value of lands, the inquisition must find the place and county where they are situate, and where the inquisition is taken; Dy. 208; the estate the defendant possesses in them; Moore, 8; and whether he is seised in severalty, as a joint tenant, or tenant in common. Hut. 16: Brownl. 38.

the debtor are made liable, as well as his personal estate, yet if the creditor takes out an elegit, and it appears to the sheriff that there are goods and chattels sufficient of the debtor's to satisfy the debt, he ought not to extend the lands. 2 Inst. 395. But an elegit executed upon goods only is not a fieri facias, for a fieri facias is executed by sale by the sheriff; but the elegit by the appraisement of the goods by a jury, and delivery to the party. 1 Sid. 184: 1 Lev. 92: 1 Keb. 105. 261. 465. 556. 692.

All writs of execution may be good, though not returned, except an elegit; but that must be returned, because an inquisition is to be taken upon it, and that the court may judge of the sufficiency thereof. 4 Rep. 65.74. if there be no lands, the sheriff need not return the inquisition. 2 Str. 874. Where chattels have been appraised and delivered to the plaintiff, the sheriff should return to the writ, that he delivered the goods at a reasonable price fixed by the jury. Dy. 100. a. pl. 71.

The sheriff may extend under an elegit

lands in ancient demesne; Hob. 47: Moore, 211; Brown, 234: or rent charges; Moore, 32; and by virtue of the 29 Car. 2. c. 3. § 10. estates held in trust for the defendant; but only such as are so held at the time of execution of the writ, for it does not relate back to the judgment. Com. Rep. 226.

A term of years may either be extended, that is, a moiety thereof may be set out and delivered to the plaintiff at an annual value, as part of the lands of the defendant; or the lands in more counties than one, and the entirety of it may be delivered to him as part of the defendant's chattle property, being first extends the lands upon the elegit, and afterappraised by the jury at a gross sum. 2 Inst. wards files the writ, he cannot after that suc 395: 8 Co. 171: Dalt. 137. But whether ex- out an elegit into the other counties; but he tended as land, or appraised and delivered as may immediately after entry of the judgment a chattel, the inquisition in both cases, and upon the judgment-roll, award as many ele-

mencement and duration of the term with certainty. 2. Saund. 68. c: Cro. Eliz. 584.

And the sheriff cannot sell any thing but

Copyhold lands cannot be extended upon an elegit (but if the inquisition comprehends both freehold and copyhold, it may be good as to the former); 3 D. & R. 603: 2. B. & C. 242; or a term of years of copyhold lands made by license of the lord; 1 Rol. Ab. 88; or a rent seck; Cro. Eliz. 656; or it seems an adowson in gross; Gilb. Execution, 39 (but see 3 P. W. 401); or the glebe of a parsonage, or vicarage. or a churchyard; Gilb. Execution, 40: Jenk. 207; although it is said the lands of a bishop may be extended. Dalt. 136. Nor can a tenement that is not grantable over be extended, such as the office of filazer. Dy. 7.

The sheriff is not bound to deliver a mojety of each particular tenement and farm, but But though, by this statute, the lands of only certain tenements, &c., making in value a moiety of the whole. 2. Dougl. 473.

The sheriff's return to an elegit stated that he had delivered an equal moiety of a house; held, that this return was void for not setting out the moiety by metes and bounds, and that the objection might be taken at Nisi Prius to an ejectment brought on the elegit. 1. B. & A. 40.

It has been ruled, that if more than a moiety of the lands is delivered on an elegit by the sheriff, the same is void for the whole. Sid. 91: 2 Salk. 563.

Where it appears that all the defendant's lands had been extended on an elegit, the inquisition is altogether void, and there needs no application to set it aside. 2 B. & C. 232. 1

If two persons have each of them a judgment against one debtor, and he who hath the first judgment brings an elegit, and hath the moiety of the lands delivered to him in execution; and then the other judgment creditor sues out another elegit, he shall have only a moiety of that moiety which was not extended by the first judgment. Cro. Eliz. 483.

But where two writs of elegit, tested the same day and term, were delivered to the sheriff together; held that the whole of the defendant's lands might be taken, whether the writs were at the suit of the same party or

Doe. v. Creed, 6 Bingh. 327.

When lands are once taken into execution on an elegit, and the writ is returned and filed, the plaintiff shall have no other execution. 1 Lev. 92. And if the defendant hath plaintiff awards an elegit to one county, and gits into as many counties as he thinks fit,1 and execute all or any of them at his plea- wholly levied, he may bring ejectment or sure. 1 Lil. Abr. 509: Cro. Jac. 246.

A man had lands in execution upon an elegit, and afterwards moved for a new elegit, upon proof that the defendant had other lands, not known to the creditor at the time when the execution was sued out; and it was adjudged, that if he had accepted of the first by the delivery of the sheriff, he could not afterwards have a new elegit; but when the sheriff returns the writ, he may waive it, and then have a new extent. Cro. Eliz. 310: 1 Nels. Abr. 699. sed qu.

If the defendant dies in prison, so that there is no execution with satisfaction, the plaintiff shall have an elegit afterwards. 5 Rep. 86. And if all the lands extended on an elegit be evicted by a better title, the plaintiff may take out a new execution. 4 Rep. 66. Where one having land by elegit is wholly evicted out of it, he may have a farther execution, either against the defendant's lands or goods, as he might have had at first; save only he must bring a scire facias against the defendant, or him that comes in under him; but if the eviction be of part of the land, or for a time only, so that the plaintiff may take his full execution by holding it over, there he cannot have any new execution by the stat. 32 H. 8. c. 5. 2 Shep. Abr. 115.

Where an elegit is sued upon a judgment, the levying of goods thereon for part only is no impediment, but the plaintiff may bring another elegit pro residuo, and take the lands. 1 Lev. 92. On a nihil returned upon an elegit, there may be brought a capias ad satisfaciendum, or fieri facias. 1 Leon. 176. And an elegit may be sued after a fieri facias returned nulla bona, or where a part is levied by it; and after a capias ad satisfaciendum returned non est inventus. Hob. 57. An elegit may be revived by a scire facias. Loft, 651.

A person in execution was suffered to escape, and then he died; the land which he had at the time of the judgment may be extended by elegit, upon a scire facias brought against his heir as ter-tenant. Dyer, 271.

It would seem that a tenant in elegit may enter without a previous judgment in ejectment under the legal possession given him by the sheriff. 6 Taunt. 202. But where he cannot obtain the actual possession by peaceable means, he of course must bring an ejectment. If at the time of the judgment the elegit debtor is entitled to the whole property claimed in ejectment by the elegit creditor, other persons who with the elegit debtor are in possession when the ejectment is brought, must prove their title; if they do not, the elegit creditor shall have judgment against all. 2 C. & J. 71.

A tenant in elegit has not a freehold but a chattel interest only, which goes to his executors. Co. Lit. 42. 43: 2 Inst. 396: 2

Comm. 161.

Vol. I.— 80

Where he is evicted before the elegit is may have a scire facias and re-extent by the 32 H. 8. c. 5. See Co. Lit. 289. b. 290. a: Cro. Jac. 338. Also by 13 Ed. 1. c. 18. he may recover possession by writ of novel disseisin, and after by writ of redisseisin, if need be; but these writs have long been disused, and are by the 3 and 4 W. 4. c. 27, speedily to be

Or he may bring action of tresspass, or reenter and hold over till satisfied; but after satisfaction received, the defendant may enter on the tenant by elegit. 4 Rep. 28. 67.

On tenant by elegit's accounting, if the money recovered by the plaintiff is levied out of the lands, the defendant shall recover his land; and the court will refer it to the master to ascertain an account of what has been received. 5 D. & R. 612: S. C. 3 B. & C. 733.

Tenants by elegit, statutes merchant, &c., are not punishable for waste by action of waste; but the party against whom execution is sued is to have a writ of venire facias ad computandum, &c., and there the waste shall be recovered in the debt; though it is said there is an old writ of waste in the register for him in reversion, against tenant by elegit committing waste on lands which he hath in execution. 6 Rep. 37: New Nat. Br. 130.

An elegit creditor cannot hold against an antecedent estate. 3 Swanst. 118. See further

tits. Estate, Execution, Extent.

ELF-ARROWS, were flint-stones sharp-ened on each side in shape of arrow-heads, made use of in war by the ancient Britons; of which several have been found in England, and greater plenty in Scotland, where it is said the common people imagine they drop from the clouds, or are made by the elves or

ELISORS, electors.] In cases of challenge to the sheriff and coroners for partiality, &c. the venire to summon a jury shall be directed to two clerks of the court, or two persons of the county named by the court and sworn. And these two, who are called elisors, shall indifferently name or choose the jury; and their return is final, no challenge being allowed to their array. Fortesc. de Laud. leg. c. 25 : Co. Lit. 158. See tit. Jury.

ELKE. A kind of yew to make bows of.

Stat. 32 H. 8. c. 9.

ELOINE, from the Fr. esloisner.] To remove or send a great way off; in this sense it is used where it is said that if such as are within age be eloined, so that they cannot come to sue personally, their next friends shall be admitted to sue for them. Stat. 13. Ed. 1. c. 15.

ELONGATA, is a return of the sheriff in replevin, that cattle are not to be found, or are removed, so that he cannot make deliverance, &c. 2 Lil. Abr. 454. 458.

ELONGATUS. A return made by the sheriff to a writ de homine replegiando, which lies to replevy a main out of prison, or out of Merley, Mos. C. C. R. 343. But it is other. the custody of any private person (in the same manner as chattels taken in distress in a single instance; he need not be a may be replevied), upon giving security to the sheriff that he shall be forthcoming to answer any charge against him. And if the man be conveyed out of the sheriff's jurisdiction, the latter may return that he is eloigned, elongatus; whereupon a process issues (called a capias in withernam), to imprison the defendant himself, without bail or mainprize, until he produces the party. See 2 Comm. 129.

ELOPEMENT, from the Belg. E'e matri. monium et loopen currere, or more probably from the Sax. geleoran, to depart, the Saxon r being easily perverted from its shape into a p. Blount.] Is where a married woman, of her own accord, goes away, and departs from her husband, and lives with an adulterer. See

tits. Adultery, Baron and Feme.

ELY. A royal franchise, or county-pala- torney, Banker, Broker, Factor,

tine. See tit. Counties-palatine.

jurisdiction within the isle, though exercising Strictly speaking, the word signifies the profits jura regalia there. A writ of fieri facias, directed, in the first instance, to the bailiff of emblements extends not only to corn sown, the Isle of Ely, out of K. B., is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. Process issued out of the courts at Westminster into the isle, goes, in the first instance, to the sheriff of although they spring from old roots; because Cambridgeshire, who, thereupon, issues his they are manured yearly and require cultivamandate to the bailiff of the franchise. 3 East's Rep. 128.

EMBARGO. A prohibition upon shipping not to go out of any port on a war breaking

out, &c. See Imbargo.

EMBASSADOR. See Ambassador.

EMBEZZLEMENT. By clerks and servants. By the stat. 7 and 8 G. 4. c. 29 § 47. any clerk or servant, or any person employed in that capacity, receiving any chattel, money, or valuable security, on account of his master, and embezzling the same shall be deemed to have stolen the same, and may be transported for fourteen years, or imprisoned, &c. By § 48. distinct acts of embezzlement, not exceeding three, committed within six calendar months from the first to the last, may be God, or of the law, between the period of sowcharged in the same indictment; and the charge may be of embezzling money, without | Touch. 244. For if the estate be put an end specifying any particular coin, which charge shall be sustained by proofs of any coin, &c., or portion thereof, being embezzled, although tenant-at-will, he shall not take his emblesuch piece of coin, &c. may have been delivered to him in order that some part of the lessees to suffer for acts over which they have value thereof should be returned to the party delivering the same, and such part shall have been delivered accordingly.

If the property embezzled has been in the possession of the master, or any other of his them were he in the actual occupation of the servants, the case is not within the above land. statute. Rex v. Murray, Moo. C. C. R. 276. neither is an umbezzlement of money by a and cases on the subject. servant not authorized to receive it. Rex. v.

wise if he has been employed to receive it general servant. Ry. & M. 259: Rex v. Hughes. Moo. C. C. R. 370. Where, however, a person is neither a clerk nor servant to one who in a single instance requests him to receive money, embezzles the money so received, he is not punishable under the statute. Rex v. Nettleton, 1 Ry. & M. 259.

And where a servant is sent to do a particular thing, for which he is to receive a specified sum, and not less, and he is paid a less sum and appropriates it, this is not an embezzlement, for he does not receive the money by virtue of his employment. 4 C.&

P. 390.

As to embezzlements by bankers, merchants brokers, attorneys, or other agents, see 7 and 8 G. 4. c. 29. § 49. and tits. Agent, At-

EMBLEMENTS, from the Fr. emblavance The Bishop of Ely has not a palatinate de bled, corn sprung or put up above ground.] of land sown with corn; but the doctrine of but to roots planted, or other annual artificial profits. Cro. Car. 515. Thus hemp, flax, saffron: God. Orp. Leg. part 2. c. 13. 2 Freem. 510: Harg Co. Lit. 556; and melons, cucumbers, artichokes, &c., are emblements. Also hops, tion. Harg. Co. Lit. 55. b. note 364. And so of turnips, carrots, &c. Law of Test. 380: Cro. Car. 515. It is otherwise of fruit-trees, grass, and the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth. Co. Lit. 55, 56; 1 Rol. Abr. 728: 2 Comm. 123. It seems, however, that artificial grasses, as clover, saintfoin, &c., by reason of the greater care and labour requisite for their production, are within the rule of emblements. 1 Rol. Abr. 728 : Hob. 132 : 2 Freem. 210: 9 Vin. Ab. 368. MS. note by Mr. Serj. Hill.

Those only have a right to emblements who possess an uncertain estate or interest in land, which is determined either by the act of ing and the severance of the crop. Shep. to by the party's own act, whether he be tenant for the life of himself or of others, or a ments. But it would be unjust were underno control; and therefore where a tenant for life determines his interest by forfeiture, or otherwise, his under-tenant shall have emblements, though he would not be entitled to

The following are the principal authorities

Where tenant for life sows the land, and

dies, his executors shall have the emblements, I taking the profits, the law will not suffer him and not the lessor or him in reversion, by to be a loser by it. Co. Lit. 55. b.: 2 Comm. reason of the uncertainty of the estate. Cro. Eliz. 463. And if a tenant for life plants hops, and dies before severance, he in reversion shall not have them, but the executors of tenant for life. Cro. Car. 515. If tenant for years (if he so long live) sow the ground, and die before severance, the executor of the lessee shall have the corn; and where lessee for life leases for years, if the lessee for years sow the land, and after lessee for life dies before severance, the executor of lessee for years shall have the emblements. 2 Danv. Abr. 765.

So it is also if a man be tenant for the life of another, and cestui que vie (he on whose life the land is held) dies after the corn sown, the tenant pur auter vie shall have the emble-The same is also the rule if a lifeestate be determined by the act of law. Therefore if a lease be made to husband and wife during coverture (which gives them a de-terminable estate for life), and the husband sows the land; and afterwards they are divorced d vinculo matrimonii, the husband shall in this case, have the emblements; for the sentence of divorce is the act of the law. 5 Rev. 116.

his wife, and sow the land, and after she dies before severance, he shall have the emblements. Dyer, 316: 1 Nels. Abr. 701. And where the wife hath an estate for years, life, or in fee, and the husband sows the land, and dieth, his executors shall have the corn. 1 Nels. 702. But if the husband and wife are joint-tenants, though the husband sow the land with corn, and die before ripe, the wife, and not his executors, shall have the corn, she being the surviving joint-tenant. Co. Lit.

sown, she shall have the emblements, and not the heir. 2 Inst. 81. And a tenant in dower may dispose of corn sown on the ground; or it may go to her executors, if she die before severance. 2 Inst. 80, 81.

A jointress, however, is not entitled to the crop sown at the time of her husband's death; because a jointure is not a continuance of the estate of the husband like dower; nor on the death of a jointress are her representatives entitled to emblements. See Cruise's Digest, VII. c. 1.

By the particular provisions of stat. 28 H. 8. c. 11. if a parson sows his glebe, and dies, his executors shall have the corn; and such parson may by will dispose thereof. 1 Rol. see for years, upon condition that if he com-Abr. 655.

ments, for the same reason as regulates other waste, the lessor shall have the corn. Co. Lit. cases, viz. the uncertainty of his interest. 55. And where a lord enters on his tenant Since he could not know when his landlord for a forfeiture, he shall have the corn on the would determine his will, and therefore could ground. 4 Rep. 21. And where a lease was

146.

If tenant by statute-merchant sows the land, and before severance a casual profit happens, by which he is satisfied, yet he shall have the corn. Co. Lit. 55. Lands sown are delivered in execution upon an extent, the person to whom delivered shall have the corn on the ground. 2 Leon. 54. And judgment was given against a person, and then he sowed the land, and brought a writ of error to reverse the judgment; but it was affirmed, and adjudged, that the recoverer shall have the corn. 2 Bulst. 213.

If a disseisor sows the land, and afterwards cuts the corn, but before it is carried away the disseisee enters, the disseisee shall have the corn. Duer, 31: 11 Rep, 52. A person seised in fee of land dies, having a daughter, and his wife privement enseint with a son; the daughter enters and sows the land, and before severance of the corn the son is born; in this case the daughter shall have the corn, her estate being lawful, and defeated by the act of God; and it is for the public good that the land should be sown. Co. Lit. 55.

A man seised in fee simple sows land, and If a husband holds lands for life, in right of then devises the land by will, and dies before swife, and sow the land, and after she dies severance; the devisee shall have the corn, and not the devisor's executors. Winch. 52: Cro. Eliz. 61. If a person devises his lands sown, and says nothing of the corn, the corn shall go with the land to the devisee; and when a man seised of land, in fee or in tail, sows it, and dies without will, it goes to the executor, and not the heir. 10 Ed. 4. 1 b.: 21 H. 630. a.: 37 H. 635. b. A devisee for life dies, he in remainder shall have the emblements with the land. Hob. 132.

But if an estate for life be determined by When a widow is endowed with lands the tenant's own act (as by forseiture for wn, she shall have the emblements, and not waste committed, or if a tenant during widowhood thinks proper to marry); in these and similar cases, as in that of a tenant at will determining his own tenure, the tenants shall not be entitled to take the emblements. 1 Inst. 55. So when a parson resigns, he is not entitled, but his lessee is. 2 B. & A. 470.

If tenant for years sows ground, and before his corn is severed, the term, which is certain, expires, the lessor or he in reversion shall have the emblements; but he must first enter on the lands. 1 Lil. Abr. 511. A lessee for life or years sows the land, and after surrenders, &c. before severance, the lessor shall have the corn. 2 Danv. 764. If there be lesmit waste, &c. his estate shall cease; if he A strict tenant at will is entitled to emble- sows the ground with corn, and after doth make no provision against it, and he has sown granted on condition that if the lessee should the land on a reasonable presumption of contract a debt upon which he should be sued

issue, the lessor should re-enter as of his for- not do it; for the bare writing a letter to a mer estate: the lessor did re-enter after judgment, and it was held he was entitled to the

emblements. 7 Bing. 133.

Though if a feme copyholder for her widowhood sows the land, and before severance takes husband, so that her estate is determined, the lord shall have the emblements; yet if such a feme copyholder, durante viduitate, leases for one year according to custom, and the lessee sows the land, and afterwards the copyholder takes husband, the lessee shall have the corn. 2 Danv. 764.

As the privilege is founded on public policy, and the justice of recompensing the party who suasions, entreaties, money, entertainments. has been at the expense of cultivating the and the like. The punishment for the person land, emblements cannot be claimed by a embracing (the embraceor), is by fine and person although he has an estate which is uncertain in duration, if he is not the individual who sowed the ground, but the charge was incurred during the existence of a pre-vious estate. Therefore if A. seised of land, sows it, and then conveys it to B. for life, remainder to C. for life; and B. dies before the corn is reaped, B.'s executors shall not have it, but it shall go with the land to C .: for here the reason of industry and charge fails. Hob. 132: Winch. 31: Cro. Eliz. 61. 463. So where a tenant for life sows land, and afterwards grants over his estate, the executor of the grantee, who dies before the corn is severed, shall not have emblements; and if a man sow land and let it for life, and the lessee for life die before the corn be reaped, the reversioner, and not his executor, shall have it; but if he had sown it himself it would have been otherwise. Cro. Eliz. 464.

Where there is a right to emblements, ingress, egress, and regress, are allowed by law to enter, cut, and carry them away, when the estate is determined, &c. 1 Inst. 56.

And if a party entitled to emblements grant them to another, the grantee may cut and take them away after the death of the grantor. Shep. Touch. 244. The right to emblements, however, does not give a title to the exclusive occupation of the land; and it would seem, but the point is by no means clear, that if the executors occupy till the corn or other product is ripe, the reversioner may maintain an action for the use and occupation of the land. See Plowden's Queries, 239.

EMBLERS DE GENTZ, Fr.] Carrying

off people. Rot. Parl. 21 Ed. 3 n. 62.

EMBRACEOR, Fr. embrasour.] He that, when a matter is in trial between party and party, comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labours the jury, or stands in the court to survey and overlook them, whereby they are awed or influenced, or put in fear or doubt of the matter. But lawyers, attorneys, &c. may speak in the emendatio panni, the power of looking at the case for their clients, and not be embraceors; assize of cloth, that it be of just measure also the plaintiff may labour the jurors to ap. emendatio panis et cervisia, the assizing of

to judgment, and a writ of execution should pear in his own cause, but a stranger must person, or parol request for a juror to appear not by the party himself, hath been held within the statutes against embracery and main. tenance. Co. Lit. 369: Hob. 294: 1 Saund. 391. If the party himself instruct a juror, or promise any reward for his appearance, then the party is likewise an embraceor. And a juror may be guilty of embracery, where he by indirect practices gets himself sworn on the tales, to serve on one side. 1 Lil. 513. See post, Embracery. See also tits. Jury, Attaint. EMBRACERY. An attempt to influence

a jury corruptly to one side by promises, perimprisonment. 4 Comm. 140. See 1 Hawk. P. C. c. 85. and the preceding title.
The stat. 6. G. 4. c. 50. § 61. enacts and de-

clares, that notwithstanding any thing therein contained, every person who shall be guilty of the offence of embracery, and every juror who shall wilfully and corruptly consent thereto, shall be respectively proceeded against by indictment or information, and be punished by fine and imprisonment, in like manner as every such person and juror might have been before the passing of the act.

EMBRING DAYS, from embers, cineres, so called either because our ancestors, when they fasted, sat in ashes, or strewed them on their heads.] Those days which the ancient fathers called Quatuor tempora jejunii, and of great antiquity in the church; they are observed on Wednesday, Friday, and Saturday next after Quadragesima Sunday (or the first Sunday in Lent), after Whitsunday, Holyroodday in September, and St. Lucy's day, about the middle of December. These days are mentioned by Britton, c. 53. and other writers; and particularly in the stat. 2 and 3 Ed. 6. c. 19. Our almanacs call them the Ember

EMBROIDERY. See tits. Manufactures, Navigation Acts.

EMENDALS, emenda.] An old word still made use of in the accounts of the Society of the Inner Temple; where so much in emendals at the foot of an account, on the balance thereof, signifies so much money in the bank or stock of the houses, for reparation of losses or other emergent occasions: quod restaurationem damni tribuitur. Spelm.

EMENDARE, emendam solvere.] To make amends for any crime or trespass committed. Leg. Edw. Confess. c. 35. Hence a capital crime, not to be atoned by fine, was said to be

inemendabile. Leg. Canut. p. 2.

EMENDATIO, hath been used for the power of amending and correcting abuses, according to stated rules and measures, as

bread and beer, &c., privileges granted to lords | ENFRANCHISEMENT, Fr. from franof manors, and executed by their officers apchise, i. e. libertas.] Is when a person is inpointed in the court-leet, &c. Paroch. Antiq. corporated into any society or body politic, 196.

EMPANEL. See Impanel.

EMPARLANCE. See Imparlance.

EMPEROR, imperator.] The highest ruler of large kingdoms and territories; a title anciently given to renowned and victorious generals of armies, who acquired great power and dominion. This title was formerly given to the kings of England, as appears by a charter of King Edgar.

ENBREVER, Fr.] To write down in short.

Brit. 56.

ENCAUSTUM. See Incaustum. ENCHANTMENT. See Conjuration.

ENCHESON, old Fr.] An occasion, cause, or reason, wherefore any thing is done. See the ancient Statutes.

ENCROACHMENT. See Increachment. ENDEAVOUR. Where one who has the use of his reason endeavours to commit felony, &c., he shall be punished by our laws, but not to that degree as if he had actually committed it: as if a man assault another on the highway, in order to a robbery, but takes nothing from him, this is not punished as a felony, because the felony was not accomplished; the act does not extend to a gin or trap for though, as a misdemeanor, it is liable to fine vermin. And see tits. Frameworked-knitted and imprisonment. 3 Inst. 68, 69, 161: 11 Rep. 98. See tits. Intendment, Malicious cious.) Mischief, Robbery.

ENDOWMENT. suring of dower on a woman. It is some- destroy, &c., any steam-engine, or other entimes used metaphorically for the settling a gine, used in conducting the business of any provision upon a parson, or building of a mine, is a capital felony. See tit. Steam-enchurch for chapel; and the severing a suffi- gine cient portion of tithes, &c. for a vicar, towards his perpetual maintenance, when the benefice is appropriated. See stats. 15 R. 2. c. 6: 4 H.

4. c. 12. See Dower, Tithes. ENEMY, inimicus.] Is properly an alien or foreigner who, in a public capacity and in Denmark, but kept some Danes behind to be an hostile manner, invades any kingdom or country; and whether such persons come the preservation of his Danes (who were of ten privately made away with by the English), English traitors, they cannot be punished as traitors, but shall be dealt with by martial should be tried for the murder; or, if he law. H. P. C. 10. 15. But the subjects of a escaped, the town or hundred where the fact foreign prince coming into England, and liv- was done was to be amerced sixty-six marks ing under the protection of the king, may, if to the king: so that after this law, whenever they take up arms, &c. against the govern- a murder was committed, it was necessary to ment, be punished as traitors, not as alien en- prove the party slain to be an Englishman, emies. If a prisoner be rescued by enemies, that the town might be exempted from the the gaoler is not guilty of an escape, as he amercement; which proof was called Enwould have been if subjects had made the rescue, when he might have a legal remedy against them. See tits. Alien, Escape; and time accounted Francigena, which word comas to adhering to and succouring the king's enemies, see tit. Treason.

ENFRANCHISE, Fr. enfranchir.] make free, or incorporate a man into any society, &c. It is also used where one is made a free denizen, which is a kind of incorpora-

tion in the commonwealth.

and it signifies the act of incorporating. He that by charter is made a denizen, or freeman of England, is said to be enfranchised, and let into the general liberties of the subjects of the kingdom; and he who is made a citizen of London, or other city, or free burgess of any town corporate, as he is made partaker of those liberties that appertain to the corporation, is, in the common sense of the word, a person enfranchised. And when a man is enfranchised into the freedom of any city or borough, he hath a freehold in his freedom during life; and may not, for endeavouring any thing only against the corporation, lose and forfeit the same. 11 Rep. 91. See tit. Corporation. A villein was said to be enfranchised when he was made free by his lord, and rendered capable of the benefits belonging to free-

ENGINE. See Deer-dredge. ENGINES. By 7 and 8 G. 4. c. 18. the setting any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict bodily harm with intent to destroy or injure a trespasser, is a misdemeanor; but Pins, Furnaces, Machines, Mischief (mali-

By 7 and 8 G. 4. c. 30. § 7. maliciously The bestowing or as- pulling down, &c. or damaging with intent to

ENGLECERY, or ENGLESCHERIE, Engleceria.] An old word signifying the being an Englishman. When Canutus the Dane came to be King of England, he, at the request of the nobility, sent back his army into glecery, or Engleschire. And whereas if a person were privately slain, he was in ancient prehended every alien, especially the Danes: it was therefore ordained, that where any person was murdered, he should be adjudged Francigena, unless Englicery were proved, and that it was made manifest he was an Englishman. The manner of proving the person killed to be an Englishman was by two

witnesses who knew the father and mother, before the coroner, &c. Bract. lib. 3. tract. 2 cap. 15: Fleta. lib. 1 cap. 30: 7 Rep. 16. This Englecery, by reason of the great abuses and trouble that afterwards were perceived to grow by it, was utterly taken away by stat. 14 Ed. 3. st. 1. c. 4. Sec 4 Comm. 195: and this Dict. tit. Murder.

ENGLAND. By the stat. 20 G. 2. c. 42. & 3. it is declared that in all cases where the kingdom of England, or that part of Great Britain called England, bath been or shall be mentioned in any act of parliament, the same has been and shall from henceforth be deemed and taken to comprehend and include the dominion of Wales and town of Berwick-upon-Tweed. 20 G. 2. c. 42. § 3.

Although this estab-ENGLAND, BANK OF. lishment has already been mentioned under the title Bank of England, it is again introduced under the present head for the purpose of noticing the recent act of the 3 and 4 W. 4. c. 98, by which its charter has been

renewed.

Sec. 1. The Governor and Company of the Bank of England are to enjoy such exclusive privilege of banking as is thereby given as a body corporate for the period and upon the terms after mentioned.

Sec. 2. During the continuance of such privilege, no banking company, exceeding six persons, is to issue bills or notes payable on demand in London, or within sixty-five miles

thereof.

But by § 3. any company or partnership, although consisting of more than six persons, may carry on the business of banking in London, or within sixty-five miles thereof, provided it does not berrow or take up money on bills or notes payable on demand, or at any less time than six months.

Sec. 4. After the 1st of August, 1834, all notes of the Bank of England, payable on demand, issued in any part of England out of London, are to be made payable at the place

where issued.

Sec. 5. Upon a year's notice, given within six months after the expiration of ten years from the 1st of August, 1834, and repayment of the debt due to it from the public, in the manner thereinafter stipulated, in the event of such notice being deterred until after the 1st of August, 1855, the exclusive privileges

of the Bank are to cease. Sec. 6. After the 1st of August, 1834, Bank notes are to be a legal tender for all sums above five pounds, so long as the Bank shall pay on demand such notes in legal coin; provided no such notes shall be deemed a legal tender by the Bank of England or any branch bank thereof; the Governor and Company are not to be liable to pay at any branch bank notes not made specially payable there; but bond, damages, &c., are said to be entire when shall be liable to pay at the Bank of England they cannot be divided or apportioned. all notes of the Governor and Company, or of any branch thereof.

Sec. 8. An account of the bullion and securities of the Bank, and of notes in circulation. and deposits, is to be transmitted weekly to the Chancellor of the Exchequor; such accounts to be consolidated every month, and an average state of the Bank accounts of the precoding three months therefrom made, is to be published every month in the London Ga.

Sects. 9 and 10. One-fourth part of the debt of 14.656,500l., due from the public to the Bank is to be repaid, and the capital stock of the Bank (in case it shall be so determined at a General Court of Proprietors to be held before the 5th of October, 1834) reduced from 14,533,000l. to 10,914,750l.

Sec. 43. The Bank, in consideration of the exclusive privileges given by the act, is to deduct the annual sum of 120,000l., from the sums allowed for the management of the na-

tional debt.

Sec. 14. The provisions of the 39 and 40 G. 3. are to remain in force, except as thereby altered: at any time upon twelve months notice after the 1st of August, 1835, and repayment of the debt then due from the public to the Bank, its exclusive privileges are to determine.

ENGLISH. Pleas, records, bonds, and proceedings, in courts of justice, to be in Eng. lish. Stat. 4. G. 2. 26. And see stats. 5 G. 2. c. 27: 6 G. 2. c. 14: and this Dict. tits.

Pleading, Process, &c.

ENGRAVERS. See tit. Literary Property. ENGRAVING. It is no piracy of an engraving to make another from the original picture. 2 Stark. 548. See tit. Literary Property.

ENGROSSER. See Ingrosser, Forestaller. To ENHANCE. To raise the price of goods or merchandize. See tit. Forestaller.

ENICIA PARS. See Esnecy.

ENPLEET. Anciently used for implead, -They may enpleete and be enpleeted in all courts. Mon. Ang. tom. 2. fo. 412.

ENQUESTS. See Inquest.

ENQUIRY, Writ of. See tit. Writ. ENROLMENT OF DEEDS. See tit.

Deed, IV. ENSIENT, or ENSEINT. The being

with child. Law Fr. Dict.

ENSIENTURE, or ENSIENCY, of any woman condemned for a crime, is no ground to stay judgment; but it may be afterwards alleged against execution. 2 Hale's Hist. P. C. 413.

ENTAIL. See tit. Tail.

ENTENDMENT. See Intendment. ENTERPLEADER. See Interpleader.

ENTIERTE, from the French entierte, entireness.] Is a contradistinction in our books to moiety, denoting the whole; and a

ENTIRE TENANCY. Contrary to several tenancy, and signifying a sole possession in one man; whereas the other is a joint or com- | In order to regain possession of lands by mon possession in two or more. Brook.

itus. | Signifies the taking possession of lands, into it, and say these words :- I do here enter, or tenements, where a man hath title of entry; and take possession of this house. But if the and it is also used for a writ of possession. door be shut, then set your foot on the ground-There is a right of entry, when the party set, or against the door, and say the before claiming may for his remedy either enter into the land, or have an action to recover it; and land, and say, There enter and take possession a title of entry, where one hath lawful entry of this land. It another do it for you, he given him in the lands which another hath, must say, I do here enter, &c., to the use of but has no action to recover till he hath en- A. B. And it is necessary to make it before tered. Plowd. 558: 10. Rep. 45: Finch's witnesses, and that a memorandum be made Law, 105.

An actual entry is where a man enters to retain his right of entry, and to prevent its ful; this settles the possession before agreebeing taken away by a descent east, must ment to the parties: though it is otherwise (previous to the 32 H. 8. c. 33. hereafter no-where a person enters to the use of one whose ticed) have repeated his claim once in the entry is not lawful; for this vests nothing in space of every year and day, which was called him till agreement, and then he shall be a continual claim. Dit. 421, 22, 23. But by the disseisor. 2 Dane. 787. If two joint-tenants 3 and 4 W. 4. c. 27. § 11. it is enacted, "that are disseised, and the disseisor aliens, and one no continual or other claim upon or near any joint-tenant enters upon the alience to the use

and summary remedy against certain species she gains the part of her companion by of injury by ouster, used by the legal owner abatement; and it shall not settle any poswhen another person, who hath no right, hath session in the other. Co. Lit. 243. previously taken possession of lands or tenements. In this case the party entitled may only of the five species of ouster, viz. abatemake a formal, but peaceable, entry thereon, ment, intrusion, and disseisin; for as in these declaring that thereby he takes possession; the original entry of the wrongdoer was unwhich notorious act of ownership is equivalent lawful, they may therefore be remedied by to a fædal investiture by the lord; or he may the mere entry of him who hath right. But enter on any part of it in the same county, upon a discontinuance or deforcement, the declaring it to be in the name of the whole, owner of the estate cannot enter, but is dri-Lit. § 417. But if it lie in different counties, he must make different entries; for the notoriety of such entry or claim to the pares or freeholders of Westmoreland is not any notoriety. to the pares or freeholders of Sussex. Also if there be two disseisors, the party disseised must make his entry on both; or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both. Co. Lit. 252. For as their seisin is owner. But if the owner thinks it more exdistinct, so also must be the act which devests pedient to suppose or admit such tenant to that seisin.

of entry on the estate, and thereby makes him complete owner, and capable of conveying intrusion, or disseisin, where entries are geit from himself by either descent or purchase. nerally lawful, this right of entry might, be-Co. Lit. 15.

entry, &c., the manner of entry is thus: If it ENTRY, Fr. entrée, i.e. ingressus, intro- be in a house, and the door is open, you go of it. Lit. 385. Co. Lit 237, 238.

If he who hath a right of entry into a freeinto and takes possession of any lands, hold, enters into part of it, it shall be ad-&c., either in his own right or as the judged an entry into all possessed by one attorney of another. Formerly there might tenant; but if there be several tenants poshave been an entry in law; as, if a claim-sessed of the freehold, there must be several ant were deterred from entering by men- entries on the several tenants. 1 Lil. Abr. aces or bodily fear, he might approach the 515, 516. Special entry into a house with estate as near as he dared, and by word which lands are occupied, claiming the whole, claim the lands to be his, which claim had the is a good entry as to the whole house and same effect in all respects as an actual entry, lands. Ihid. If a husband enters to the use Lit. 419. This claim was good only for a year of his wife; or a man enters to the use of an and a day; and therefore a person who wished infant, or any other, where the entry is lawland shall preserve any right of making an of both; this settles the freehold in both of entry or distress, or of bringing an action." them. Ibid. 788. But if one copareener, Extry may be defined to be an extrajudicial &c. enters especially claiming the whole land.

This remedy by entry takes place in three ven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be everthrown by the mere act or entry of the claimant. Yet a man may enter on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession; which may be defeated, like a tenancy at will, by the mere entry of the have gained a tortious freehold, he is then Such an entry gives a man seisin, or puts remediable by writ of entry, ad terminum qui into immediate possession him that hath right preteriit. 1 Inst. 57. 237, 8. See tit. Disseisin.

On the other hand, in cases of abatement, fore the recent act of the 3 and 4 W. 4 c. 27. scent. Descents which took away entries cording to stat. 5 R. 2. st. 1. c. 8. in a peaceawhere when any one, seised by any means ble and easy manner, and not with force or whatsoever of the inheritance of a corporeal strong hand. For if one turns or keeps anhereditament, died, whereby the same de- other out of possession forcibly, this is an inscended to his heir: in that case, however jury of both a civil and a criminal nature, feeble the right of the ancestor might be, the The civil is remedied by immediate restituentry of any other person who claimed title tion, which puts the ancient possessor in statu to the freehold was taken away, and he could not recover possession against the heir by this summary method, but was driven to his action to gain a legal seisin of the estate. Lit.

In general, therefore, no man could recover relating to this subject may be found of use. possession by mere entry on lands which another had by descent. Yet this rule had some out entry or claim: also a remainder of an exceptions; especially if the claimant were estate of freehold cannot cease, without entry, under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases there was no neglect or laches in the claimant, and therefore no descent should bar or take away his entry. Co. Lit. 246. And this title of taking away entries by descent was still further narrowed by stat. 32 H. S. c. 33. which enacted, that if any person disseised, or turned another out of possession, no descent to the heir of the disseisor should take away the entry of him that ress termini; but he may not take a release to had right to the land, unless the disseisor had tenlarge his estate; or bring trespass, &c. till been in peaceable possession for five years next after the disseisin without entry or claim gain and sell in a lease, &c. for considerafrom him having lawful title. But the statute, for feodal reasons, did not extend to any feoffee or donee of the disseisor, mediate or immediate. Ibid. 256.

Now by the 3 and 4 W. 4. c. 27. § 39. it is provided that no descent cast which may happen or be made after the 31st of December, 1833, shall toll or defeat any right of entry or

action for the recovery of the land.

By the statute of limitations, 21 Jac. 1. c. 16. it was enacted, that no entry should be made by any man upon lands, unless within twenty years after his right accrued. And by stat. 4 and 5 Anne, c. 19. no entry should be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action were thereupon commenced within one year after, and prosecuted with effect.

(which word by § 1. extends to body politic, corporate, or collegiate) shall make an entry vests without entry, a reversion will vest to recover any land but within twenty years without claim. 2 Mod. Rep. 7, 8. A bare next after his right, or the right of the person entry on another, without an expulsion, through whom he claims, accrued.

have been in possession of any land within 3 Salk. 135. the meaning of the act, merely by reason of

having made an entry thereon.

or eleemosynary corporation sole shall make But it must be averred that the goods were an entry to recover any land after two in- in the house. Lutw. 1428, 1434. And a man cumbencies and six years, or sixty years. See cannot enter a house, the doors being open, to further as to the provisions of this act, tit. demand a debt, unless he aver that the debtor Limitations of Actions.

have been tolled, that is, taken away, by de- | This remedy by entry must be pursued, acquo; the criminal injury or public wrong, by breach of the king's peace, is punished by fine to the king. See this Dict. tits. Fines. Forcible Entry.

The following miscellaneous observations

An estate of freehold will not cease, with-Ac., no more than an estate of freehold in possession. Cro. Eliz. 360. A right of entry preserves a contingent remainder. 2 Lev. 35. And a grantee of a reversion may enter for condition broken. Plowd. 176.

A lessee must enter into lands demised to him; and though the lessor dies' before the lessee enters, yet he may enter: and if the lessee dies before entry, his executors or administrators may enter. The lessee may assign over his term before entry, having inteactual entry. Though if there be words hartion of money, the lessee or bargainee is in possession on executing the deed,! to make a release. &c. Lit. 59. 454: Co. Lit. 46. 57.

Where a lessor enters on his lessee for years, the rent is suspended. 1 Leon. 110. But without entry and expulsion, the lessee is not discharged of his rent to the lessor, unless it be where the lessor is attainted of treason, &c.; then the rent is to be paid to the king, who is in possession without entry.

Sid. 399: 1 Nels. Abr. 706.

There is no need of entry to avoid an estate in case of a limitation, because thereby the estate is determined without entry or claim; and the law casts it upon the party to whom it is limited. If A. devises land to B. and his heirs, and dies, it is in the devisee imme-By 3 and 4 W. 4. c. 27. § 2, no person diately; but till entry he cannot bring a possessory action; and where a possession makes only a seisin; so that the law will Sect. 10. No person shall be deemed to adjudge him in possession who hath the right.

Where a person is in a house with goods, &c. the house may be entered when the doors By §29. no archbishop, &c., or other spiritual are open, to make execution. Cro. Eliz. 759. is within the house at the same time. Cro. Eliz. 6, 8. So entry may be made on a past, there lay no writ of entry at the com-

which disproves the title of the tenant or pos- sion, should enter upon 1 im who had the sessor, by showing the unlawful means by which he entered, or continues possession, he was driven to his writ of entry to gain Finch. L. 261. The writ is directed to the possession; so, after more than two descents, sheriff, requiring him to " command the te- or two conveyances were passed, the demandnant of the land, that he render fin Latin, ant, even though he had the right both of procipe quod reddut) to the demandant the possession and property, was not allowed this land in question, which he claims to be his possessory action, but was driven to his writ right and inheritance; and into which, as he of right, a long and final remedy, to punish saith, the said tenant had not entry, but by this neglect in not sooner putting in his claim (or after) a disscisin, intrusion, or the like made to the said demandant, within the time limited by law for such actions; or that upon sies. 2 Inst. 153. But by the stat. of Martrefusal he do appear in court on such a day, to show wherefore he hath not done it." This is the original process the pracipe, upon which all the rest of the suit is be allowed without any mention of degrees at grounded; wherein it appears that the tenant all. And, accordingly, is required either to deliver seisin of the lands, or to show cause why he will not. Writ of entry in the post, which only alleges This cause may be either a denial of the fact the injury of the wrongdoor, without deducing of having entered by or under such means as all the intermediate title from him to the

mention of the degrees within which writs of the same wrong. Upon the latter of these of entry are brought. If they be brought writs it was (the writ of entry sur disseisin against the party himself that did the wrong, in the post) that the form of our common recothen they only charge the tenant himself veries of landed estates was usually grounded, with the injury; "non habuit ingressum nisi A writ of entry in the per and sui shall be per intrusionem quam ipse fecit." But if the maintained against none, but where the tenant intruder, disseisor, or the like, has made any is in by purchase or descent; for if the alienalienation of the land to a third person, or it ation or descent be put out of the degree upon has descended to his heir, that circumstance which no writ may be made in the per and must be alleged in the writ, for the action cui, then it shall be made in the post. Terms must always be brought against the tenant of de la Ley. the land, and the defect of his possessory title, There are five things which put the right whether arising from his own wrong or that of entry out of the degrees, viz. intrusion; of those under whom he claims, must be set disseisin upon disseisin; succession, where forth. One such alienation or descent makes the disseisor was a person of religion, and his the first degree, which is called the per, because then the form of a writ of entry is this—that the tenant had not entry, but by the original wrongdoer who alienated the land, or from whom it descended, to him; which the lord enters, &c. In all these cases " non habuit ingressum nisi per Gulielmum the disseisee or his heir shall not have a writ qui se in illud intrusit, et illud tenenti dimi- of entry within the degrees of the per, but in sit." A second alienation or descent makes the post; because they are not in by descent, another degree, called the per and cui; or purchase. Terms de la Ley. because the form of a writ of entry in that Degrees as to entries are of tw case is, that the tenant had not entry but by by act in law, as in case of a descent; or by or under a prior alience, to whom the intruder act of the party by lawful conveyance. But demised it; " non habuit ingressum nisi per no estate gained by wrong doth make a de-Ricardum cui Gulielmus illud dimisit qui se gree; so that abatement, intrusion, &c. work in illud intrusit."

wrong, and the title of the tenant who claims by judgment, &c., or of any others that come under such wrong. If more than two degrees in the post; though a tenancy in dower by (that is, two alienations or descents), were assignment of the heir doth work a degree, be-

tenant, where rent is in arrear, to take a distance mon law. For, as it was provided for the tress, &c. See 11. Execution, Rent, Demand. quietness of men's inheritances, that no one, The WRIT OF EVERY is a possessory remedy even though he had the true right of possesapparent right by descent or otherwise, but while the degrees subsisted; and for the ending of suits and of quieting all controverbridge, 25 H. 3. c. 30. it was provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should

by reason of title in himself, or in those under whom he makes claim; whereupon the possession of the land is awarded to him who produces the clearest right to possess it. In our ancient books we find frequent claims derived from thence must participate

Degrees as to entries are of two sorts, either not a degree; nor doth every change by law. These degrees thus state the original ful title, as an estate of tenant by the curtesy,

signment of dower by a disseissor doth not, another's life, or by the curtesy, &c. aliens by reason she is in the post. Co. Lit. 239.

is applicable to all the cases of ouster, except the land. New Not. Br. 461.

that of discontinuance of tenant in tail, and

Entry, ad Terminum qui preterit; at a that of discontinuance of tenant in tail, and some peculiar species of deforcements. Such term that has ended. A writ of entry anciently is that of the deforcement of dower, by not brought against tenant for years, who held assigning any dower to the widow within the over his term, and thereby kept out the lessor. time limited by the law; for which she has See New Nat. Brev. 447, 8. But an ejecther remedy by writ of dower, unde nihil habet. F. N. B. 147. See tit. Dower.

But, in general, the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner. It were therefore endless to recount all the several divisions of writs of entry, which the different a writ that lies for him in reversion by stat. circumstances of the respective demandants may require, and which are furnished by the by the curtesy, who aliens in fee, &c. See laws of England, being plainly and clearly Casu Consimili. chalked out in that collection of legal forms, the registrum omnium, brevium, or register of vided. Where a tenant in dower aliens in such writs as are issuable out of the king's fee, or for term of life, or for another's life, courts; upon which Fitzherbert's Natura Bre- then he in the reversion shall have this writ, vium is a comment, which see, and the seve-

ral appropriate titles in this Dict.

right of possession seems to have been recover by writ of entry." See tit. verable only by writ of entry. Gilb. Ten. 42. Dower. And the writ may be brought against This writ was then usually brought in the the tenant of the freehold of the land, on such county court: and the proceedings in these alienation, and the heir shall recover during actions were not then so tedious (when the life of the tenant in dower, &c. New courts were held, and process issued from, Nat. Br. 456: 2 Inst. 509: 2 Comm. 136: and was returnable therein, at the end of 3 Comm. 135. every three weeks) as they became after. The above the Conquest, when all causes were drawn into the king's courts, and process issued only from term to term. Hence a new remedy was invented in many cases to do entry, that lay where a bishop, abbot, &c. justice to the people, and to determine the aliened lands or tenements of the church, possession in the proper counties by the king's judges: this was the remedy by Assise; as to which, see tit. Assise in this Dict.; and fully on this subject, 3 Comm. 174. ledgment of the title of the heir, &c. to be 184.

The learning relating to write of entry has long been more curious than useful, as few instances have occurred of their being resorted to available; it is as much as offectum: as for in modern times. And under the provisions of the 3 and 1 W. 1, c, 27, they will shortly be By § 36. of that statute it is him in the reversion. Lit. enacted, that no writ of entry sur disseisin, in the quibus, in the per, in the per and oni, or in the post, writ of entry sur intrusion, writ in which sense it is mentioned in the laws of of entry sur alienation, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casa, cui in vita, sur cui in vita, cui use of by the Danes for barons. See Earl. ante divortium, writ of entry sur abatement, writ of entry quare ejecit terminum, or ad terminum qui preterit, or causa matrimonii peared to the wise men of Christ's Nativity, prolocuti, and no other action, real or mixed, generally called Twelfth Day. except for dower, quare impedit, and ejectment, shall be brought after the 31st of tomary payments from the clergy to their December, 1834.

cause she is in by her husband; but an as- where tenant for term of life, or for term of and dies; he in the reversion shall then have This remedial instrument of writ of entry this writ against whomsover is in possession of

> ment is now the common mode of proceeding, and by stat 4 G. 2. c. 28. tenants for term of years, &c. holding over after demand made, are subject to double rents. See tits. Rent, Ejectment, Tenant.

ENTRY IN CASU CONSIMILI, in like case, is W. 2. c. 24. against tenant for life, or tenant

ENTRY, IN CASU PROVISO, in the case proprovided by the stat. of 6 Ed. 1. c. 7. by which statute it is enacted, " that if a woman alien In the times of our Saxon ancestors, the her dower in fee, or for life, the next heir,

The above four writs of entry might all have been brought either in the per, or in the

cui or post.

ENTRY SINE ASSENSU CAPITULI. A writ of without the assent of the chapter or convent. F. N. B. 195.

Entry in Scotch law refers to the acknow-

admitted by the superior.

ENTRY, FORCIBLE. See Forcible Entry. ENURE. In law, to take place or be example, a release made to tenant for life shall enure, and be of force and effect to

EODORBRICE. From the Sax, eoder, a hedge, and brice, ruptura.] Hedge-breaking:

King Alfred, c. 45.

EORLE. Sax. for earl, &c., though made

EPIMENIA. Expenses or gifts. Blount. EPIPHANY. The day when the star ap-

EPISCOPALIA. Synodals, or other cusbishop or diocesan, which were formerly col-ENTRY, AD COMMUNEM LEGEM, at the com- lected by the rural deans, and by them transmon law, is the writ of entry which lies mitted to the bishop. Mon. Ang. tom. 3. p. 61. These customary payments have been other- | year, or half-year, which is without the words wise called onus eviscopale; and were re- of the act, but within the meaning of it; and mitted by special privilege to free churches the words that enact the one by equity enact and chapels of the king's foundation, which the other. Terms de la Ley. were exempt from episcopal jurisdiction. Ken. Gluss.

EPISCOPUS PUERORUM. It was a custom in former times, that some lay person about a certain feast should plait his hair, and put on the garments of a bishop, and in them exercise episcopal jurisdiction, and do several ludicrous actions, for which reason he was called bishop of the boys: and this custom obtained here long after several constitutions were made to abolish it. Mon. Ang. tom. 3. p. 169.

the Processionale of the Church of Sarum, is contained the service of that church on this occasion, which appears to have taken place on the day of the Holy Innocents. The service is very short, and is set to music. Blount. From the monuments in some of the cathedrals it appears that the episcopus puerorum was himself a boy (generally of the choir). His office lasted about a month; and if he (7th ed.) died while in office, he was buried in pontificalibus. A monument of this nature still exists in Salisbury cathedral.
EQUALITY. The law delights in equali-

and divers ought to bear it, he shall have re- sent known, or seems to have ever been known, lief against the rest. 2 Rep. 25. And where in any other country than England at any a man leaves a power to his wife to give an time. With us the Aula regia, which was estate among three daughters, in such propor- anciently the supreme court of judicature, untions as she shall think fit, it has been held doubtedly administered equal justice accordshe must divide it equally, unless good realing to the rules of both, or either, as the case son be given for doing otherwise. Preced. might chance to require; and when that was Canc. 256. See tit. Contribution.

In equity it is a maxim, that "EQUALITY IS EQUITY." See Francis's Maxims, fol. 9. &c. EQUES AURATUS, Lat.] Is taken for

were allowed to beautify and gild their armour with gold: but this word is rather used Fleta, nor yet in Britton (composed under the by the heralds than lawyers: for eques auratus is not a word in our law for knight, but treating particularly of courts, and their several miles, and formerly chevalier. 4 Inst, 5.

EQUITY.

(See, generally, tit. Chancery.)

be a correction, or qualification of the law, generally made in that part wherein it faileth, or is too severe. In other words, "the correction of that wherein the law, by reason of its universality, is deficient." 1 Comm. 62. It likewise signifies the extension of the words of Requests, which was virtually abolished by of the law to cases unexpressed, yet having stat. 16 Car. 1. c. 10); and they were wont to the same reason; so that where one thing is refer the matter either to the chancellor and a enacted by statute, all other things are enacted select committee, or, by degrees, to the chanthat are of the like degree: for example, the cellor only, who mitigated the severity, or supstatute of Glouc. gives action of waste against plied the defects of the judgments pronounced him that holds lands for life or years; and, by in the courts of law, upon weighing the cir-the equity thereof, a man shall have action of cumstances of the case. This was the cus-

So that equity is of two kinds; the one doth abridge and take from the letter of the law, and the other enlarge and add thereto. Æquitas est perfecta quædam ratio, quæ jus scriptum interpretatur et emendat. Co. Lit. 24. And statutes may be construed according to equity; especially where they give remedy for wrong, or are for expedition of justice, &c. Co. Lit. 24. 54. 76: 2 Inst. 106. 107. &cc.

This equitable construction might well obtain formerly, when the legislature was used In an old work, printed under the title of to express its intention sparingly, in a few words or sentences only: but, in modern times, since it has been the practice to express the intention fully, and at large, such construction is unnecessary and dangerous. See 4 M. & S. 118. And Lord Tenterden, in a late case, said, "There was always danger in giving effect to the equity of a statute." 6 B. & C. 475: and see Bac. Ab. Statute (I.)

A court of equity cannot now be created by the king, but the same must be done by act of

parliament. 4 Inst. 84.

The distinction between law and equity, as ty; so that when a charge is made upon one, administered in different courts, is not at prebroken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton, l. 2. a knight, because anciently none but knights c. 7. pl. 23. as a thing contrasted to strict law; yet neither in that writer, nor in Glanvill or auspices and in the name of Edward I. and jurisdictions), is there a syllable to be found relating to the equitable jurisdiction of the Court of Chancery. It seems therefore probable, that when the courts of law, proceeding merely Equitas; quasi equalitas. Is defined to upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council (from whence also arose the jurisdiction of the Court waste against a tenant that holds but for one tom not only among our Saxon ancestors,

before the institution of the Aula regia, but in the Court of King's Bench, obtained by also after its dissolution, in the reign of King Edward I., and perhaps, during its continuance, in that of Henry II. Ll. Ed. c. 2: Lamb. Arch. 59.

When about the end of the reign of King Edward III. uses of land were introduced, and though totally discountenanced by the courts of common law, were considered as fiduciary deposits, and binding in conscience by the clergy, the separate jurisdiction of the Chancery as a court of equity began to be estublished. Spelm. Gloss. 106: 1 Lev. 242. cstublished. Spelm. Gloss. 106: 1 Lev. 242. John Waltham, who was bishop of Salisbury, and chancellor to King Richard II. (by a strained interpretation of the statute of Westm. 2. [13 Ed. 1. c. 24.] enabling the clerks in Chancery to form new writs according to the special circumstances of each case,) devised the writ of subpana, returnable in the Court of Chancery only, to make the feoffee to uses accountable to his cestui que use, which process was afterwards Earl of Notational Times and the limit to discover and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and wholly determinable at the common law upon wholly determinable at the common law, upon the imperfect ideas of redress which had posfictitious suggestions, for which therefore the sessed the courts of equity. The reason and chancellor is, by stat. 17 Rich. 2. c. 6. directed necessities of mankind, arising from the great to give damages to the party unjustly ag- change in property by the extension of trade, grieved. But as the clergy had long attempt- and the abolition of military tenures, co-opeed to turn their ecclesiastical courts into courts of equity, by entertaining suits pro lasione fidei, as a spiritual offence against conscience, in case of non-payment of debts, or any breach of civil contracts, till checked by the Constitutions of Clarendon (10 Hen. 2. c. 15.), therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own newly acquired jurisdiction, especially as the spiritual courts continued to grasp at the same authority as before, till finally prohibited by the unanimous concurrence of all the judges; however, it appears from the parliament rolls, that in the reigns of Henry IV. and V. the Commons were repeatedly urgent to have the writ of subpana entirely suppressed, as being a novelty devised against the form of the common law. But though the stat. 4 H. 4. c. 23. was passed, whereby judgments at law are declared irrevocable, unless by attaint or writ of error, yet in Edward IVth's time, the process by bill and subpæna was become the daily practice of the court, though its jurisdiction tive thereto an appeal lies to the House of was not then nearly so extensive as at pre- Lords. The Court of Exchequer can only sent. Rot. Parl. 14 Ed. 4. no. 33.

(A. D. 1616) arose that notable dispute be- against him; a power which is incident to tween the courts of law and equity, set on foot the jurisdiction of every court of justice. Cro. by Sir Edward Coke, then Chief Justice of Jac. 641: 2 Lev. 163: T. Jon. 90. But when tha Court of King's Bench, whether a court the interest of a minor comes before the court of equity could give relief after or against a judicially, in the progress of a cause, or upon judgment at the common law. This contest a bill for that purpose filed, either tribunal, was so warmly carried on, that indictments indiscriminately, will take care of the prowere preferred against the suitors, the solici- perty of the infant. tors, the counsel, and even a master in Chancery, for having incurred a premunire by used formerly to commit the custody of them questioning, in a court of equity, a judgment to proper committees in every particular case;

gross fraud and imposition. This matter being brought before the king, was, by him, referred to his learned counsel for their advice and opinion, who reported so strongly in favour of the courts of equity, that his majesty gave judgment on their behalf. Whitelock of Parl. 2. 390: 1 Ch. Rep. Append. 11.

Lord Bacon, who succeeded Lord Ellesmere. reduced the practice of the court into a more regular system; his successors in the reign of Charles I. did little to improve upon his plan; till the appointment of Sir Hineage Finch in rated in establishing his plan, and enabling him, in the course of nine years, to build a system of jurisprudence and jurisdiction, upon wide and national foundations, which have also been extended and improved by many great men, who have since presided in Chancery. See 3 Comm. 50-56.

The same jurisdiction is exercised, and the same system of redress pursued in the Equity Court of the Exchequer, with a distinction, however, as to some few matters peculiar to each tribunal, and in which the other cannot

Upon the abolition of the Court of Wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feodal view, but resulted to the king in his Court of Chancery, together with the general protection of all other infants in the kingdom. F. N. B. 27. When, therefore, a fatherless child has no other guardian, the Court of Chancery has a right to appoint one; and from all proceedings relaappoint a guardian ad litem, to manage the In the time of Lord Chancellor Ellesmere defence of the infant, if a suit be commenced

As to idiots and lunatics, the king himself

but now, to avoid solicitations, and the very formation can be brought in Chancery for the regular course of law. See tit. Idiots.

The king, as parens patriæ, has the general of Lancaster. superintendence of all charities, which he exercises by the chancellor; and, therefore, court of equity in the court of Chancery will when necessary, the attorney-general, at the be equally applicable to the other courts of relation of some informant (who is usually equity. Whatever difference there may be in called the relator), files ex officio, an informa- the forms of practice, arises from the different

charity properly established.

By stat. 43 Eliz. c. 4. authority is given to quire into any abuses of charitable donations, several chancellors, upon exceptions taken either as assistant to, concurrent with, or exthereto. But though this is done in the petty-bag office of the Court of Chancery because common law; which is here done in an the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent, in his answer to the ex-ceptions, may allege what new matter he depending in courts of law. 2dly. By compleases; upon which they go to proof, and pelling a discovery, which may enable them examine witnesses in writing upon all the to decide. 3dly. By perpetuating testimony, matters in issue; and the court may decree when in danger of being lost, before the mat-the respondent to pay all the costs, though no ter to which it relates can be made the subsuch authority is given by the statute. And ject of judicial investigation. It may also be as it is thus considered as an original cause said to be assistant, by rendering the judgthroughout, an appeal lies of course from the chancellor's decree to the House of Peers, notwithstanding any loose opinions to the contrary. Duke's Char. Uses. 62. 128: 2 Vern. 118.

By the several statutes relating to bankrupts, a summary jurisdiction, from which there was no appeal, was given to the chancellor, in many matters consequential or previous to the commissions thereby directed to ters of trust and confidence; and wherever, be issued. But by the late act of the 1 and 2 W. 4. c. 56. the jurisdiction over bankrupts is transferred from the chancellor to a new court called "the Court of Bankruptcy," by whom all matters that were formerly laid before the chancellor, by petition or otherwise, are to be determined; with an appeal, however, to him on questions of law and equity, and relating to the admission or rejection of evidence. See further tit. Bankrupt.

does not extend to some causes wherein re- urged against the claims of courts of equity

but now, to avoid solicitations, and the very formation can be brought in Chancery for shadow of undue partiality, a warrant is issued such mistaken charities as are given to the by the king, under his royal sign manual, to king by the statutes for suppressing superstite chancellor, to perform this office for him; tious uses. Nor can Chancery give any relief and if he acts improperly in granting such against the king, or direct any act to be done custodies, the complaint must be made to the by him, or make any decree disposing of or king himself in council. 3 P. Wms. 108. See Reg. Br. 267. But the proceedings on the commission, to inquire whether or no the must be determined in the Court of Exparty be an idiot or a lunatic, are on the law chequer, as a court of revenue, which alone side of the Court of Chancery, and can only has power over the king's treasure, and the be redressed (if erroneous) by writ of error in officers employed in its management, unless the regular course of law. See tit. Idiots. where it properly belongs to the Duchy Court

In all other matters, what is said of the tion in the Court of Chancery, to have the constitution of their officers. See 3 Comm.

426-429.

The learned commentator then enters into the lord chancellor, and to the chancellor of a brief, but comprehensive view of the genethe duchy of Lancaster, respectively, to grant ral nature of equity, to show that in our commissions under their several seals to in- courts it is not contrary to, but consistent with, law; a position which, perhaps, will be and rectify the same by decree; which may best understood by farther explanation of the be reviewed in the respective courts of the jurisdiction exercised by courts of equity, clusive of, the jurisdiction of the courts of abridgment from Fonblanque's Treatise of Equity, pp. 10, &c. in n.

Equity is assistant to the jurisdiction of the courts of law; 1st. By removing legal imsaid to be assistant, by rendering the judgments of courts of law effective; as by providing for the safety of property in dispute pending a litigation, and by counteracting fraudulent judgments, &c.; and by putting a bound to vexatious and oppressive litigation. It exercises a concurrent jurisdiction with courts of law, in most cases of fraud, accident, mistake, account, partition, and dower. It claims an exclusive jurisdiction in all matupon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. See Mitford's Treatise on the Plead. ings in Chancery.

To pursue this division of the jurisdiction of courts of equity with that minuteness which is necessary to a particular acquaintance of its powers, would lead to an investigation too extensive. Some short notice shall The jurisdiction of the Court of Chancery be taken of the general objection that is lief may be had in the Exchequer. No in- to a concurrence of jurisdiction in some cases

with courts of law. This concurrence of cases which involve an equity, which the jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of ton v. Deane, Pre. Ch. 5, 6: Dormer v. Forsults; for as the mode of proceeding in courts to the control of the control of the control of the cases which into the case which is cased as a case which into the case which is cased as a case which into the case which is cased as a case which into the case which is cased as a case which into the case which is cased as a case which into the case which is cased as a case which into the case which is cased as a case which is cased as of law requires the plaintiff to establish his case, without enabling him to draw the neces- also Curtis v. Curtis, Rolls, 2 Bro. C. R. 622. sary evidence from the examination of the defendant, justice could never be attained at of equity, in most cases of accident, presents law in those cases where the principal facts a very striking instance of their anxiety to to be proved by one party are confined to the prevent innovation on the jurisdiction of knowledge of the other party. In such cases, courts of law; their interference being genetherefore, it becomes necessary for the party in want of such evidence to resort to the extraordinary powers of the court of equity, which will compel the necessary discovery; and the court having acquired cognizance of the suit for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident, and mistake; and for other reasons will entertain suits for partition and dower, though discovery be not necessary to the plaintiff's case.

The case (and it seems the only case) in which fraud cannot be relieved against in equity, concurrently with courts of law, though discovery be sought, is the case of fraud in obtaining a will; which, since the loss of a deed is not always a ground to come case of Kerrick v. Bransby, 3 Brown's Parl. into a court of equity for relief; if there were Cas. 358. is constantly referred to a court of no more in the case, although he is entitled to law in the shape of an issue, devisavit vel have a discovery of that, whether lost or not, non. That courts of equity have a concur- courts of law admit evidence of the loss of a rence of jurisdiction with courts of law in deed, proving the existence of it and its conall other matters of fraud. See White v. Hussey, Pre. Ch. 14: Hungerford v. Earle, 2 are two grounds to come into equity for relief, Vern. 261: Colt v. Woolaston, 2 Pr. Wms. annexing an affidavit to the bill. First, where 156: Stent v. Baillis, 2 P. Wms. 220: 2 the deed is destroyed or concealed by the decountered to the state of the state o Comyn's Digest, tits. Chancery, Fraud.

The jurisdiction exercised by courts of equity in matters of account is in many cases bounded by the discovery; as where a suit is instituted for an account of waste of timber, without praying an injunction, the plaintiff cannot have a degree for relief.

Jesus College v. Bloome, 3 Atk. 262: Piers v. Piers, 1 Vez. 521. But where the bill seeks an account of ore dug, the court will decree it (Bishop of Winchester v. Knight, 1 P. Wms. 406), because the working of a mine P. Wms. 406), because the working of a mine mere circumstance of the bond or instrument is a kind of trade. Story v. Lord Windsor, 2 being lost; by allowing him to state such cir-Atk. 630. Yet even in that case the plaintiff cumstances in his declaration, as a reason for must show a possession. Sayer v. Pierce, 1 Vez. 232. Neither will equity, in all cases, decree an account of mesne profits; for where a man has title to the possession of lands, and makes an entry, whereby he becomes entitled served, that the Court of King's Bench have to damages at law for the time that posses- ing determined to give relief in a case for-sion was detained from him, he shall not after merly relievable only in equity, was not a his entry turn that action at law into a suit in reason for excluding the ancient, particular, equity, and bring a bill for an account of the profits, except in the case of an infant, or some other very particular circumstances.

Tilly v. Bridges, Pre. Ch. 252. Owen v. The particular circumstances excepted by the lord keeper, in laying dawn this will activate the lord keeper, in laying dawn this will activate the lord keeper. laying down this rule, extend to all those concealed by the defendant, or has been lost

Atk. 336: Norton v. Frecker, 1 Atk. 524. See

The jurisdiction exercised by our courts rally founded on some circumstance which prevents the party being relievable at law; as, where a bond, or other instrument or security, is lost, equity will interiere, by compelling a discovery from the defendant, and will relieve upon such discovery; but the plaintiff is not entitled to any relief upon a mere suggestion that the bond, instrument, or security is lost; but is required, for the purpose of relief, to annex to his bill an affidavit to such effect. 3 Atk. 17: Mitford's Treatise, 112. And, as a farther security against innovation, it must appear that the loss of the deed or instrument obstructs the plaintiff in seeking relief at law; for the fendant; and whenever that is the case, the

not making profert of it; but, upon this case

by the plaintiff; though of the contents of those cases, in which there appeared to be no obstacle to her legal remedy. Wallis v. Evedence, of which he might avail himself at law. But where the relief sought in equity is upon the loss of a bill of exchange or promissory note, the plaintiff must, by his bill, rassments of trust terms, &c., that she is fully offer to give security, as an indemnity to the defendant against any demand being made upon him in respect of such lost bill or note.

Walmsley v. Child, 1 Vez. 341.

To establish the origin of any branch of legal or equitable jurisdiction is always difficult. and seldom necessary, provided the exercise of such jurisdiction is sanctioned by the dictates of reason, and found to be conducive to the ends of substantial justice; and such will appear to be the nature and tendency of the jurisdiction exercised by our courts of equity in cases of partition, upon a reference to the difficulties which obstructed the mode of proceeding at common law; and though many of those difficulties are removed by stat. 8 and 9 W. 3. c. 31. yet still, if the parties are in any degree complicated, it is extremely difficult to proceed at law, or where the tenants in possession are seised of particular estates only; for the persons entitled in remainder cannot be bound by the judgment in a writ of partition. Mitford's Treatise, p. 110. Neither can a feme covert be bound by partition by writ (Co. Lit. 166. a.), which, it should seem, she may be by decree and commission in equity. Martyn v. Perryman, 1 Ch. Rep. 125. On these considerations, and the almost constant occasion that the parties have for a discovery, is founded this branch of equitable jurisdiction, in the exercise of which our courts of equity are constantly governed by an anxious attention to the legal title of the plaintiff; for though, at law, it be sufficient to allege seisin, yet in equity the plaintiff must show his title. Cartwright v. Pultney, 2 Atk. 380. And if the defendant contest the legal title, the court will dismiss the bill. Bishop of Ely v. Kenrick, Bunb. 322; but see Parker v. Gerard, Ambler, 286. And, as a further mean to prevent innovation and vexatious suits, courts of equity will never allow costs on bills of partition; courts of law allowing none on the proceeding by writ. Metcalf v. Beckwith, 2 P. Wms. 276: Mitford's Treatise, 111. And this rule prevails, notwith-standing the unequal interests of the parties. Parker v. Gerard, Ambler, 236. See, on this subject of partition in equity, also 1 Inst. 169. b., and the notes there, which are very ingeniously combated, we may say refuted, by Mr. Fonblanque, who sums up the result in the foregoing paragraph.

The jurisdiction of our courts of equity, in matters of dower, for the purpose of assisting the widow with a discovery of the lands or her rendering her legal title available at law, of personal assets, 2 P. Wms. 145., conse-

entitled to every assistance that a court of equity can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained. Curtis v. Curtis, 2 Brown C. R. 634. and Lucas v. Calcraft, there cited. And in the exercise of this jurisdiction, courts of equity will even enforce a discovery against a purchaser for valuable consideration without notice. Williams v. Lambe, 3 Bro. Ch. Rep. 264. And though the widow should die before she had established her right to dower, equity will, in favour of her personal representatives, decree an account of the rents and profits of the lands, of which she afterwards

With respect to the exclusive jurisdiction exercised by our courts of equity in matters of trust, and in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles. In the course of this work, however, a variety of instances appear, from which the wisdom of this branch of equitable jurisdiction will be fully and satisfactorily established, and to which, at present, it may be sufficient to refer. See particularly tits.

The essential difference (says Blackstone) between law and equity principally consists in the different modes of administering justice in each, in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, viz. the true construction of securities for money lent, and the form or effect of a trust or second use, hath been principally erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial

Chancery, Fraud, Trust, &c. &c.

foundations as the system of the courts of common law.

As to the mode of proof, when facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him, upon oath, with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery, at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. 1 Chan. C. 57. As incident to accounts, they take a title deeds, or of removing impediments to concurrent cognizance of the administration has never been doubted. But it has been quently of debts, legacies, the distribution of questioned whether equity could give relief in the residue, and the conduct of executors and

dent to accounts, they also take the concur- may be tried at law, in a great multiplicity of rent jurisdiction of tithes, and all questions actions, a court of equity assumes a jurisdicrelating thereto; 1 Eq. C. Ab. 307; of all tion, to prevent the expense and vexation of dealings in partnership; 2 Vern, 277; and endless liftgation and suits. 1 Vern, 308; many other mercuntale transactions; and so of Pre. Ch. 261: 1 Pr. Wins. 672: Stra. 401. barliffs, receivers, factors, and agents. Ibid. 635. In various kinds of fraud it assumes a con-

sive discovery upon outh, the courts of equity a discovery, but of a more extensive and spehave acquired a juri-diction over almost all cific relicit 2 P. Wms. 156, as by setting matters of fraud; 2 Chan, C. 46; all matters aside fraudulent deeds, decreeing re-convey. in the private knowled to of the party, which, lances, or directing an absolute conveyance though concealed, are binding in conscience, merely to stand as a security; 1 Vern. 32: 1 and all judgments at law obtained through | P. Wms. 239: 1 Vern. 237: 2 Vern. 84; and such fraud or concealment. And this not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking an lands a court of equity holds plea of all debts, advantage of a judgment obtained by sup. incumbrances, and charges that may effect it, pressing the truth. 3 P. Wms. 148: Year. book. 22 Ed. 4. 37. p. 21. See tit. Discovery.

The mode of trial is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If, therefore, the cause arises in a foreign country, and the witnesses reside upon the spot; if in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if the witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction which might have been exercised at law, if the witnesses could probably attend.

See tit. Depositions.

With respect to the mode of relief. The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance executory agreements. A court of equity will demption, if, when called upon by the mortcompel them to be carried into strict execution, unless where it is improper or impossible; instead of giving damages for their nonperformance. Eq. Ca. Ab. 16. And hence a fiction is established, that what ought to be done shall be considered as being actually analogy to the statute of limit ations. See also tits. Bond, Mortgage, Penalty.

The form of a Trust, or second use, gives done, and shall relate back to the time when the courts of equity an exclusive jurisdiction, it ought to have been done originally; and this fiction is so closely pursued through all its consequences, that it necessarily branches created in the present complicated mode of out into many rules of jurisprudence, which form a certain regular system. 3 P. Wms. 215. A court of equity will not decree performance of one part of an agreement, leaving the other parts unperformed. 2 Bligh, 595. It is discretionary in the court to decree a specific a regular positive system established in the performance. 1 Vez. & Bea. 527. And the court has no power to alter the contracts of parties, in consequence of a change having occurred not contemplated at the time. 2 Ball. & B. 288. Of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. 1 Ch. Rep. 11: 2 Ch. C. 32. If one act of waste is the taking bills pro confesso" comprises five proved, the court will restrain equitable waste principal objects of great importance to the

administrators. 2 Chan. C. 152. As inci- generally, 6 Madd. 17. Over questions that From the same fruitful source, the compul., current jurisdiction, not only for the sake of thus, lastly, for the sake of a more beneficial and complete relief, by decreeing a sale of or issue thereout. 1 Eq. Ca. Ab. 337. In cases the most unfavourable to equitable relief, wherein any difficulties embarrass the legal remedy, courts of equity will interpose. 13 Price, 721. And courts of equity have a jurisdiction to try matters of fact, without directing an issue. 3 Ves. & Bea. 42: 4 Dow, 318.

As to the construction of securities for money lent; when courts of equity held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum bona fide advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it: but this ownership is mutually transferred, and the mortgagor is barred from regagee, he does not redeem within a time limited by the court; or he may, when out of possession, be barred, by length of time, by

as to the subject-matter of all settlements and devises in that form, and of all the long terms This is a very ample source conveyancing. of jurisdiction: but the trust is governed by very nearly the same rules as would govern the estate in a court of law, if no trustee was interposed. 2 P. Wms. 645, 668, 9. And by courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of common law. See 3

The statute 1 W. 4. c. 36. (1830) " for alter-

Comm. 436-440.

administration of justice in these courts. 1. although they might be willing to obey the The enlarging their powers and authorities. law, and conform to the rules of the court. 2. Shortening the process in cases of contempt. 3. Preventing a long and continued imprisonment. 4. Affording assistance and relief to very measures intended to prevent it. They poor or ignorant parties. 5. Preventing obstinate parties from impeding the course of justice, by refusal to comply with the decrees or whereby they escaped the penalty of their orders of the court.

Previous to this act courts of equity could act only in personam and not in rem: when, therefore, a bill was filed, or a suit instituted, and a party defendant refused to appear, a court of equity had no power but to order that he should be committed to prison; from prison the defendant was brought up to the bar of the court, and ordered to enter an appearance; if he then refused, the court entered an appearance for him. So if a defendant refused to put in an answer, all the court could do was to commit him to prison, and take the bill pro confesso. It had no power to compel him to execute the act for the non-appearance of which he stood committed.

With regard to process; if a party were committed to prison for refusing to obey the orders of the court, he was brought into court, first by writ of habeas corpus, where he was told what he was to do, and if he refused, he was remanded to prison: the second time he was brought up by an alias hab. corp. and the same scene was performed, if he persisted in his refusal: the third time he was brought up by a pluries alias hab. corp., and after the same forms had been again gone through, he was again remanded to prison; if he continued obstinate, the fourth and last time he was brought up by a writ of alias pluries alias hab. corp.; and then, if he still persisted in his refusal, the bill was taken against him, pro confesso. became very much abused, the party, in many instances, never in fact being warned or adavowals within the times prescribed by the rules of the court; and yet from whatever cause the party might neglect to answer, he contempt, and lodged in gaol, without there being any obligation upon the person sending him there ever after to take the slightest notice of him. In all such cases there was no power to discharge the defendant from prison; nor indeed was there any such power even after the object of imprisonment was accomplished, by the bill being taken pro confesso. The consequence of this system was, that in the prisons there were always persons committed for such contempt; many of them were originally sent to gaol in consequence of their poverty and ignorance, and some of them, when at last mercifully discharged, had been in confinement for twenty or thirty years; son, and examine the prisoners confined there and what was still worse, no effectual provis- for contempt, and report his opinion to the

Another consequence of this system was, that men were taught to do injustice by the vountarily remained in prison; some to avoid executing deeds and rendering accounts, neglect or refusal, while honest suitors were defrauded of their just rights: others were content to submit to the inconvenience of a gaol, though rich enough, and competent at any time to obtain their release, through mere obstinacy, or a desire to live riotously upon the assets of their creditors; and many held lucrative appointments in the prison which they were unwilling to resign.

The provisions of the 1 W. 4. c. 36. are in-

tended to remedy all these inconveniences, for which purpose the act recites and sanctions twenty rules and regulations which are to be adopted by the Court of Chancery, and also, with the exception of the first four, by the Court of Exchequer. The effect of these rules is thus stated in Jemmett's Edit. of the Acts, relating to the administration of justice

in courts of equity, passed in 1830.

1. The process of the courts is materially shortened by the first five rules; power is given to the courts to enter an appearance for every person who will not enter one within a reasonable period; and when the appearance is entered, the gaoler must discharge the party from custody. 2. Wherever a poor man is unable to discharge the expenses of a suit, he will be immediately brought to the bar of the court, and if upon inquiry his allegation proves true, relief will be immediately given, by putting in the answer for him without expense, by not requiring office copies to be This practice was quite of course, till at last it taken by him, and by allowing gaolers to take the answers and affidavits. Relief is also extended in all cases to persons of unsound mind. monished at all. There were many causes 3. There is no instance in which the impriwhich prevented parties from putting in their sonment of a party in contempt can be prolonged under this act beyond the purpose for which it is imposed, without a special application to the court, and notice of such applicamight be taken up upon an attachment for tion to the party imprisoned. 4. Whenever a party omits to apply for his discharge, the court may discharge him from his contempt and from custody, and pay the costs of the contempt out of any funds belonging to him, over which the court may have power, or make them costs in the cause against him, or may discharge him from the contempt, and leave him in custody for the costs, which may be cleared, if he be insolvent, under the insolvent acts. 7. G. 4. c. 57: 1 W. 4. c. 38. In order to prevent instances of future oppression or neglected imprisonment, provision is made that four times in the year one of the masters in Chancery shall visit the Fleet priion existed in favour of the poor or ignorant, court, giving a representation of the cases

which require relief; upon which a solicitor, either to pay the money, or to be foreclosed of and counsel, are to be assigned to them, and his equity; which is done by proceedings in the questions in which they are at issue with the Court of Chancery. But the Chancery other parties brought to as speedy a decision cannot shorten the time of payment of the as possible, and with the utmost convenience mortgage money, where it is limited by exand facility to the prisoners. 5. The provisions in §§ 10 and 11 of the act relating to and then upon non-payment, the practice is cases where a defendant refuses or neglects to answer within a certain time are of importance to the suitor, and particularly call for the attention of the practitioner. 6. Whenever a party is ordered to execute a deed, and refuses to comply, the court is authorised to execute it for him, instead of confining him for the remainder of his life.

By the 2 and 3 W. 4. c. 58. the provisions of the above act are extended, and the Courts of Chancery and Exchequer are empowered in all cases of contempt, besides those thereby provided for, to discharge persons committed from their contempt, except as to the costs thereof; for which costs they shall remain in mortgagor only should redeem during life, or custody, but may be relieved under the in-

solvent acts.

In the 2 and 3 W. 4. c. 111. an act was passed for abolishing certain sinecure offices connected with the Court of Chancery. by 3 and 4 W. 4. c. 84. and 3 and 4 W. 4. c. 94. provision was made for the performance of the duties of some of the offices which had mortgagee shall have the land absolutely, as been abolished, and for regulating the pro- a purchaser, &c. Ibid. 488. See at large this ceedings and practice of the court. Under Dict. tit. Mortgage. the two latter acts, considerable changes have been introduced, and more are intended to be effected in the number and duties of the officers of the courts of equity upon the deaths of the present possessors.

By § 10 of the last mentioned act any person may take an office copy of so much only of any decree, &c. as he may require; and unless the court otherwise direct, no recitals shall be introduced in any decree or order, but the pleadings, petition, &c. on which the teenth century; composed in England chiefly same are founded shall be merely referred to; of common lawyers under the guidance of and the lord chancellor, with the master of the Selden. The denomination is used in the prerolls and the vice-chancellor, or one of them, sent age ignorantly, and therefore indefinitely. may make such regulatione as to the form of A modern author states their funadmental such decrees and orders as he may deem principle to be-"That in a commonwealth

necessary.

And by § 22. the lord chancellor, with the advice of the master of the rolls and the vicechancellor, or one of them, is empowered to

practice of the court.

taking away for a fraudulent purpose, or obliterating, destroying, or injuring, any bill, spiritual judge is liable to be reversed by a answer, interrogatory, deposition, order, afficivil tribunal; the Court of Delegates, by virdavit, or decree, or any original document tue of the king's supremacy in all causes, and belonging to any court of equity is made a particularly what is called church discipline, misdemeanor and punishable by transporta- or the censures of ecclesiastical governors tion, &cc.

gages. If where money is due on a mortgage, believe every one except those who derive a the mortgagee is desirous to bar the equity of a little profit from it, would require its aboliredemption, he may oblige the mortgagor tion." Hallam's Hist. of England, from Hen.

press covenant, though it may lengthen it; to foreclose the equity of redemption of the mortgagor. 2 Vent. 364.

ERA

To foreclose the Equity, a bill in Chancery is exhibited; to which an answer is put in. and a decree being obtained, a master in Chancery is to certify what is due for principal, interest and costs, which is to be paid at a time prefixed by the decree, whereupon the premises are to be re-conveyed to the mortgagor; or, in default of payment, the mortgagor is ordered to be foreclosed from all equity of redemption, and to convey the premises absolutely to the mortgagee.

If the condition of a mortgage is, that the that he and the heirs of his body shall do it; yet the general heir shall have the equity of redemption, for if the principal and interest be offered, the land is free. 1 Vern. 39. 190. And it is held, a man may also redeem though a bond be conditioned, that if the money be not paid at such a time, then, for a further sum, the

EQUIVALENT. Commissioners are appointed by statute to examine and state the debts due to Scotland on the Union by way of equivalent; and provision is made for payment of the same by a yearly annuity, &c. Stat. 5 G. 1. c. 20. See tit. Scotland.

EQUUS COPERTUS. A horse equipped with saddle and furniture. Inq. 16 Ed. 1.

ERASTIANS. A sect of religionists named from Erastus, a German physician in the sixgovernment] where the magistrate professes Christianity, it is not convenient that offences against religion and morality should be punished by the censures of the church, espemake rules for simplifying and settling the cially by excommunication." The same author adds-"The ecclesiastical constitution of Eng-By 7 and 8 G. 4. c. 29. § 21. stealing, or land is nearly Erastian in theory, and almost wholly so in practice. Every sentence of the for offences have gone so much into disuse, EQUITY OF REDEMPTION on mort- and what remains is so contemptible, that I

VII. to George II. See this Dict. tits. Courts | matter of law, arising on the face of the pro-(Ecclesiastical), Excommunication.

dom, &c. See tit. Peers.

ERIACH. By the Irish Brehon law, in case of murder, the brehon or judge compounded between the murderer and the friends of the deceased who prosecuted, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompense, which was called an eriach. 4 Comm. 313. See Weregild.

ERMINE, OR ERMINAGE STREET.

See Watling Street.

great value, much used in robes of state. See

ERN. The names of places ending in ern are said to imply a melancholy situation; from

the Sax Ern. i. e. Locus Secretus. ERNES. The loose scattered ears of corn that are left on the ground, after the binding or cocking of it: it is derived from the old Teutonic Ernde, Harvest; Ernden, to cut or mow corn: hence to ern is, in some places, to glean. Kennet's Glos.

ERRANT, Itinerant.] Is applied to justices of the circuit, and bailiffs at large, &c.

ring, or wandering beast. Constit. Norman, 8. enacts, that in all actions, real, personal, or A. D. 1080.

ERROR, Fr. Erreur.]

process, &c. whereupon a writ is brought for vided, that no action shall be stayed, nor any remedy thereof, called a writ of error; in judgment, sentence, &c. reversed, by reason

Latin, de errore corrigendo.

out of the Court of Chancery in the nature, ed. By these and other statutes, all trifling as well of a certiorari to remove a record exceptions are so thoroughly guarded against, from an inferior to a superior court (except in that writs of error cannot now be maintained the case of error coram nobis), as of a commission to the judges of such superior court, tits. Amendment, Judgment. by which they are authorised to examine the record, upon which a judgment was given in judgment of an inferior court of record, the inferior court, and, on such examination, where the damages are less than 10l. (since to affirm or reverse the same, according to extended to 201. by 7 and 8 G. 4. c. 71. § 6.): law. Jenk. Rep. 25: 2 Inst. 40: Yelv. 220: or if it is brought to reverse the judgment of Hardw. 340. But yet if, by the writ of error, any superior court after verdict, he that brings the plaintiff therein may recover, or be re- the writ, or that is plaintiff in error, must stored to any thing, it may be released by the (except in some peculiar cases) find substanname of an action. Co. Lit. 288. b. See tial bail; to prevent delays by frivolous prepost, Div. V. There is also a writ of error to tences of appeal: and for securing payment reverse a fine, and which must be prosecuted of costs and damages. See tit. Costs. And within twenty years by stat. 10 and 11 W. 3. as to bail in such cases, see stats. 3 Jac. 1. c.

A writ of error to some superior court of 8: 19 G. 3. c. 70. appeal is the principal method of redress for erroneous judgments in the king's courts of the case of a defendant below becoming record, having power to hold plea of debt or plaintiff above in a writ of error: a party trespass above 40s .- It lies for some supposed who is plaintiff both above and below need mistake in the proceedings of such court; not give bail in error. 1 D. & R. 184. By 6 for, to amend errors in a base court, not of record, a writ of false judgment lies. Finch, venting delay to creditors by frivolous writs

ceedings; so that no evidence is required to ERECTION of lands into a Barony, Earl- substantiate or support it, there being no method of reversing an error in the determination of facts, but by an attaint or a new trial, to correct the mistakes of the former verdict. See Bro. P. C. 8vo. ed. 515.

Formerly suitors were much perplexed by writs of error brought upon very slight and trivial grounds; as mis-spellings, and other mistakes of the clerks, all which are now effectually helped by the statutes of amendment and jeofails: and particularly by stat. 5 G. 1. c. 13. it is enacted, that all writs of error, ERMINS, from the Fr. ermine.] A fur of wherein there shall be any variance from the original record, or other defect, may be amended by the court, and made agreeable to the record: and where any verdict hath been given in any action, suit, &c. in any of the courts at Westminster, or other court of record, the judgment thereon shall not be stayed or reversed for any defect or fault in form or substance in any bill, writ, &c., or for vari-ance in any such writs from the declaration and other proceedings; but this statute not to extend to any appeal of felony or process, on indictment, information, and appeal. Such writ of error to be brought and prosecuted c Eyre.

with effect within twenty years, by stat. 10 ERRATICUM. A waif, or stray; an er. and 11 W. 3. c. 14.—Stat 16 and 17 Car. 2. c. mixed, the death of either party between verdict and judgment shall not be alleged for error. By stat. 25 G. 3. c. 80. imposing a Signifies something wrong in pleading or stamp duty on warrants of attorney, it is proof omission or defect in the entering, or filing A writ of error is an original writ issuing of record, the memorandum or minute direct-

8: 13 Car. 2. st. 2. c. 2: 16 and 17 Car. 2. c.

The stat. 3 Jac. 1. c. 8. only contemplates L. 484. The writ of error only lies upon of error, it is enacted, that on any judgment

stayed or delayed by writ of error or super-sedeas thereon, without the special order of In criminal cases also, judgments may be the court, or some judge thereof, unless a re- reversed by writ of error; which lies from cognisance, according to the statute 3 James all inferior criminal jurisdictions to the Court 1. c. 8. is first acknowledged in court. Under of K. B. and from K. B. to the House of the former acts bail on writs of error was only necessary (after judgment by default) in actakes in the judgment or other parts of the tions on specialties or specific contracts. But record; as where a man is found guilty of by this important act bail in error is required perjury, and receives the judgment of felony, in all cases after judgment by default as well or for other less palpable errors, such as any as after verdict, unless otherwise ordered by the court or judge, a provision which has mainly suppressed frivolous writs of error for

mere delay.

of record in England into the King's Bench, scribing where his county-court was held; and not into the Common Pleas. Finch, L. 480: Dy. 250. And before stat. 23 G. 3. c. the late king, to be done against the peace 28. it lay from the King's Bench in Ireland to of the present; and many other similar misthe King's Bench in England. It likewise might be brought from the Common Pleas at Westminster to the King's Bench, and then from the King's Bench the cause was removable to the House of Lords. From proceedings on the law side of the Exchequer, a writ of error lay into the Court of Exchequer Chamber, before the lord chancellor, lord treasurer, and the judges of K. B. and C. P. and from thence it lay to the House of Peers. From proceedings in K. B. in debt, detinue, to reverse attainders in capital cases are alcovenant, account, case, ejectment, or trespass, originally begun there by bill (except where the king was a party), it lay to the Exchequer Chamber, before the justices of C. P. and barons of the Exchequer; and from thence also to the House of Lords. Stat. 27 Eliz. c. 8.—But where the proceedings in K. B. did not first commence therein by bill, but his heir or executor after his death, but not by by original writ sued out of Chancery, this took the case out of the general rule laid down the easier and more effectual way is, to reby the statute; so that the writ of error then verse such attainder by act of parliament. lay without any intermediate stage of appeal, directly to the House of Lords, the dernier resort for the ultimate decision of every civil now proceed purticularly to inquire, action. 1 Ro. Rep. 204: 1 Sid. 424: 1 Saund. 346: Carth. 180: Comb. 295. But now by 1 W. 4. c. 70. § 8. the writ of error on any judgments of the King's Bench, Common Pleas, or Exchequer, is returnable only before the judges, or judges and barons, as the case may be, of the two other courts in the Exchequer Chamber, and from thence no writ of error lies except to the House of Lords. By this act the several statutes relating to writs of error upon judgments in the Exchequer seem to be virtually repealed. The king, seem to be virtually repealed. however, not being mentioned in the act, may still bring a writ of error in parliament in the first instance. Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final, save only the House of Peers, to whose judicial decisions all other tribunals must there- writ of error to reverse it, whether he be a

in amy personal action, execution shall not be | fore submit, and conform their own. See 3

irregularity, omission, or want of form, in the process of outlawry or proclamations. The want of a proper addition to the defendant's name; not properly naming the sheriff. or A writ of error lies from the inferior courts other officer of the court, or not duly delaying an offence committed in the time of takes, were formerly sufficient grounds for a writ of error: but defects of this nature are now cured by the 7 G. 4. c. 64. § 19, 20, 21. See tits. Outlawry, Indictment, &c.

Writs of error to reverse judgments in cases of misdemeanors are not to be allowed of course, but on sufficient probable cause shown to the attorney-general; and then they are understood to be grantable of common right, et ex debito justitiæ. But writs of error lowed only ex gratia, and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general. 1 Vern. 170, 5: Burr. 2250. These can rarely be brought by the party himself, especially where he is attainted for an offence against the state; they may, however, be brought by any other party. 2 Hawk. c. 50. § 11. But

See tits. Attainder, Judgment. Having said thus much generally, we may

I. 1. By whom, against whom; and 2, At what time this writ may be brought.

1. In what Cases it will lie; and 2. II. How it is to be brought.

In what Court it is to be brought. III. 1. When and how Errors are to be assigned; 2. What may be us-IV.

signed for Error. What Defence may be made by a Defendant in Error.

Of the Judgment on a Writ of Error; and of the abatement of, and quashing the Writ, &c. Of Interest and Costs.

VII.

I. 1. By whom, against whom.—Any person damnified by error in record, or that may be supposed to be injured by it, may bring a party or no. And where there are several de- bring the writ of error, and not the heir at may be summoned and served, and the others the land. Owen, 68: 1 Leon, 261: 4 Leon, 5. may reverse the judgment. 6 Rep. 26: Hob. 72.

should be awarded ex debito justitie, and therefore the court will require a very strong

case to supercede it. 9 Price, 606.

Judgment against two, one brought a writ of error, and held it should be quashed with costs; that it could not be amended, and that only a daughter, who levies a fine, and dies if the other party would not join, the defendant who chose to bring a writ of error must proceed by summons and severance. Hardw. 135, 136: Burr. Rep. 1789: and see 1 Wils. 88: Loft. 652.

Where a judgment is against several, any of them may bring a writ of error, but it it does not appear that the remainder in fee must be in the names of all, otherwise the was in the daughter as right heir, wherefore court will quash it. 2 T. R. 738: 3 Burr. 1789: 1 Wils. 88. And where one of the parentibus et non existentibus eadem est ratio, parties is dead, he must be mentioned in the especially in a court of judicature, where the writ, and his death stated, though the writ judges can take notice of nothing that does may be brought by the survivors. 1 Str. 233.

Defendants having agreed under a consolidation rule not to bring any writ of error, cannot do so, though there be manifest error

in the record. 1 H. Blackst. 21.

No person can reverse a thing for error, unless the error be to his prejudice. 5 Rep. 38. One in remainder may have writ of error upon judgment given against tenant in tail. But he in reversion or remainder shall not have writ of error in the life-time of tenant for life, on judgment given against such tenant, because they cannot be parties grieved in respect of the person of the infant, which is his time. 2 Nels. Abr. 712.

No person can bring a writ of error to reverse a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal thereof. 1 Rol. Ab. 747: Dyer,

90.

So a writ of error does not lie against any but him who is party or privy to the first judg. ment, his heirs, executors, or administrators.

1 Rol. Ab. 747: Dyer, 90.

And therefore, on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although he had nothing in the land, and not against the judgments are several, and affect distinct pertenant: and on such writ the judgment may be reversed; but there must go a scire facias against all the tertenants. 1 Rol. Ab. 749: 1 Rol. Rep. 302.

of error to reverse a judgment, but he who is order that he may be enabled to bring a new privy to, or hath some prejudice thereby, it action. 3 Burr. 1772. hath been resolved, that if one hath lands on the part of his mother, and loseth them by erroneous judgment, and dies, the heir of the he dies before attainder, his administrators part of the mother shall have the writ of error. 1 Leon. 261: 2 Sid. 56. See Owen. 68:

Godb. 377.

land by the custom of Borough English, shall be given. 11 Co. 41 b.

fendants, if one of them release the errors, he common law: for this remedy descends with

So if there be an erroneous judgment in This writ is demandable of right, and the case of tenant in tail-female, the issue female, and not the son, shall bring a writ of error. Dyer 90: 1 Leon, 261: 1 Rol Ab. 747.

So if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies leaving issue without issue, and J. S. brings a writ of error as cousin and collateral heir of the daughter, yet he shall never reverse the fine; for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and J. S. shall not reverse the fine, quia de non apnot come judicially before them, and appear in the pleading. Dyer, 89: Cro. Eliz. 469: 3 Lev. 36.

If there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing; and this is said to be necessary only by way of conformity. 1 Rol. Ab. 747; Dyer, 89.

But if tenant for life, and he in remainder in fee (being an infant), join in a fine, the infant alone may bring error for the error in the cause of the action, for him, and for no

other. 1 Leon. 31: Cro. Eliz. 115.

A writ of error may be brought by him that is made party by the law, though he was not originally party to the suit, as he who comes in as a vouchee. 1 Roll. Ab. 748, 755.

If there be judgment against the principal, and also judgment against the bail, the principal cannot have error on the judgment against the bail; 2 Leon. 4: Cro. Car. 408: Id. 481; or the bail on the judgment against the principal; Cro. Car. 408: 1 Lev. 137; neither can they join in a writ of error; Cro. Car. 300, 384, 408: Hob. 72; because the sons. Cro. Car. 481: Style, 174: Carth. 447.

A writ of error is usually brought by the party against whom the judgment is given; but a plaintiff may bring error to reverse his Upon this rule, that none shall have a writ own judgment, if he be dissatisfied with it, in

If a man is indicted for felony, and thereupon a capias and exigent are awarded, but may have error upon this award of the exigent, because by the award of the exigent his goods were forfeited; and this is ad grave damnum, So the younger son, when entitled to the &c. though the principal judgment can never

2. At what time this writ may be brought .-- \ It was formerly holden that a writ of error could not be brought before the judgment given; and if it bore teste before, it was no supersedeas, for the words of the writ are, Si judicium redditum, sit, &c. 1 Rol. Ab. 749. But it seems now agreed, that a writ of error that bears teste before the judgment is good; and this is the usual course for preventing and superseding execution: but the judgment must be given before the return of the writ. March, 140: 1 Vent. 255; Moor, 461: 3 Keb. 308: 1 Vent. 96: Latch. 133: and see 1 Term. Rep. 279, and New Rep. C. P. i. 298.

But a writ of error, that bears teste before any plaint entered, is not good. March, 140.

So where the defendant, upon an indictment of barratry, brought a writ of error bearing teste before the assise: it was disallowed; because, if such practice should obtain, it would disappoint all proceedings there. 1 Vent. 255: 3 Keb. 308.

The allowance of a writ of error may be served before the plaintiff is entitled to sign final judgment. 2 B. & P. 137. But the allowance of the writ of error, previous to the judgment being signed, is an irregularity permitted for the convenience of the party; for the judgment in the action is the true foundation of the writ of error. 2 B. & P. 479.

The Court of K. B. will not infer that a writ of error was sued out for delay, because it was sued out before final judgment signed. And though it should be made returnable before final judgment, it will still operate as a supersedeas upon the judgment, which, when signed in the same term, relates back to the first day thereof. 5 East's Rep. 145.

teen days between the teste and return of the tum the same term in which an exigent is writ. 4 B. & C. 116. And see 6 D. & R. 174. Nor that the teste should be on a seal day. 1

N. R. 298.

A writ of error cannot be brought after

tation of Actions; Recovery.

error will lie of any judgment that is not giv. 659-651: 1 Rol. Ab. 742, 3. And see st. 5 en in a court of record; nor of a judgment Eliz. c. 23. § 13, 14. given in an inferior court, as the county-court, as tence in Chancery proceeding according to error, for the judgment being quod suspendatury. 37 H. 6: Bro. Error. 95: 1 Rol. Ab. tur, &c. which is the judgment of law due for the offence, it must be presumed to have been the offence, it must be presumed to have been Court of Chancery, called the Petty Bag, given for that he was guilty of the offence, which proceeds according to the Common Law, but if judgment of acquittal is given upon and holds plea of scire facias for repeal of the such indictment, the king need bring no writ king's letters patent, &c. a writ of error lies of error; but the offender may be newly in in B. R. 1 Rol. Ab. 744: Dyer, 315: 4 Inst. dicted, for the judgment being quod eat sine 80: Plow. 393.

The Court of B. R. having allowed the sufficiency of a return to a writ of mandamus. and therefore refused to grant a peremptory writ, the party applying brought his writ of error in Parliament. Held that no writ of error lay in this case, it being merely an award of the court, and not a strict formal judgment. 3 Bro. P. C (8vo. ed.) 505.

The Court of C. P. have held, that, though writ of error may lie on a judgment of nonsuit, yet the Court will, on motion to take out execution, grant it, as such writ of error must be evidently merely for the purpose of delay and vexation. 1 H. Black. Rep. 432.

Writ of error cannot be brought on any record which is not a judgment. 1 Salk. 145. Nor upon any interlocutory judgment. 6

East's Rep. 333.

Nor upon a judgment of respondeat ouster, on a plea to the jurisdiction. 2 Tidd. Prac.

It is no cause of error that there is a misnomer of the Christian name of one of the defendants below in the warrants of attorney. 6 Moore, 135. Nor the omission of the Christian name of one of the defendants on the postea. 8 Moore, 297: S. C. 1 Bing. 314.

The misfinding of the jury is not error; the remedy in such case is applying for a new trial. 3 Bro. P. C. 515.

It is error of the jury, on a writ of inquiry, to assess more damages than are laid in the declaration, and judgment is entered for such damages. 2 W. Black. 1300.

In prohibition a writ of error does not lie from K. B. to the Exchequer Chamber. 5 B

& C. 765.

By the practice of the Court of Common It is not necessary that there should be fif- Pleas, a defendant coming in by capias utlagareturnable, may avoid the outlawry without a writ of error, by showing that he sued a supersedeas out of the same court, and delivered it to the sheriff before the quinto exactus, A writ of error cannot be brought after twenty years. Hardw. 345. (10 and 11 W. 3.c. 14). It may be returnable at any time in the term of which judgment is given; 2 Sid. 104: 1 Str. 632; but not before it. 1 Vent. 96: Latch. 136. The statute of limitations must be pleaded to a writ of error, as well as to an original action. Hardw. 346. See Limitations of such addition as is cess, or the want of such addition as is II. 1. In what cases it will lie.-No writ of required by st. 1 H. 5. c. 5: 2 Hawk. P. C.

die, &c. may be given as well for the insuf-

ficiency of the indictment, as for the party's innocence. 3 Inst. 214.

Also any judgment whatsoever, given by persons who had no good commission to proceed against the person condemned, may be falsified, by showing the special matter, without writ of error, because it is void; as where a commission authorizes to proceed on an indictment taken before A. B. C. and twelve others, and by colour thereof the commission. ers proceed on an indictment taken before eight persons only. 1 Inst. 231: 2 Hawk. P. C. 459.

If one is attainted of felony, and after, by relation of a general pardon, the felony is pardoned, he shall be discharged, for he hath no remedy by writ of error to reverse the at-

tainder. 6 Co. 5. a.

On error brought on a judgment of conviction for felony at the sessions, the Court will only look to the record of conviction, although the justices return also the record of a former

acquittal. 1 Maule & Sel. Rep. 183.

Wherever a new jurisdiction is erected by act of Parliament, and the court or judge, that exercises this jurisdiction, acts as a court or judge of record, according to the course of the Common Law, a writ of error lies on their judgments; but where they act in a summary method, or in a new course different from the Common Law, there a writ of error lies not, but a certiorari. 1 Salk. 263. See tit Certiorari.

2. How it is to be brought.—Error in the King's Bench is thus prosecuted: the cursitor of the county makes out the writ of error from a pracipe, or copy of the declaration left out execution on the affirmetur, or bringing with him; which is to be allowed by the action of debt on the judgment; or he may clerk of the errors, and a certificate of the allowance of the writ must be served on the attorney of the defendant in error. Formerly the proceedings were by scire facias ad audiendum errores against the plaintiff in the action, wherein judgment was obtained, and the writ of error being received by the sheriff to whom directed, he was to give notice to the plaintiff in error to show cause why execution should not be on the judgment, and make a return to that purpose; then a rule was to be given with the clerk of the rules, for the plaintiff in error to assign his errors by such a day, which if he did not do before the rule was out, the plaintiff in the original action might take out execution against him. But these steps are no longer necessary to compel an assignment of errors. See post,

error a supersedeas of execution; viz. the al-478.

By § 83. of the general rules made in H. T. 2 W. 4. it was declared a writ of error should be a supersedeas from the time of the allowance. But by one of the rules of H. T. 4 W. 4. no writ of error shall be a supersedeas of execution until the service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued. Provided that if the error stated in such notice shall appear to be frivolous, the court or a judge upon summons may order execution to issue.

In all the courts, if any writ of execution has been in part actually executed before the allowance of a writ of error, or before notice, the execution may proceed; Tidd, 1148; but otherwise not until after default in putting in or perfecting sufficient bail. 2 Term Rep. 45.

If the plaintiff in error assign errors in the record, then the defendant must plead in nullo est erratum, and thereupon enter the cause with the clerk of the papers, for the errors to be argued; and paper books for the counsel and judges are to be made out, &c. If some part of the record be not returned, a certiorari must be prayed to bring it into court; and if matters of fact are alleged in error, as non-age, death of the palintiff, &c., a proper plea must be made thereto, and issue thereupon taken and tried, as in any other issue: but if only matters of law are assigned, the errors are argued by counsel on both sides, and the judgment is either re-versed or affirmed: and when judgment is affirmed, the defendant in error may proceed against the defendant in the action, by taking prosecute the bail by scire facias upon their recognisance.

When a judgment is reversed or affirmed in the Exchequer-chamber, the transcript of the record thereof will be remitted back to the Court of K.B. to be entered up at the end of the judgment there: and if such judgment shall be affirmed in the Exchequer-Chamber, yet a writ of error may be brought

thereupon returnable in parliament.

If you would bring a writ of error in parliament to reverse a judgment in B. R. there must be a petition to the King for his warrant, which petition has the allowance of the Attorney-General, and then the King writes on the top of it Fiat Justitia; whereupon a writ of error is made out by the clerk of the errors. And then the Lord Chief Justice of Two things are requisite to make a writ of thereof, up to the House of Lords in full Parliament, and after they are examined there, lowance, (i. e. the delivery of the writ to the leaves the transcript with the Lords, but clerk of the errors;) and putting in bail. If brings back the record: and this being done, the writ of error be allowed before judg- the attorney for the defendant in error gets ment, the time for putting in bail, four days, some lord to move that the plaintiff in error runs from the judgment; if after judgment, may assign his errors; but if for the plain-from the time of the allowance. 1 B. & P. tiff, motion is to be made, that upon his assigning errors, the defendant may appear and

make his defence, and counsel be heard on the record shall be necessary; but the plainboth sides: and then, after the judgment is tiff in error shall, within twenty days after either affirmed or reversed, the clerk of the the allowance of the writ of error, get the parliament remands the transcript of the record into B. R. with the affirmation or reversal thereof, to be entered upon the record of the said court, which court, if affirmed, awards execution, &c. Dyer, 385. See Cowp.

A writ of error in parliament is made returnable immediately; or on a prorogation to the next session, and it doth not determine by a prorogation. But if a parliament is dissolved before the errors are heard, it is otherwise. And on motion, execution hath been granted in B. R. on a judgment in such a case, the record being never out of the court. Raym. 5: 2 Nels. Ab. 731.

Where a writ of error was brought in B. R. in the life-time of Geo. I. but was not argued till after the accession of Geo. II. when the judgment was affirmed, on a writ of error in parliament, this judgment was reversed; it being held that the first writ of error, the King being sole plaintiff in the cause, was absolutely abated. This was the case of the Deanery of Armagh in Ireland. 3 Bro. P. C.

(8vo. ed.) 507.

The party bringing the writ of error is to cause the roll where the judgment is entered, to be marked with the word error in the margin, that the other party may have notice on the record that the writ of error is brought, and this marking of the roll, on given notice thereof, is as it were a supersedeas in itself to hinder execution: though a supersedeas is to be made out, allowed, and left with the sheriff of the county; and the plaintiff's attorney is not obliged to search the record, whether writ of error is brought or not; but may make out execution upon the judgment, if no supersedeas be taken forth, or he hath no notice of the writ of error. Trin. 24 Car. B. R.

On a writ of error of a judgment in the Common Pleas, or other inferior court, in every adversary suit, the record itself shall be removed, that it may remain as a precedent and evidence of the law in the like cases.

1 Rol. Ab. 753: 5 Co. 39.

But in the case of a fine the transcript only is removed, for fines are only a more solemn acknowledgment or contract of the parties, and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the errors in fact may be corrected in C. B. the latter, the justices of B. R. may send for the fine itself, and reverse it, or they may send a in the Exchequer Chamber. Ibid. 620. writ to the treasurer and chamberlain to take it off the file; besides, should the record itself actions, a writ of error will not lie in the be removed and affirmed, it could not be engrossed for want of a chirographer in B.R. a jury; but upon a judgment in criminal Rol. Ab. 752: 1 Bendl. 51: Dyer, 89: cases, error will lie in B. R. whether the Godb. 248: 2 Roll. Rep. 233: F. N. B. 20. error be in fact or in law; though it lies also See tits. Fines of Lands, Recovery.

By the 11th of the general rules made in

transcript prepared and examined with the clerk of the errors of the court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors, or administrators, shall be at liberty to sign judgment of non pros. The clerk of errors shall, after payment of the transcript money, deliver the writ of error when returnable, with the transcript annexed, to the clerk of the errors of the Court of Errors.

III. In what Court it is to be brought,-A writ of error is brought either in the same court in which the judgment was given, or to which the record has before been removed by a former writ of error, or in another and superior court.

If upon a judgment in B. R. there be error in the process, or through the default of the clerks, it shall be reversed in the same court by writ of error sued there before the same justices. F. N. B. 21: Poph. 181: 1 Rol.

Ab. 746.

This writ is called error coram nobis, because the record and process upon which it is founded are stated in the writ to remain before us-that is, in the Court of King's Bench; the writ (as is the case with all original writs) running in the King's name.

So if one is indicted of treason or felony in B. B. or being indicted elsewhere, the indictment is removed in B. R., and by process of that court he is erroneously outlawed, and so returned, a writ of error may be brought in B. R. for the reversal thereof. 3 Inst. 214.

Also where the error is in fact and not in law, a writ of error, coram nobis, lies in the same court; as where the defendant being under age appeared by attorney. Style, 406: 5 B. & A. 418. So where the plaintiff or defendant was a married woman at the commencement of the suit; Roll. Ab. 747: Style, 254. 80; or died before verdict or interlocutory judgment. 2 Saund. 101.

Error de recordo quod coram nobis residet lies in the court of B. R. for errors in fact in the judgment of the same court; as non-age of the parties &c. which doth not proceed from the error of the judges; and this writ is allowed without bail. Cro. Jac. 254. And same term, without this writ, which lies not

If judgment is given in B. R. in civil same court, only for errors in fact triable by in Parliament. 3 Salk. 147.

Likewise, if a record be removed into the H. T. 4. W. 4. no rule to certify or transcribe, K. B. by writ of error, which is quashed for insufficiency; Carth. 368; or for any fault firmance or reversal there, a writ of error lies but variance from the record; 1 Str. 607: 2 Ld. Ray. 1408; a writ or error, coram nobis, may be sued out in that court upon the record upon a judgment in a County Palatine. 4 so removed. Carth. 369, 70.

But if an erroneous judgment be given, and Durham, 4 Inst. 418. the error lies in the judgment itself, and not in the process, a writ of error does not lie in lies to the Exchequer-Chamber, before the B. R. of such judgment. 1 Roll. Ab. 746.

law be given in B. R. upon an indictment in London, a writ of error may be brought in the same court; for though in civil cases error does not lie in the same court, unless for a Pleas, and afterwards to the House of Lords matter of fact, yet in criminal cases it lies as well for an error in law as fact. 1 Sid. the Exchequer in cases where the King is a

for error in fact, can be brought either in the their assistance the judges of the Courts of Exchequer Chamber or the House of Lords. King's Bench and Common Pleas, or some of

court, where, anciently, causes of great con- from the King's Bench and Court of Exchesequence, as between the Magnates Regni, quer-Chamber in Ireland also to the House of were heard and determined: hence the der. Lords. (39 and 40 G. 3. c. 67.) nier resort is to the House of Lords, to which a writ of error lies; and, therefore, if a writ gis upon a judgment given within the five of error be brought of a judgment in the ports; but by custom such judgment is exa-King's Bench into the Exchequer Chamber, minable by bill in nature of a writ of error, and there the judgment is reversed; yet a coram domino custode seu gardiano quinque writ of error lies of such judgment into parliament, and the Lords may reverse such second judgment. Show. Parl. Cas. 24. 110: 1 Vent. 334: Raym. 330: 2 Jon. 99: 2 Lev. naries of the Duchy of Cornwall, no writ of

From the King's Bench a writ of error at common law lay in all cases immediately to the House of Lords, whether upon judgments in causes originally commenced in the King's Bench, or brought there by writ of error. But Council. 1 Rol. Ab. 745. See 4 Inst. 230. 2 now a writ of error upon any judgment (not being the reversal or affirmance of the judgment of an inferior court; 2 C. & I. 11.; and not being a case in which the King is a party) given by this court, must be made returnable before the judges of the Common Pleas and the Barons of the Exchequer in the Exchequer-Chamber, and from the judgment thereupon given in the Exchequer-Chamber there is no writ of error except to the House of Lords. 1 W. 4. c. 70 § 8. A writ of error, take the acknowledgment of the seal of the therefore, still lies to the House of Lords; judge of Nisi Prius. 2 Tidd. Prac. 914. first, after a reversal or affirmance of a judgment of this court in the Exchequer; secondly, without a previous writ of error to the Exchequer upon the reversal or affirmance by the King's Bench of the judgment of an inferior court; and thirdly, where the king is a party. Qui tam actions do not fall within the exceptions as to the King.

fact; 1 Chitt. Rep. 369; or error in law, a writ of error lies from all inferior courts of record in England (with the exceptions of H. T. 4 W. 4. it is declared, "no rule to allege those in London and in some other places diminution, nor rule to assign errors, nor scire

to the House of Lords.

A writ of error lies in the King's Bench Inst. 214. 223: Rol. Ab. 745. But see as to

From the Common Pleas a writ of error judges of the King's Bench and the barons of Also if an erroneous judgment in point of the Exchequer, and afterwards to the House of Lords: from the law side of the Exchequer to the Exchequer-Chamber before the judges of the King's Bench and the Common (1 W. 4. c. 70. § 8.) Also from the law side of party to the Exchequer-Chamber before the It is to be observed that no writ of error Lord Chancellor and Treasurer, calling to 2 Saund. 101. a.: 2 Lev. 38: 1 Vent. 207, 208. them (31 Ed. 3. c. 12.); and from thence to The court of parliament is the supreme the House of Lords (6 A. c. 26. § 12.); and

No writ of error lies in Banco or Banco Reportum apud curiam suam de Shepway. 4

Inst. 224. See tit. Cinque Ports.

If a judgment be given in the court of stanerror lies upon this in Banco or Banco Regis, because it hath not been used: but of this there may be an appeal to the guardian of the Stannaries, and from him to the Prince; and when there is no Prince, to the King's Privy Danv. Ab. 304.

Upon a judgment given in the Hustings in London, a writ of error lies at St. Martin's before certain justices; 1 Rol. Ab. 745: 1 Lev. 309: 2 Saund. 253. S. P.; and upon a judgment of the said justices, a writ of error lies in parliament. See 2 Leon. 107.

On a writ of error from K. B. in Ircland the proper mode is to send a writ from this country to the chief justice of that court, to

IV. 1. When and how Errors are to be assigned.—The parties, upon the removal of the record by the writ of error, have no day in court given to either of them; so that, formerly, if the plaintiff in error delayed to sue forth his sci. fac. ad audiend. errores, the defendant had no way to compel him, but by To the King's Bench, either for error in suing out a scire facias quare executionem non,

But by r. 11. of the general rules made in hereafter noticed), and after judgment of af- facias quare executionem non, shall be neces-

Vol. I.—83

sary, in order to compel an assignment of er- where it ought to have been for the defendant; rors, but within eight days after the writ of and the errors of a judgment are now to be aserror, with the transcript annexed, shall have signed on the record, to appear with it to the been delivered to the clerk of the errors of the court of error, or to the signer of the writs in the King's Bench in eases of error to that court, or within twenty days after the allowance of the writ of error in cases of error coram nobis, or coram cobis, the plaintiff in error shall assign errors; and in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non pros."

R. 12. "The assignment of errors and subsequent pleadings thereon shall be delivered to the attorney of the opposite party, and not

filed with any officer of the court."

R. 13. " No scire facias ad audundum errores shall be necessary (unless in case of a so as to have it tried by the country. 1 Sid. change of parties), but the plaintiff in error may demand a joinder in error, or plead to is in the nature of a demurrer, which confesses the assignment of errors; and the defendant the fact, if well pleaded, or well assigned. in error, his executors, or administrators, shall be bound within twenty days after such 'nullo est erratum is no confession of it; as if demand to deliver a joinder or plea, or to de- lit be assigned, that such a one at the time of mur, otherwise the judgment shall be reversed."

" Provided, that if in any case the time allowed as hereinbefore mentioned, for getting that error, because the record is not in court, the transcript prepared and examined, for as that being no part of the record, for the plea signing errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the 10th of August in any year, the party entitled to such time shall have the like time for the same purpose, after the 24th in fact, viz. that the defendant, who was an of October, without reckoning any of the days infant, did not appear by guardian, but by atbefore the 12th of August."

may be extended by a judge's order."

error to reverse fines and common recoveries, a scire facias to the terretenants shall issue as heretofore."

to the ancient practice, is to put a bill into court, and say in the bill, in hoc erratum est, &c. showing in certain in what things.

N. B. 20. 2. What may be assigned for Error .- It seems a general rule, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice being murrer, because it is against the record. things of the greatest credit, cannot be questioned but by matters of equal notoriety with 1 Vent. 252: 3 Keb. 259: 1 Lev. 76. themselves; wherefore, though the matter assigned for error should be proved by witnesses not be assigned in the Exchequer Chamber: of the best credit, yet the judges would not though, by some authorities, errors in fact admit of it. 1 Rol. Ab. 757.

The assignment of error, in omnibus erra- 2 Nels. Ab. 708. tum, is not good; for the judgment is founded upon the original writ, count, pleading, issue, process, trial, and so is manifold.

Cent. 84.

The assigning general errors is to say that the declaration, &c. is not sufficient in law: and that judgment was given for the plaintiff | See 2 Saund. 1019. Special errors are, any

court.

If the plaintiff in error assigns errors in fact, and errors in law, which are not assignable together, and the defendant in error pleads in nullo est erratum; this is a confession of the error in fact, and the judgment must be reversed, for he should have demurred for the duplicity. Style, 69: 1 Lev. 76: Salk. 265: 6 Mod. 113. 206. For errors of fact and in law cannot be assigned together, as they are distinct things, and require different trials. 2 Tidd. Prac. 1226.

Also if an error in fact be well assigned in nulla est erratum is a confession of it, for the defendant ought to have joined issue upon it, 93: Raym. 59. Because, in nullo est erratum

But if an error in fact be ill assigned, in the return of the venire was not sheriff, and the record be removed into B. R. by certiorari, there in nullo est erratum is no confession of is in nullo est erratum in recordo. Cro. Jac. 12. 29. 521: Raym. 231: Cro. Car. 421: 1 Rol. Ab. 758.

So if the plaintiff in error assigns an error torney, and concludes with hoc paratus est "Provided, also, that in all cases such time verificare, instead of concluding to the country, as, he ought to do, though the defendant "Provided also, that in all cases of writs of in error pleads in nullo est erratum, yet it shall not amount to a confession, but shall be taken only for a demurrer. Yelv. 58.

Also if an error in fact, that is not assign-The manner of assigning errors, according able, be assigned, and in nullo est erratum be pleaded, it is no confession; as if it be assigned, that such a day there was no court of Common Pleas sitting, because that is against the record, and in such case in nullo est erratum is only a demurrer; so if a man says he did not appear, and the record says he did, in nullo est erratum is no confession, but a de-Cro. Car. 12. 29. 52: Yelv. 58: Raym. 231:

It has been held that an error in fact canmay be assigned as errors in law. 2 Mod. 194:

Errors in law are common or special. Common errors are, that the declaration is in-Jenk. sufficient in law to maintain the action, and that the judgment was given for the plaintiff instead of the defendant, or for the defendant instead of the plaintiff, in the original action. which shows the judgment to be erroneous. shall recover or be restored to any personal

to assign the errors in his proper person: and when land is to be recovered or restored in a in cases of outlawry for felony, errors sufficient must be certainly alleged in writing, be-bar; but where by a writ of error the plaintiff fore the writ of error is allowed. Jenk. Cent. shall not be restored to any personal or real 165. 179. Where a recovery is had, and error thing, a release of all actions real or personal brought, if the original writ does not abate by is no bar. Co. Lit. 288, b. 8 Co. 152: 1 Rol. death, but is abateable only, as by entry into the land pending the writ, or coverture, acquisition of a dignity a particle. quisition of a dignity, a partial array returned, releases all his right to the land, and so where aid denied, &c. that should have been pleaded, there is a fine levied, this shall bar him of his and were not: these shall not be assigned for writ of error; for no person can bring a writ error, for they are waived. 9 Rep. 47: 21 H. of error to reverse a judgment that is not inti-

final judgment is given, will not warrant that mandant can make out a clear title; possesjudgment, if it appear upon the same record, sion always carrying with it the presumption

ing term. 1 Wils. 181.

verse a fine, the plaintiff cannot assign, that ant, pending a precipe against him, aliens in the conusor died before the teste of the dedi- fee, and after judgment is given against him, mus, because that contradicts the record of and he brings a writ of error; this feoffment the conusance taken by the commissioners, which evidently shows that the conusor was then alive, because they took his conusance after they were armed with the commission, and the dedimus issued. Dyer 89: 1 Rol. Ab.757.

By stat. 20 Car. 2. c. 6. in action real, personal, and mixed, the death of either party between verdict and judgment shall not be

alleged for error.

The want of a warrant of attorney might formerly be assigned for special error; but by one of the general rules made in H. T. 4 W. 4. and which were to come into operation in the following Easter Term, no entry shall be made on record of warrants of attorney to sue or defend.

V. What Defence may be made by a Defendant in Error .- The defendant may plead either the common joinder in nullo est erratum, or a special plea, or may demur.

The common joinder (in nullo est erratum) alleges there is no error in the record and proceeding, and prays the court to examine them,

and affirm the judgment.

After in nullo est erratum pleaded, the party affirms the record to be perfect, and he is tore-closed to say there is error in it: though the Age.—A judgment, as bring on entire thing, it. 1 Salk. 270. The judges are not bound to other part; or be reversed as to one party, to search for errors in the record which were and remain good against the rest: though if

errors, or a release of all suits, and these pleas, against joint-defendants, when one of them is if found for him, will for ever bar the plaintiff dead, the judgment shall be reversed for error in error. 1 Rol. Ah. 7--.

matter appearing on the face of the record | So where, by a writ of error, the plaintiff dd. 1078. thing, as debt, damage, or the like, a release If one in execution brings error, he ought of all actions personal is a good plea; and

tled to the land, &c. for the courts of law will An original writ of the same term, in which not turn out the present tenant, unless the dethat there have been proceedings of a preced- of a good title till the right owner appears. 1 Rol. Ab. 747. 788: Dyer, 90. a: 3 Leo. 36: Hence it is, that in a writ of error to re- Cro. Eliz. 469: 1 Rol. Ab. 789. If the tenis not any bar to the writ, because he was privy to the judgment after. 1 Rol. Ab. 788: Bridge, 77: 1 Rol. Rep. 306. In a writ of error to reverse a common recovery, it is no good plea that the plaintiff, pending the writ of error, hath entered into part, for before the possession was taken from him, he might have error to reverse the judgment, though not to have restitution. 1 Lev. 72. See tit. Fine and Recovery.

In a sci. fac. against a tertenant, he may plead a release of error, though he be not privy to the judgment. 9 H. 6. 48: Bro. 9. S. C.

But the tertenants cannot plead in abatement of the writ of error, but only in bar as a release, &c. in maintenance of their title. 1 Lev. 72.

It is to be observed, that if there be two or more plaintiffs in error, the release of errors by one of them will not bar the others. Cro. Eliz. 648, 49: Cro. Jac. 116.

Should the errors be badly assigned, the defendant may demur; but in most cases the common joinder will answer the purpose.

VI. Of the Judgment in the Writ of Error, court is not restrained from examining into cannot be reversed in part, and stand good as to search for errors in the record which were and remain good against the rest: though in not assigned; but may if they will; and if there be error in awarding execution, the execution only shall be reversed, and not the ment. Jenk. Cent. 159.

Special pleas confess the errors assigned, but avoid them by other matter. Thus the defendant in error may plead a release of all costs. Burr. 2018. If judgment is entered as to all of them; for in such case the plaintiff

ought to make a special entry of the death of Where a judgment is pleaded in bar of anthe party, with nihil ulterius versus eum fiat, other action, &c., and judgment given on that and then taking judgment only against the plea; writ of error may be had to reverse the others. Ibid. 149.

A Court of Error ought to give the same judgment upon reversal, which the court below ought to have given. 1 Anst. 178.

The Court of Exchequer-Chamber have not any authority, but to reverse or affirm the judgment, &c., for they cannot make execution. Cro. Eliz. 108. But where judgment is given for the defendant, and the plaintiff brings a writ of error; if the judgment is reversed, the court which reverses the judgment shall give judgment for the plaintiff as the other court ought to have done. Yelv. 117, 75: Style, 121. 125. 406. 118.

When a record is removed into K. B. from one count in a declaration, and a distinct judgthe County Palatine Court by a writ of error, and that writ is non-prossed, the Court of K B. will award execution. 3 Term Rep. K. B. 657

Where judgment for the defendant on a special verdict is reversed in the Exchequer-Chamber, that court, on motion, will give a final judgment for the plaintiff. 1 Bos. & Pull.

In the Exchequer-Chamber after reversal of a judgment, &c. in B. R. the court gave judgment that the plaintiff recover, &c. but because they wanted power to award a writ of inquiry, which was necessary, being on a demurrer, therefore it was sent back into B. R. for the execution of that writ, and thereupon to give final judgment: but if the judgment reign of George I., but not argued till the reign is against the plaintiff in B. R. upon a special verdict, and that judgment is reversed in the Exchequer-Chamber, there being no writ of that the first writ of error (the king being the inquiry requisite, the Court of Exchequer-Chamber doth not only give judgment of reversal, but a complete judgment for the plaintiff in the action. Carth. 181.

If erroneous judgment be had by consent of parties, it may be reversed in the Exchequer-Chamber; for consent of parties may not error. 4 D. & R. 153. change the law; but if the consent is entered upon and made part of the record it may be quash his own writ of error; though they good. Hob. 5: Cro. Eliz. 664. The reversal in the Exchequer-Chamber is res judicata: no writ of error lies upon such judgment, except in parliament; and it is by six judges at least, by stat. 27 Eliz. c. 8: 31 Eliz. c. 1.

When judgment is given in B. R. for the plaintiff in error, there shall be only a judici- quer-Chamber cannot be quashed by the forum revocetur, &c. entered with costs: if for mer court. 1 Dough. 350. the defendant in error, that the plaintiff nil capial per breve suum de errore. The chief justice of B. R. &c., or the eldest judge, ought to allow a writ of error, which is in judgment | the time, within which he must get the transof law a supersedeas until the errors are examined, and the judgment affirmed or reversed. Cro. Jac. 534. As a plaintiff having erroneous judgment may reverse it, and new judgment may be given for him; so if a judg- 4 W. c. 42. although courts of errors generally ment is reversed, the plaintiff may bring a allowed interest to the defendant in error when new action for the same cause. 1 Lev. 310. the judgment of the court below was affirmed,

second judgment. Cro. Eliz. 503: Jenk. Cent. 259. And debt lies upon a judgment in B. R. after a writ of error brought, which is only a supersedeas to the execution. 1 Lev. 153. But the court will stay proceedings in such action on giving judgment.

In a writ of error upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reversed in toto against all. 1 Rol. Ab. 776 : Cro. Jac. 289. 303 : Allen, 74,

If judgment be given for the plaintiff on ment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the Court of Error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record. 6 Term Rep. K. B. 200.

A writ of error in parliament may be nonprossed without carrying over the transcript to the court of error. I Maul. & Selw. Rep.

The stat. 8 and 9 W. 3. c. 11. § 7. applies to writs of error, and therefore such a writ does not abate by the death of one of several plain-

tiffs in error. 1 B. & A. 586.

On a writ of error brought in K. B. in the of George II., when judgment was affirmed on a writ of error in parliament; it was held sole plaintiff) was absolutely abated. 3 Bro. P. C. 507.

The Court of K. B. have no authority to grant a writ of error brought upon a judgment in a county-palatine court, nor to issue executions upon judgment brought there upon

The court will not let the plaintiff in errror may grant leave to discontinue it. 5 Mod. 67. If a verdict is for a defendant in error, and judgment is affirmed, costs are allowed by st. 3. H. 7. c. 10. on occasion of the delay of execution.

A writ of error from K. B. to the Exche-

If the plaintiff in error make default after errors assigned, the writ of error will thereby be discontinued. See ante II. and IV. as to cript prepared and examined, and assign er-

VII. 1. Of Interest .- Previous to the 3 and

and in all cases where it was evident the writ | costs in the original action, but not to the of error had been brought for the pupose of costs in error. 2 Tidd, Pract. 1244. delay, yet they exercised a discretionary power, and in some actions refused it; but by § 30. of that act it is provided, "that if any per- in error being a lunatic. 2 B. & P. 437. son shall sue out any writ of error upon any judgment whatsoever, given in any court in Black. 566: 5 Dow, 233: 10 East, 2: 2 M. & any action personal, and the Court of Error S. 249. shall give judgment for the defendant thereon, then interest shall be allowed by the Court a meeting of the neighbourhood to com-of Error, for such time as execution has been promise differences among themselves; it is delayed by such writ of error, for the delaying thereof."

2. Of Costs.—Where the judgment in the cher.] court below is given for the plaintiff, and the defendant, before execution had, brings a writ of error; if the judgment be affirmed, or the cos, was one of our ancient tenures in serwrit of error discontinued by default of the jeanty; as appears by the inquisition of the party, or the plaintiff in error be nonsuit, the defendant in error shall, at the discretion of the court, recover his costs and damages for the delay, &c. 3 H. 7. c. 10. enforced by 19 H. 7. c. 20. But no costs are allowed in 3 H. 7. c. 10. where the writ is nonprossed before the transcript of the record; 7 E. R. 111: 2 Smith, 121; or where the writ of error has been sued out after execution. 2 Str. 1190: Cro. Jac. 636: Cro. Car. 173.

By 13 Car. 2. st. 2. c. 2. § 10. if a judgment after verdict be affirmed in error, the defendant in error shall have double costs. The court has no discretion to award costs or not, but is bound to allow them in all cases with-

in this statute. 2 H. B. 284.

But it is confined to cases where the judgment affirmed is for the plaintiff below, and not when the defendant below obtains judgment upon a special verdict. 5 E. R. 545.

S. C. 2 Smith, 142.

Where judgment is given for the defendant in a court of record, and the plaintiff thereupon brings a writ of error, if the judgment be affirmed, or the writ of error discontinued, or the plaintiff be nonsuit, the defendant in error shall have judgment to recover his costs, that statute not being confined to judgment for defendant in demurrer. 8 and 9 W. 3. c. 11. s. 3: 10 East, 4: 1 B. & Ad. 197.

And by 4 Anne, c. 16. § 25. upon quashing writs of error, for defect or variance from the record, &c. the defendant is to have costs as

if judgment were affirmed.

The writ having been quashed because brought by a feme covert, defendant in error was held entitled to costs under the last men-

tioned act. 3 T. R. 302.

None of the above statutes extend to a reversal of a judgment; where such is the case each party pays his own costs in error; but the prevailing party shall have his costs in the original action, as the court of error must give the same judgment as ought to have been given by the court below. 1 Str. 617: 5 East, 49: 12 East, 668.

The Court of C. P. will not compel security for costs in error on the ground of plaintiff

See as to other cases of costs in error, 1 H.

ERTHMIOTUM. An ancient word for mentioned in Leg. Hen. 1. c. 57. ESBRANCATURA, from the Fr. esbran-

Cutting off branches or boughs in

forests, &c. Hoved, 784. ESCALDARE. To scald: escaldare porserjeancies and knights' fees in the 12th and 13th years of king John, within the counties of Essex and Hertford. Lib. Rub. Scaccar' MS. 137.

ESCAMBIO, derived from the Span. cambier to change.] Was a licence granted to make over bills of exchange to another beyond the sea; for by the stat. 5 R. 2. c. 2. (which is now repealed by 59 G. 3. c. 49. & 11.) no merchant ought to exchange or return money beyond sea without the king's license. Reg. Orig. 194. See tit. Exchange, Bill of Exchange.

ESCAPE.

ESCAPIUM, from the Fr. escapper, i. e. effugere to fly from.] A violent or privy evasion out of some lawful restraint; as where a man is arrested or imprisoned, and gets away before he is delivered by due course of law. Staundf. P. C. cap. 26, 27: Terms de Ley. See also tit. Rescue.

Escapes are either (A.) in civil, or (B.) in

criminal cases.

(A.) As to Escapes in Civil Cases.

I. 1. Where the Party shall be said to be legally committed, so that the suffering him to go at large will be adjudged an Escape; 2. What Degree of Liberty, or going at large, shall be deemed an Escape; 3. What Persons are answerable for an Escape.

II. Of the Difference between voluntary and negligent Escapes; and Escapes on Mesne Process, and Execution.

III. 1. Of the Nature of the Action to be brought for an Escape; and 2. Of the Manner of laying it.

Of the Party's Defence sued for the Escape; and therein of pleading fresh

I. 1. Where the Party shall be said to be legally committed, so that the suffering him to go at large will be adjudged an Escape.-It seems agreed as a general rule, that wherev-Where judgment for plaintiff was reversed er a sheriff or other officer hath a person in on facts, plaintiff in error entitled to the custody, by virtue of an authority from a

court which hath jurisdiction over the matter, | The sheriff having a writ against G. B., arthat the suffering such a person to go at large rested M. B., who was the real debtor, and is an escape, for he cannot judge of the va- who, at the time of contracting the debt, relidity of the process or other proceedings of presented himself as G. B. It was held that such court, and therefore cannot take advan- the sheriff having been informed of the cirtage of any errors in them; hence the law cumstances while he had the real debtor in allows him, in an action of false imprison- his custody, was not bound to detain him, and ment, to plead such authority, which will ex- therefore was not liable to an action for an escuse him, though it be erroneous; but if the cape. Magnay v. Bridges, 1 Barn. & A. 647. court has no jurisdiction of the matter, then But where the sheriff arrested a defendant all is void, and consequently the officer not within a liberty where particular officers had punishable for suffering a person taken upon the privilege of executing writs, and there such void authority to escape. Moor, 274: Dyer, 66. 175. 306: Poph. 203: 1 Leon. 30: the sheriff was not justified as against the 5 Co. 64: 8 Co. 141. b: Cro. Jac. 280. 289; owner of the franchise in making the arrest, 2 Bulst. 64, 237, 256. If a ca. sa. issue after it was held that he was liable for an escape for a year and a day, without suing out a scire letting the defendant go while within the lifacias, this error will not excuse the sheriff berty. Piggott v. Wilkes, 3 Barn. & A. 502. in an escape. Cro. Car. 288; Salk. 273. But though a sheriff may not take advantage of an erroneous process, yet he shall of a void entered in the judge's book, and a commitprocess, on which it is no escape to let a prisoner go.

If at the petition of A. and the rest of the creditors of B. a commission under the statutes against bankrupts is issued out against B., and thereupon the commissioners sit and offer interrogatories to C., and he refuses to be examined, and by them is thereupon committed to prison, and the gaoler suffers him to escape, as the commissioners had sufficient authority to commit, and A. was prejudiced charge the marshal with any escape, without by the escape, he may maintain an action against the gaoler. 1 Rol. Rep. 47: Moor,

834. pl. 1123. S. C.

The sheriff cannot be charged with an escape before he had the party in actual custody by a legal authority; and therefore if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. Bro. Es-

cape, 22.

But if A. is arrested, and in the actual custody of the sheriff, and afterwards another; writ is delivered to him at the suit of J. S. upon the delivery of the writ, A., by construction of law, is immediately in the sheriff's custody, without an actual arrest; and if he escapes, the plaintiff may declare that he was arrested by virtue of the second writ, which office for that purpose, or in default thereof, is the operation it has by law, and not accord-| shall forfeit the sum of 50L, and if such maring to the fact. 5 Co. 89. But where the sheriff, not having actually arrested a defendant, but accepted the undertaking of an attorney to put in bail, who put in bail, and the sheriff had returned a cepi corpus, held per Lord Mansfield at the Surrey assizes, summer 1775, in Hodgson v. Akerman, Esq. that the sheriff was not liable, upon a writ of non est custody." inventus, on another process, to an action, either for an escape or a false return, or for negligence in not taking the defendant, no ac. | book. Ld. Raym. 705. tual negligence being proved; and the plaintiff was nonsuited.

was no non omittas clause in the writ, so that

If a person out upon bail renders himself in discharge of his bail, and a reddidit se is titur filed in the office, and the prisoner afterwards escapes; yet if no notice was given to the marshal of such render, or any entry made of the commitment in his book, the prisoner shall not be deemed in custody so as to charge the marshal with an escape; but it seems this matter cannot be insisted upon after trial. 1 Salk. 272, 3. Vide post.

It hath been held, that entering a committitur upon the roll was not sufficient to proving an actual imprisonment: but that proving the party to be actually in prison, though there be no entry made in the marshal's book, is sufficient. 1 Sid. 220: 1 Keb.

And now, for the greater security of creditors, and the better to enable them to prove the actual custody of the prisoner, it is enacted, by stat. 8 and 9 W. 3, c. 27, § 9. "That if any one, desiring to charge any person with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputies, or by any other keeper of any other prison, whether such person be a prisoner in his custody, or not, the said marshal or warden, or such other keeper, shall give a true note in writing thereof, to the person so requesting the same, or to his lawful attorney, upon demand at his shal or warden, or their respective deputy, &c. exercising the said office, or other keeper, &c. of any other prison, shall give a note in writing that such person is an actual prisoner in his or their custody, every such note shall be taken as a sufficient evidence that such person was at that time a prisoner in actual

A committitur upon the roll is good evidence in escape, without an entry in the marshal's

2. What Degree of Liberty, or going at large, shall be deemed an Escape .- Every

person in prison by process of law is to be It hath been adjudged no escape to let a Rol. Ab. 806.

A prisoner in execution shall not be allowed to go out of the gaol; for if he goes out, though he returns again, it is an escape. Person into court, if the sheriff on the way 3 Rep. 43, 44: 2 Inst. 360. 381. And yet in let him go at large in the county, or carry London, by special custom there, in some him round about a great way, &c. it will be cases the prisoner may go abroad with his an escape. 1 Mod. 116. And an escape in keeper, and it will be no escape. Ibid.—See Hob. 202. Where the justice of the court, prisoner being once escaped, and at large, it and plaintiff in the suit, agree that the shall be intended he is confined to no place-prisoner shall be at liberty, and he go out 1 Lil. 4 br. 537. Committing the marshal and return at his time, it is no escape: but of the Marshalsea to prison, was held an esthis may not be without the sheriff's consent. cape in law of all the prisoners there. See Dyer, 275.

If therefore a defendant being taken in execution, be afterwards seen at large, for any execution to a lock-up house within his own the shortest time, even before the return of bailiwick, and keeps him there 14 days bethe writ, this is an escape. 2 Bl. Rep. 1048: fore the return of the writ, is not thereby and see 1 Bos. & Pull. 24. that a defendant guilty of an escape. 4 W. P. Taunt. 608. so taken in execution cannot be allowed to

go about even with an officer.

prisons are to be actually detained within the said prisons; and if they escape, action of debt lies against the warden, &c. 1 R. 2. c. 12. But now the marshal or warden grant sons, and both are taken in execution, if the the liberty of the rules to such as they think sheriff suffer one of them to escape, he shall proper (not criminally charged), on proper be answerable for the whole debt, though he security. Keepers of those prisons suffering prisoners, either upon a contempt or mesne process, or in execution, to be out of the rules (except on rule of court, &c.), are guilty of an escape; and persons conniving at an escape shall forfeit 500l. &c. by 8 and 9 W. 3. c. 27. And by this statute, where any prisoner in execution escapes, the creditor may have any other new execution against

If the bailiff of a liberty, who has the return and execution of writs, remove a prisoner taken in execution to the county-gaol, situated out of the liberty, and there deliver him into the custody of the sheriff, this is an escape for which an action of debt lies. 2 Term Rep. 5.

deliver the prisoner, no action will lie for this

as an escape. 27 H. 8. 24.

If there be an escape by the plaintiff's consent, when he did not intend it, the law is hard that the debt should be thereby discharged; as where one was in execution in B. R. and some proposals being made to the plaintiff in behalf of the prisoner, seeing there was some likelihood of an accommodawas held to be an escape with the plaintiff's at the suit of another, the judgment-creditor consent, and he could never after be in execubrings a warrant on a capies utlagatum, and tion at his suit for the same matter. 2 Mod. 136. delivers it to the sheriff's officer, who hath

kept in salva et arcta custodia, in order to prisoner go where the sheriff hath the pricompel them the more speedily to pay their soner in custody, if it be before the return of debts, and make satisfaction to their credithe writ: it is sufficient if the officer have tors. Plowd. 36: 3 Co. 44: 2 Inst. 381: 1 the party at the return of the writ, &c. Moor, 299: 1 Salk. 401: 2 Nels. 739, 740. A prisoner in execution shall not be al- See post, II. Yet it hath been held, that this may not be without the sheriff's consent. cape in law of all the prisoners there. See Style, 375.

A sheriff who carries a prisoner taken in

If a woman, warden of the Fleet prison, marries her prisoner, or if a sheriff, &c. mar-Persons in the King's Bench and Fleet ries a woman in execution with him, in either case it will be deemed an escape in law.

Plowd. 17.

If a man hath judgment against two perhath one of them still in custody. 1 Rob. Ab. 810. But in an action on the case, tried before Lord Mansfield, in Surrey, for an escape of one of two defendants, under very favourable circumstances for the officer, his lord-ship left it to the jury whether they would find the whole of plaintiff's debt in damages, or only half, and the jury found only half.
By stat. 8 and 9 W. 3. c. 27. § 8. it is

enacted, "That if the marshal or warden for the time being, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to show any prisoner committed in execution to the creditor at whose suit such prisoner was committed or charged, or to his If a plaintiff by word license the sheriff to attorney, every such refusal shall be adjudged

to be an escape in law."
3. What Persons are answerable for an Escape.—In civil actions the sheriff is to answer for the escape of his bailiff: as the bailiff is for that of his servant; and action on the case lies against the sheriff for an escape upon mesne process, because the plaintiff is prejudiced in his suit by it. Cro. Eliz. there was some likelihood of an accommoda. 623. 625: 1 Danv. Abr. 183.—See also Cro. tion, the plaintiff consented to a meeting in a Jac. 419: Dyer, 241.—See Bull, Ni. Pri. 59, certain place in London, and desired the prison- | 60. Where a person is in custody on mesne er might be there, who came accordingly: this process, and being outlawed after judgment

mits the person to escape, though he refuse non-payment of money is in the nature of a to execute the warrant, the sheriff is chargeable in action on the case. 5 Rep. 89.

Where one has the custody of a gaol of freehold or inheritance, and commits it to another person, who is insufficient, the superior is answerable for all escapes suffered by his inferior; but if the inferior be sufficient, the action should be brought against him, and not against the superior. See 9 Co. 98: 2 Jon. 60: 2 Lev. 158: 1 Vent. 314: 2 Mod. 119: 4 Rep. 98.

Also by stat. 8 and 9 W. 3. c. 27. § 11. it is enacted, "That the officers of marshal of the King's Bench prison and warden of the Fleet shall be executed by the several persons to whom the inheritance of the prisons, prisonhouses, &c. of the said prisons, or either of them, shall then belong respectively in his or their respective proper person, &c., or by their sufficient deputies; for which deputies, and for all forfeitures, escapes, and other misdemeanors in their offices by such deputies permitted, &c., the said person in whom the aforesaid inheritances respectively are, shall be answerable; and the profits and inheritances of the said offices shall be sequestered, &c. to make satisfaction for such forfeitures, escapes, &c. respectively, as if permitted, &c. by the persons themselves, in whom the respective inheritance of the said prisons shall then be."

A prisoner escapes out of the King's Bench, or Marshalsea, or the Fleet; the keeper of the prison out of which he escaped is to be charged with it: but if the escape be from either of the Compters, the action must be brought against the sheriffs of London. Dyer,

278: 3 Rep. 52.

By 1 Anne, st. 2. c. 6. whereby persons prisoners in the Queen's Bench or the Fleet, either in execution or upon mesne process, or upon any contempt, in not performing orders or decrees made in the courts at Westminster, escaping, may be retaken by warrant as therein mentioned, and committed to the gaol of the county where they are taken, it is enacted (§ 2.) that if such persons so retaken shall at any time escape out of the gaol to which they are so committed, the sheriff in whose custody they were shall be liable for such escape, as in the case of any other escape.

By § 3. the bail of prisoners may have writs to such sheriff commanding him to detain the prisoners so retaken in discharge of his bail; and if such sheriff or his deputies shall suffer such prisoners to escape, they shall be liable to the same actions as the marshal and warden of the Bench and Fleet prisons are liable to for permitting escapes of persons rendered in

discharge of their bail.

By stat. 5 Anne, c. 9. § 4. if any person in custody, for not performing any decree in Chancery, &c. escape, the party for whom the money is decreed may have the same remedy against er's office, as one voluntary one will; but the sheriff, as if the prisoner had been in cus- many negligent escapes will do it; and the

him in custody; if the officer afterwards per- | tody on execution. But an attachment for mesne process: and if a party in custody under it escape, and then return into custody before the return of the writ, it is not an escape. Lewis v. Morland, 2 Barn. & A. 56.

Action of escape against the warden of the Fleet for an escape upon mesne process; the prisoner returns to the Fleet the same day, and the plaintiff afterwards proceeds to final judgment against him, yet the action lies against the warden. 1 Wils. 293. In an escape upon mesne process out of the borough court, brought in B. R. against the bailiff thereof, the defendant shall not take advantage in B. R. of any error in the process below. 1 Wils. 255.

Action of escape will not lie against the executor or administrator of a sheriff, &c. for an escape, because it was personal, and moritur cum persona: but it may be otherwise if there be a judgment recovered against the sheriff before he died. Dyer, 322. See post, III.2.

If there are two sheriffs of the same place. and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for it being in nature of a trespass, and merely personal, the party can only have remedy against the survivor. Cro. Eliz. 625. But the death should be suggested on the roll. 8 and 9 W. 3. c. 11. § 7.

An old sheriff omits turning over a prisoner in execution to the new sheriff, it is said to be an escape; so where there are two executions against a man, and in the indenture of turning over mention is made but of one, &c. 3

Rep. 71.

But a new sheriff is not answerable for the escape of a debtor, taken in execution, and removed to London by habeas corpus in the time of his predecessor, and not delivered over to him by indenture. 1 M. & M. 34.

A sheriff who takes a bail bond, and on inquiry denies that he has taken one, cannot be therefore sued for an escape. 5 W. P. Taunt.

II. Of the Difference between voluntary and negligent Escapes; and Escapes on Mesne Process, and Execution.—There are two kinds of escapes; voluntary and negligent: Voluntary is when one arrests another for felony, or other crime, and lets him go by consent; in which case the party that permits the escape is esteemed guilty of the crime committed, and must answer for it. Negligent escape, is when one is arrested, and afterwards escapes against the will of him that arrests him, or had him in custody; and is not pursued by fresh suit, and taken again before the party pursuing hath lost sight of him. Cromp. Jus. And for these negligent escapes, the gaoler, &c. is to be fined. One negligent escape will not amount to a forfeiture of a gaol-

fine for suffering a negligent escape of a per- posse comitatus. 1 Rol. Ab. 807: 1 Jon. 207: son attainted, was by the common law of 1 Rol. Rep. 388: 3 Lev. 46. But after judgcourse 100l. and in other cases at the discre- ment on a capias ad satisfaciendum, the sheriff tion of the court. 3 Lev. 288: 2 Lev. 81. See post, as to Escapes in Criminal Cases.

If any prisoner escapes who was in execution, his creditors may retake him by cap. ad satisfac., or bring action of debt on the judgment, or a scire facias against him, &c. Vent. 269: 3 Salk. 160. If a man escapes with the consent of the gaoler, in a civil case, he cannot retake him. 3 Rep. 32. 52: 1 Sid. 330. But the plaintiff may retake him at any time. Stat. 8 and 9 W. 3. c. 27.

If the plaintiff permit the prisoner to escape, he cannot afterwards retake him; and if the body and goods, &c. of a conusor are taken in execution upon a statute-merchant, if the conusee agree that he shall go at large, it is a discharge of the whole execution, and the conusor shall have his lands again: it is otherwise if the sheriff had permitted him to escape, the execution on the lands would not be discharged. 2 Nels. Abr. 737.

A difference is to be observed between permissive and negligent escapes, with respect to the sheriff; for if a sheriff suffer a prisoner voluntarily to go at large, the sheriff cannot retake him even upon fresh suit; and if he does, the prisoner may have an action of tres-

pass against him. Carter, 212.

And if after a voluntary escape the sheriff is obliged to pay the plaintiff the amount of his debt, neither the sheriff nor his officer can maintain any action against the defendant

126.

If the marshal of the King's Bench, or warden of the Fleet, or any other who hath the keeping of prisons in fee, suffer a volun- either maintain an action qui tam against the tary escape, it is a forfeiture of the office. 3 Mod. 146: Carter, 212. And there is likewise a further penalty of 500l. added by 8 and

9 W. 3. c. 27. above-mentioned.

joint action against B. and C., B. justifies bail in an action entitled by mistake A. v. B., and a rule so entitled is served on the marshal of Jon. 144: 1 Sid. 364. S. C. K. B., who thereupon discharges B. out of custody; he not being charged in custody in cess, to declare against the sheriff, &c. in case: any more than one action at the suit of A.; the court, of K. B. held that the marshal was liable in an action for an escape. 5 East's tled .- If a sheriff or gaoler suffers a prisoner, Rep. 292.

There is this difference between an escape on mesne process and execution: if the sheriff 625: Comb. 69 .- But if, after judgment, a arrest a person on mesne process, and he is rescued by J. S., he may return the rescue, and such return is good, and no action of es- sum, the debt immediately becomes his own, cape lies against him after such return; but and he is compellable by action of debt, being the court will issue process against such res- for a sum liquidated and ascertained, to satisfy cuer, or fine him; for in this case, though the the creditor his whole demand. 2 Inst. 382. sheriff may, yet he is not obliged to raise the

cannot return a rescue, for in such case the sheriff is obliged to raise the posse comitatus, if needful, and therefore, if he return a rescue, an action of escape lies, or a new capias; for the return of an ineffectual execution is as none. 1 Rol. Ab. 837: Cro. Car. 240. 255: 8 Co. 42.—See Ni. Pri. 59, 60: 6 Rep. 51: Cro. Eliz. 868: and this Dictionary, tit. Rescue.

If a sheriff having arrested a defendant on mesne process, keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action on the case as for an escape, if the jury find that the plaintiff has not been delayed or prejudiced in his suit. 5 Term Rep. K. B. 37.

III. 1. Of the Nature of the Action to be brought for an Escape.—At common law the plaintiff had no remedy against the sheriff for an escape, whether upon mesne process or in execution, but by special action upon the case. 2 Inst. 382: 1 Show, 176: 2 Saund. 34: Hard. 30.

But now by an equitable construction of Westm. 2. 13 Ed. 1. c. 11. action of debt is given against the sheriff; and see 2 H. Black. 108; and by stat. 1. Ric. 2. c. 12. against the warden of the Fleet (which extends to all gaolers and keepers of prisons, though infants or feme coverts, 2 Inst. 382.) for escapes in execution.

for the money thus paid. 8 East, 171.

An escape from the rules of the King's either an action upon the case, or debt, for an escape in execution. Cro. Jac. 361. 533. 619: ledge, is not a voluntary escape. 2 Term Rep. Cro. Eliz. 877: Dyer, 278. b. See 1 Jon. 144:

1 Sid. 364. S. C.

If a prisoner in custody upon a capias utlagatum is suffered to escape, the plaintiff may sheriff, or bring an action of debt against him, in his own right. Cro. Jac. 361. 533. 619: Cro. Eliz. 877.

W. 3. c. 27. above-mentioned.

An action of escape is not a local action,
B. being in custody at the suit of A., in a and therefore if one escape out of the Marshalsea, which is in Surrey, the action may be laid in Middlesex. Dyer, 278. b. See 1

It is usual now, on an escape on mesne proon execution, in debt.

The distinction seems now to be thus setwho is taken upon mesne process, to escape, he is liable to an action on the case. Cro. Eliz. gaoler or sheriff permits a debtor to escape, who is charged in execution for a certain

In debt against the sheriff or gaoler for an

VOL. I.-84

a creditor would have recovered against the the action was the escape, and the commitprisoner, viz. the sum indorsed on the writ, ment only inducement. and the legal fees of execution. 2 Term Rep. 8. S. C. See 3 Lev. 393.

126. But see 2 Anst. 522, where it was de-126. But see 2 Anst. 522. where it was decided that he is answerable for the debt which shall be proved, not merely for that sworn to.

In the case of an escape on mesne process, the sheriff is not necessarily liable for the whole debt, but only for the damage really sustained. Thus, if the plaintiff can recover against another party, this is a ground of deduction from the damage. 1 M. & Rob. 227.
The nominal plaintiff in ejectment, in

whose name the mesne profits have been recovered, may sue for an escape of the defend- of A., where the jury found that A. was taken ant in execution thereon. 2 Maul. & Selw.

Rep. 473.

An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner in execution on a judgment obtained by her as administratrix.

Term Rep. 126.

An action of debt will lie against the gaoler for the escape of a prisoner in execution, though the escape was without his knowledge; in such case he can avail himself of nothing but the act of God, or the king's enemies as an excuse. 2 H. Blackst. 103.

2. Of the Manner of laying it .- In this action it is not necessary to set forth all the formalities required by law in other cases. Cro.

Eliz. 877. See 2 Show, 424.

Therefore, if upon a judgment obtained by the testator, the executor brings a scire facias, and has judgment, whereupon a capias ad satisfac. issues, and B. is arrested, and suffered to escape, the plaintiff in an action against the sheriff for this escape, may declare briefly upon the judgment in the scire facias, without showing the gradual proceedings at length, as is usually done in an action of debt upon a Carth. 148, 149: 3 Mod. 321. S. judgment. C.: Cro. Eliz. 877.

So if a defendant is arrested on a special capias, founded on an original returnable in B. R. in action for his escape, it is not neces.

sary to set forth the original.

writ of execution against J. S. without setting action. forth any judgment, and that the defendant suffered him to escape; that is an incurable fault; for by this means he lost the benefit of Escape; and therein of pleading fresh Suit. pleading nul tiel record, which he might do if If the prison takes fire, by means whereof the the plaintiff had set forth the judgment. Saund. 37, 38: 1 Lev. 191: and 1 Sid. 306. and he may well plead it. 1 Rol. Ab. 808. S. C. See tit. Debt.

has him in execution, and the sheriff suffers have no remedy over against them. 4 Co.14: him to escape, the action must be brought as 1 Rol. Ab. 808. executor in the detinet only, and not in the

S. C.

If the plaintiff declares that the prisoner against these. was committed, and escaped, but does not say, prout patet per recordum; yet, upon a general lish a gaol, by which the debtors escape, the

escape, the jury cannot give a less sum than | demurrer, this shall be good; for the gist of 2 Salk. 565: 5 Mod.

> had J. S. and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution (it being for a debt due from the wife before coverture), and that he escaped: this is sufficient, and the plaintiff shall have judgment; for the substance of the issue is found, though not pursuant to the declaration. 1 Sid. 5.

So in an action on the case for the escape by J. S. the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that he suffered him to escape, the plaintiff had judgment. Cro. Jac. 380.

Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape: and the defendant may plead a re-taking on a fresh pursuit to such count without traversing the voluntary escape. Id. Ibid.

In debt for an escape against the sheriff, the indersement of non est inventus on the ca. sa. is sufficient evidence of its having been delivered to him. But a legal arrest must be

proved in such action. Cowp. 63.

By the stat. 8 and 9 W. 3. c. 27. § 12. it is enacted, "That it shall be lawful for any person having cause of action against the warden of the Fleet prison, upon bill filed in the courts of Common Pleas or Exchequer against the warden, and a rule being given to plead thereto, to be out eight days at most after filing such bill, to sign judgment against the warden, unless he plead to the bill within

A bill could not formerly be filed against the warden for an escape in vacation time. 6 Taunt. 347. But this is now remedied by the

59 G. 3. c. 64.

By the 3 and 4 W. 4. c. 42. § 3. the time for bringing an action for an escape is limited to three years after the then session of Par-If the plaintiff declares that he sued out a liament, or to six years after the cause of such

> IV. Of the Party's Defence sued for the prisoners escape, this shall excuse the sheriff,

So if the prison is broke by the king's ene-If A. recovers against B. as executor, and mies, this shall excuse the sheriff, for he can

But if the prison was broke by rebels and debet and detinet. 1 Lutw. 893: Comb. 114. traitors, the king's subjects, this shall not excuse him, for he may have his remedy over Ibid.

But if a mob riotously and by force demo-

tors. 4 T. R. 789.

In an action of debt against a gaoler for action will lie though the escape were without the knowledge or fault of the gaoler), in such case the gaoler can avail himself of nothing but the act of God or the king's enemies as an excuse. 2 H. Blackst. 168.

When a prisoner tortiously escapes from the custody of the gaoler, he may be retaken; and the sheriff, &c. may pursue a person escaping into that or any other county; and if he retakes the prisoner on fresh pursuit be. before payment of the fine, he escaped, held fore action brought, it shall excuse the sheriff, that the marshal might lawfully retake him for there the prisoner shall be said to be in execution still. 3 Rep. 44: Cro. Jac. 657: 1 Jon. 144: 1 Rol. Ab. 808. And where the sheriff is to answer the debt and damages for such escape, he shall have his counter remedy against the party escaping; and may take served with the common side-bar rule to bring him at any time and place, and imprison him till he hath satisfied the sheriff as much as he ledgment in writing, &c., must give notice of hath paid to the plaintiff; or he may bring an the escape to the plaintiff's attorney within action upon the case against the prisoner, and so relieve himself. 5 Rep. 52: Cro. Eliz. 393.

It was formerly held that the sheriff, &c. might give fresh pursuit in evidence, and need not have pleaded it. See 1 Mod. 116: 1 Sid. 13.

But now, by stat. 8 and 9 W. 3. c. 27. § 6. it is enacted, "That no retaking on fresh pursuit shall be given in evidence, unless the same be specially pleaded; nor shall any special plea be allowed, unless oath be first made in writing by the defendant, and filed in the proper office of the respective courts, that the prisoner, for whose escape such action is brought, did, without his consent, privity, or knowledge, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the defendant shall be convicted thereof by due course of law, he shall forfeit the sum of 500l. See tit. Sheriff.

A voluntary return of a prisoner, after an escape, before action brought, is equivalent to a retaking on a fresh pursuit: but it must be pleaded. 2 Term Rep. 126.

Plea that if the prisoner escaped several times (without specifying them) he returned as often, is bad. 1 B. & P. 413.

A bailiff who has arrested a prisoner on mesne process, may retake him before the return of the writ, though he voluntarily permitted him to escape immediately after the arrest. 2 Term Rep. K. B. 172. But see contra 5 T. R. 25.

In an action against the sheriff for the escape of a prisoner on mesne process the plaintiff was nonsuited, because he could not prove any debt against the prisoner. 4 Term Rep. K. B. 611.

Bail put in after the term in which the writ is returnable, is not an answer to an action c. 19. § 1. against the sheriff for an escape brought be-

sheriff or gaoler is answerable to the credi- fore bail was put in. Moses v. Norris, Term Rep. K. B. Mic. 56 G. 3. 397.

A bankrupt having escaped out of the custhe escape of a prisoner in execution (which tody of the marshal, and being at large, surrender to a commission subsequently, if sued, and receives the protection conferred by 5 G. 2. c. 30. y 5. he may, notwithstanding, be taken and detained in custody by the marshal. 1 B. & A. 308.

> So where a party was committed to the custody of the marshal, being convicted of a conspiracy, and fined and imprisoned, and after the expiration of the imprisonment, but whenever he could, and detain him till payment of the fine. So if the escape was even voluntary; for the public are interested in the completion of the sentence. 1 Gow, N. P. 99.

> In the case of an escape, the marshal, if the defendant into court, or give an acknowthe time limited by the rule. 1 D. & C. 550.

(B.) ESCAPES IN CRIMINAL CASES.

Escapes in criminal cases are of three. kinds:-by the party himself; by an officer or other person having the custody of the offender; and by a stranger: for which last kind see tit. Rescue.

I. 1. Of an Escape by the Party himself; 2. Of an Escape suffered by an Officer, &c.; 3. Where it shall be adjudged Voluntary, and where Negligent.

II. Of the retaking of the Prisoner.

III. 1. How the Officer suffering an Escape is to be indicted; and 2. How the Escape is to be tried and adjudged.

IV. Of the Punishment of, 1. Voluntary, and 2. Negligent Escapes.

I. 1. Of an Escape by the party himself.— All persons being bound to submit themselves to the judgment of the law, whoever (after being lawfully arrested) refuses to undergo that imprisonment which the law thinks fit to impose on him, and frees himself from it before such time as he is delivered by due course of law, though he does not use any force or violence, is guilty of a high contempt, punishable with fine and imprisonment. 2 Hawk.c. 17. § 5: 4 Comm. 129.

2. Of an Escape suffered by an Officer, &c. -An officer is not chargable with the escape of an offender unless there has been an actual Therefore if the officer only see a arrest. man shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 Hawk.

A gaoler refusing to receive a person ar-

is let go, is guilty of an escape; but there attainder of the prisoner, by the forfeiture of must be an actual arrest; which arrest must his goods, &cc. but also because the public jusbe justifiable to make an escape; for if it be tice is not so well satisfied by the killing him for a supposed crime, where no crime was in such an extra-judicial manner. 2 Hawk. P. committed, and the party is neither indicted nor appealed, &cc. it is no escape to suffer a person to go at large. Fitz. Coron. 224: Bro. Esca. 27, 28.

If a private person arrest another for suspicion of sclony, he is to deliver him to a public officer, who ought to have the custody of a prisoner break a gaol, this seems to be a him; for if he let him go it will be an escape. 2 Hawk. P. C. c. 19. And if no officer will receive him, he is to deliver him to the township where arrested, or get him bailed.

committed felony, and thereupon arrests him; or other person (charged with a negligent he is lawfully in custody of A. until he be escape under such circumstances) to show discharged, by delivering him to a constable that due vigilance was used on his part; and or common gaol; and therefore if he volunta- that the gaol was so constructed as to have rily suffers such person to escape, though he been considered a place of perfect security. were no officer, nor B. indicted, it is felony in 1 Russ. 371. A. But it is otherwise if he never takes him, nor attempts it, and lets him go. 1 Hale's Hist. P. C. 594.

A private person is equally punishable with an officer for permitting an escape: but with this distinction, if a felon escape by force gence, may retake him at any time after, from a private person, the latter is excused, whether he find him in the same or in a difbecause he cannot raise power to assist him; but an officer is not wholly excused, because he may take sufficient strength to his assist-

1 Hale, 601.

3. Where it shall be adjudged Voluntary; and where Negligent .- There can be no doubt the liberty gained by the prisoner is wholly ovbut that wherever an officer, who hath the ing to his own wrong, there seems to be no custody of a prisoner charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him either from his trial or execution, he is guilty of a voluntary escape; and thereby involved in the guilt of the same crime of which the prisoner was guilty and stood charged with. And it seems to be the opinion of Sir Matthew Hale, that in some cases an officer may be adjudged guilty of such escape, who hath not such intent, but only means to give his prisoner that liberty which, by the law, he hath no colour of right to give him.

A negligent escape is where the party imprisoned escapes against the will of the officer, and is not freshly pursued and taken before he

is lost sight of.

If the gaoler so closely pursue the prisoner, who flies from him, that he retake him without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems, in strictness, to be guilty of an escape; and a fortiori therefore, if he kill him in the pursuit, he is in like manner guilty, though he never lost sight of him, and could not oth- tion to escape, it is a good excuse for the gaoerwise take him, not only because the king ler, that, before the action brought, he took

rested by the constable for felony, whereby he loses the benefit he might have had from the C. c. 19.

And if a person in custody hang or drown himself, this is considered a negligent escape in the gaoler or officer, for not using more precaution to prevent a prisoner thus making negligent escape, because there wanted either due strength in the gaol that should have secured him, or due vigilance in the gaoler that should have prevented it. 1 Hale, 600. A., a mere private man, knows B. to have It would be competent, however, to a gaoler

> II. Of the re-taking of the Prisoner.-It seems to be clearly agreed by all the books, that an officer making a fresh pursuit after a prisoner, who hath escaped through his negliferent county. And it is said generally in some books, that an officer who hath negli. gently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit: and indeed, since reason he should take any manner of advantage from it. But where a gaoler hath voluntarily suffered a prisoner to escape, it is said by some that he can no more justify the retaking him, than if he had never had him in custody before, because by his own free consent he hath admitted, that he hath nothing to do with him. Co. Jac. 659.

> But although this position may hold in cases of arrest and imprisonment in civil process, yet as the public good requires that offenders should be brought to justice, it would hardly be contended at the present day, that a gaoler who had voluntarily suffered a prisoner indicted for murder to escape, should not be allowed in some degree to redeem his offence by re-

taking his prisoner.

Wherever a prisoner, by the negligence of his keeper, gets so far out of his power that the keeper loses sight of him, the keeper is finable at the discretion of the court, notwithstanding he retook him immediately after; for it seems agreed, that this is to be adjudged a negligent escape, which implies an offence, and consequently that it must be punishable. It is true, indeed, that in an action against a gaoler for suffering one arrested in a civil ac-

the prisoner upon fresh suit, which is well to show the time when the offence was commaintained by showing that he pursued him mitted, for which the party was in custody, immediately after notice of the escape, though not only that it may appear that it was prior it were some hours after it, and retook him; to the escape, but also that it was subsequent but it does not from hence follow, that the like to the last general pardon. Also it seems excuse will serve for the negligent escape of a clear, that every indictment for a volun-criminal, because this is an offence against tary escape must allege that the defendant the public, but the other is only a private dam-felonice and voluntarie A. B. ad largum ire age to the party: neither will it be a hardship permisit; and must also show the species of to the officer to be exposed to such punishment as the court, in its discretion, shall think ed: for it is not sufficient to say in general, fit to impose upon him for the negligent escape that he was in custody for felony, &c. of a criminal, as it would be to be liable to an action of escape, for suffering a person in his custady, in a civil action, to escape; for that in the former case the court would moderate his fine according to the circumstances of the ing another, it is trespass only, and not felony, whole matter, and would certainly mitigate, if till the party wounded is dead: and he who not wholly excuse it, if he should appear to have taken all reasonable care: but in the other case, if he should be liable to an action his judgment would not lie in the discretion of the court, but he would be bound to pay the whole debt for which the party was in custody, if the escape should be adjudged against him. However, it is certain, that it will be no advantage to a gaoler to re-take his prisoner after he has been fined for the escape, as is shown in the precedent section of Hawk. P. C., also it is clear that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him: but must, in such case, be contented to submit to such a fine as his negligence shall appear to deserve. 2 Hawk. P. C. c. 19.

By stats. 13 G. 3. c. 31. and 45 G. 3. c. 92. to render more easy the apprehending and bringing to trial offenders escaping from one part of the United Kingdom to the other, and also from one county to the other, it is enacted, that offenders escaping from England to Scotland, or from Great Britain to Ireland, or vice versa, may be apprehended and conveyed back to the place from whence they es-

caped.

By the said acts 13 G. 3. c. 31. and 45 G. 3. é. 92. persons committing offences in one county may be pursued and apprehended in any other county. See tits. Justices, Ireland.

By 54 G. 3. c. 186. all warrants issued in England, Scotland, or Ireland, may be executed in any part of the United Kingdom.

III. 1. How the Officer suffering an Escape is to be indicted .- The indictment must expressly show, that the party was actually in that the person who has them in custody is the defendants's custody for a crime, action, in no case punishable for their escape, except or commitment for it; and that it is not sufficient to say that he was in the defendant's for by stat. West. 1 c. 3. it is enacted, that custody, and charged with such a crime; for "Nothing be demanded nor taken, nor levied that a person in custody may be so charged, and yet not be in custody by reason of such cape of a thief or felon, until it be judged for charge: and it seems also, that every such in-dictment must expressly show that the pri-he who does otherwise, shall restore to him

The crime of the prisoner escaping, for which the gaoler is answerable, must be such as it was at the time of the escape; as where a person is committed for dangerously woundsuffers another to escape, who was in custody for felony, cannot be arraigned for such escape as for felony, until the principal is attainted, but he may be indicted and tried for misprison before the attainder of the principal. And in high treason it is said the escape is immediately punishable, whether the party escaping be ever convicted or not. 2 Hawk. P. C. c. 19. See post, IV. 1.

By 4 G. 4. c. 64. § 44. in case of any prosecution for an escape, attempt to escape, breach of prison, or rescue, either against the prisoner escaping, or any other person concerned therein, a certificate by the clerk of the court wherein the offender shall have been convicted, shall, with proof of his identity, be sufficient evidence of the nature and fact of the conviction, and of the species and period of confinement to which he was sentenced.

2. How the Escape is to be tried and adjudged .- Where persons, being present in a court of record, are committed to prison by such court, the keeper of the gaol is bound to have them always ready, whenever the court shall demand them of him; and if he shall fail to produce them at such demand, the court will adjudge him guilty of an escape, without any further inquiry, unless he have some reasonable matter to allege in his excuse; as that the prison was set on fire, or broke open by enemies, &c. for he shall be concluded, by the record of the commitment, to deny that the prisoners were in his custody. 2 Hawk. P. C. c. 19.

As to other prisoners who are not so committed, but are in the custody of a goaler, sheriff, constable, or other person, by any other means whatsoever, it seems agreed, in some special cases, until it be presented; by the sheriff, nor by any other, for the essoner went at large. Also it seems necessary or them that have paid it, as much as he or

also unto the king.

restrains not the Court of King's Bench from no other reason but because he is a wronoful receiving such presentments; for that its juris- one. 2 Hawk. P. C. c. 19. diction includes in it that of justices in eyre, and this court is itself the highest court of

eyre. 2 Hawk. P. C. c. 19.

14. "That the escape of thieves and felons, may be probably argued, that the guoler sufand the chattels of felons and of fugitives, fering an escape is as much punishable, as if and also escapes of clerks convicts, out of the warrant were perfectly right. 2 Hawk. their ordinary's prison, from thenceforth to be judged before any of the king's justices, shall be levied from time to time, as they shall fall, another; so that a principal gaoler is only as well of the time past as time to come." By which it seems to be implied, that other By which it seems to be implied, that other justices, as well as those in eyre, may take cognizance of escapes; and it is certain, that capes.—Whoever de facto occupies the office justices of gaol-liberty may punish justices of peace for a negligent escape, in admitting persons to bail, who are not bailable. 2 Hawk. P. C. c. 19.

By stat. 1 Ric. 3. c. 3. justices of peace have authority to inquire in their session of as if he had actually suffered it himself, and all manner of escapes of every person ar-

rested and imprisoned for felony.

Wherever an escape is fineable, the presentment of it is traversable; but where the offence is amerciable only, there the presentment is of itself conclusive; such amercement being reckoned among those minima de quibus non curat lex; and this distinction seems to be well warranted by the old books. 2 Hawk. P. C. c. 19.

IV. 1. Of the Punishment of Voluntary Escapes .- A voluntary escape amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass; and whether the person escaping were actually committed to some gaol, or under an arrest only; and whether he were attainted, or only accused of such crime.

1 Hawk. P. C. c. 19.

But the officer cannot be thus punished till the original delinquent hath actually received judgment, or been attainted upon verdict, confession, or outlawry of the crime for which he was so committed or arrested: otherwise it might happen that the officer might be punished for treason or felony, and the person arrested and escaping might be acquitted of the charge against him. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor. 2 Hawk. P. C. c. 19. § 26.

wrongfully takes upon him the keeping of a removed the indictments before the king, and gaol, seems to be punishable in the same there yielded themselves, and by the marshals manner as if he were never so rightfully en- of the King's Bench had been incontinently titled to such custody; for that the crime is let to bail, and afterwards had done many evil in both cases of the very same ill consededs, &c." And thereupon it is enacted,

they have taken or received, and as much | quence to the public; and there seems to be no reason that a wrongful officer should have It hath been adjudged, that this statute greater favour than a rightful, and that for

Also if the warrant of a commitment do plainly and expressly charge the party with treason or felony, but in some other respect It is further enacted by stat. 31 Ed. 3. c. be not strictly formal, yet it seems that it P. C. c. 19.

None shall suffer capitally for the crime of

fineable for a voluntary escape suffered by his

of gaoler is liable to answer for a negligent escape; and it is no way material whether his title to the office be legal or not. 2 Hawk. P. C. c. 19. A sheriff is as much liable to answer for an escape suffered by his bailitf, the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him; but if the gaoler who suffers an escape have an estate for life or years in the office, it is not agreed how far he in reversion is liable to be punished. 2 Hawk. P. C. c. 19.

Wherever a person is found guilty upon an indictment, or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the king, which seems most pro-

perly to be called a fine.

It hath been holden, that a negligent escape may be pardoned by the king before it happens, but that a voluntary one cannot be so

pardoned. 2 Hawk. P. Č. c. 19.

And it seems by the common law, the penalty for suffering the negligent escape of a person attainted was of course 100l., and for suffering such escape of a person indicted, and not attainted, was 51.; but if the person escaping were neither attainted nor indicted, it seems that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper; and if the party had twice escaped, it seems that the penalties above mentioned were of course to be doubled; yet it seems that the forfeiture was to be no greater for suffering a prisoner committed on two several accusations to escape, than if he had been committed but on one. 2 Hawk. P. C. c. 19.

It is recited by stat. 5 Ed. 3. c. 8. "That Also such an escape, suffered by one who persons indicted of felonies in times past, had "That if any such prisoner be wandering out of prison, by bail, or without bail, and that he be found at the king's suit, or at the suit of the party, the marshal which shall be found thereof guilty, shall have a half a year's imprisonment, and be ransomed at the king's multiple of the court where the action was proposed in the prisoner, and the justices shall thereof make inquiry when they see time; and as to the marshals, it shall be done within the verge that which reason will. And in case that the marshals suffer, by their assent, such prisoners to escape, they shall be at law, as before the time!

ESCAPE-WARRANT. If any person committed or charged in custody in the King's Bench or Fleet prison, in execution, or on mesne process, &c. go at large; on oath thereof before a judge of the court where the action was brought, an escape warrant shall be granted, directed to all sheriffs, &c. throughout England to retake the prisoner, and commit him to gaol where taken, there to remain till the debt is satisfied: and a person may be taken on a Sunday upon an escape warrant. Stat. escape, they shall be at law, as before the time 1 Anne c. 6. And the judges of the respecwhere he ought to have the same."

"That every sheriff have the custody of the upon oath made before themselves. 5 Anne, king's common gaols during the time of his c.9. office, except all gaols whereof any person or persons have the keeping of estates of inherit- taken on escape-warrant, &c. from any but an ance. And that all letters patent made for officer; nor from the rabble, &c. which is illeterm of life, or years, of the keeping of the gal. 3 Salk. 149. A person being arrested said gaols, &c. shall be annulled and void." The penalties for escapes inflicted by the subsequent part of this statute are expired.

ions, it is enacted that every person who shall him at libery. 2 Ld. Raym, 927. aid and assist any alien enemy, being a pri-soner of war in his majesty's dominions, is quietus de escapio, is delivered from that whether confined in any prison, or suffered to punishment, which, by the laws of the forest, be at large in any place, to escape from prilieth upon those whose beasts are found son, or from his majesty's dominions if at within the land where forbidden. Crompt. large on his parole, shall be guilty of felony, Jurisd. 196. and punishable by transportation for life, or fourteen years or seven years. Persons assisting any prisoner on parole in quitting the place where he is, though not assisting him in quitting the coast, shall be considered as aiding in his escape. Persons owing allegiance to his majesty aiding the escape of in the nature of forfeiture, of lands and teneprisoners when on the high seas are declared equally punishable.

son having the custody of any convict con- this Dict. tit. Tenure, II. 7. fined in the general Penitentiary at Milbank near Westminster, who shall negligently permit any such convict to escape, shall be guilty

der sentence of death by a court martial shall c. 15. obtain a conditional pardon, all the laws touching the escape of felons under sentence as of rents, commons, &c. cannot escheat to of death shall apply to them, and to all per- the lord, because there is no tenure; nor desons aiding, abetting, or assisting in any scend, by reason the blood is corrupted: though escape or intended escape. A provision near-they are forfeited to the king by an attainder ly similar to the above is contained in the an- of treason, and the profits of them shall be nual marine mutiny act, 6 G. 4. c. 6. § 14.

and 2 Hawk. P. C. c. 21.

See further, as connected with the general subject of escape, and prison breach, tits. propter defectum sanguinis, and those propter Liuol, III. Rescue.

of the statute they had been. And the king tive courts may grant warrants, upon oath to intendeth not by this statute to lose the escape, be made before persons commissioned by them to take affidavits in the country, (such Also it is enacted by stat. 19 H. 7. c. 10. oath being first filed), as they might do

A sheriff ought not to receive a person and carried to Newgate by virtue of an escapewarrant, moved to be discharged, because he said he was abroad by a day-rule when taken; By stat. 52 G. 3. c. 156. for the more effectual punishment of persons aiding prisoners upon the escape-warrant before the Court of B. R. sat that morning, they refused to set

ESCAPIUM, hath been used for what comes by chance or accident. Cowel.

ESCEPPA. A scepp, or measure of corn. Mon. Ang. tom. 1. p. 382. See Sceppa. ESCHEAT. Escaeta: from the old French eschoir, to fall or happen.] The casual descent, ments within his manor to a lord; either on failure of issue of the tenant dying seised, or By stat. 56 G. 3. c. 23. § 44, 45. if any per- on account of the felony of such tenant. See

Blackstone defines it "an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen of a misdemeanor punishable by fine and im- contingency, in which case the land naturally results back, by a kind of reversion, to the By the annual mutiny act, if offenders un- original grantor, or lord of the fee." 2 Comm.

also forfeited to the king on attainder of felony See further, relative to this subject of assist during the life of the offender; and after his ing prisoners to escape, this Dict. tit. Rescue, death it is said the inheritance shall be extinguished. 2 Hawk. P. C. c. 49. which see.

Escheats are frequently divided into those delictum tenentis; but both species may be included under the first denomination; since is provided (as is frequently the ease) that it he that is attainted suffers an extinction of his shall not extend to corruption of blood; here

See Fleta, lib. 6. c. 1.

Inheritable blood is wanting. the tenant dies without any relations on the part of any of his ancestors. 2. When he dies See tits. Attainder, Forfeiture. without any relations on the part of those ancestors from whom his estate descended. 3 the corruption of blood in a statute concerning When he dies without any relations of the felony, doth by consequence save the land to whole blood. When he is attainted for treason the heir, so as not to escheat; because the or felony .- In all these cases the lands escheat escheat to the lord for felony is only pro deto the lord. See tits. Descent, Attainder. Bastards and aliens cannot inherit.

between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. But, in fact, escheat operates in subordination to this more ancient the lands shall escheat, because the issue in and superior law of forfeiture. 2 Inst. 64: Salk. 85. See tit. Forfeiture, Tenure.

The doctrine of escheat upon attainder, taken singly, is this; that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprised, 3 Inst. 15: stat. 25 Ed. 3.c. 2. § 12.), is corrupted and stained, and the shall never escheat to a lord of whom they original donation of the feud is thereby determined. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from of the lord's court ought to present it. 2 Inst. the offender to the lord of the fee, and the inheritable quality of his blood is extinguished heirs are born after attainder of felony. 3 and blotted out for ever. In consequence of Rep. 40. Though if the king pardon a kelon which corruption and extinction of hereditary blood, the land of all felons would immediate lands by escheat; for the lord hath no title ly revest in the lord, but that the superior law before attainder. Owen, 87: 2 Nels. Ab. 741. of forfeiture intervenes, and intercepts it in its If, on appeal of death or other felony, process passage: in case of treason, for ever; in case is awarded against the party, and pending of other felony, for only a year and a day. the process he conveyeth away the land, and 2 Inst. 36. See tit. Tenure, II. 7.

In cases of escheat, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he has at the cess against him, he conveys away his land, time of his offence committed shall escheat and afterwards is outlawed, the conveyance from him, but also that he shall be incapable of inheriting any thing for the future. This further illustrates the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: the land shall escheat to the lord, because the son by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life, but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit. Co. Lit. 13. In this case the felony except in cases of high treason, petit escheat operates, and not to the forfeiture; treason (which has been subsequently reduced but in the following instance the forfeiture to murder), or murder, shall extend to the disworks, and not the escheat. As where a new inheriting of any heir, or to the prejudice of felony is created by act of parliament, and it the right or title of any person, other than the

blood, as well as he that dies without relations. the lands of the felon shall not escheat to the lord, but yet the profits of them shall be for-1. When feited to the king for a year and a day, and so long after as the offender lives. 3 Inst. 47.

It has been holden, that a saving against fectu tenentis, occasioned by the corruption of blood: but it hath been adjudged, that a saving Great care must be taken to distinguish against the corruption of blood, in a statute concerning treason, doth not save the land to the heir: for in treason the land goes to the king by way of immediate forfeiture. 3 Inst. 47: 1 Salk. 85.

Husband and wife, tenants in special bail; the husband is attainted of treason and exccuted, leaving issue; on the death of the wife tail ought to make his conveyance by father and mother, and from the father he cannot by reason of the attainder. Dyer, 322. If tenant in fee-simple is attainted of treason, and executed, upon his death the fee is vested in the king, without office found; yet he must bring a scire facias against the tertenants; land are holden, until office found. 3 Rep. 10.

Escheat seldom happens to the lord for want of an heir to an estate; but when it doth, before the lord enters, the homage jury 36. Land shall escheat to the lord where before conviction, the lord shall not have his lands by escheat; for the lord hath no title after is outlawed, the conveyance is good to defeat the lord of his escheat: but if where a person is indicted of felony, pending the proshall not prevent the lord of his escheat. Co. Lit. 13. See further this Dict. tits. Attainder, Corruption of Blood, Forfeiture.

As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the stat. 1 Ed. 6. c. 12; and still by stat. 5 and 6 Ed. 6. c. 11. the wife of one attaint of high treason shall not be en-

dowed. See tit. Dower.

By 54 G. 3. c. 145. no future attainder for

right or title of the offender during his natu- or office before escheators not finding of whom tainder of any relation who shall have died if the jury had expressly found their ignobefore the descent of any land shall have taken rance of the tenure; and a melius inquirendum place, shall not prevent any person tracing shall be awarded. 12 East, 96. his descent through him from inheriting such

There is one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and has left no heirs to inherit them. And this is the case of a corporation; for if a future condition, when a certain thing is that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by the escheat, which is perhaps the only instance where a reversion can be expectant on a grant in fee simple absolute. See tit. Corporation.

It has been decided that where a cestui que trust dies without heirs, the trust does not escheat to the crown, so that the lands may be recovered in a court of equity by the king; but that the trustee shall hold them for his own benefit. Burgess v. Wheate, 1 Black. Rep. 123. See tit. Escheator.

See the recent act amending the law with respect to the escheat of property held in trust.

Tenure, II. 7.

ESCHEATOR, escaetor.] Was an officer appointed by the lord treasurer, &c. in every county, to make inquests of titles by escheat; which inquests were to be taken by good and lawful men of the county, impannelled by the sheriff. Stats. 14 Ed. 3. c. 8: 8 H. 6. c. 16. These escheators found officers after the death of the king's tenants, who held by knight-service, or otherwise of the king; and certified their inquisitions into the Exchequer; and Fitzherbert called them officers of record. F. N. B. 100. No escheator should continue in his office above one year: and whereas, before the statute of Westm. 1. c. 24. escheators, sheriffs, &c. would seize into the King's hands the freehold of the subjects, and thereby disseise them; by this act it is provided that no seizure can be made of lands or tenements into the king's hands, before office found. 2 Inst. 206. And no lands can be granted before the king's title is found by inquisition. Stat. 18. H. c. 6. The office of escheator is an ancient office, and was formerly of great use to the crown; but having its chief dependance on the Court of Wards, which is taken away by act of parliament, it is now in a manner out of date. 4 Inst. 225. There was anciently an officer called Escheator of the Jews. Claus. 4 Ed. 1. m. 7.

The above stats. 8 H. 6 c. 16, and 18 H. 6. 6. extend to the case of an escheat upon the ESLISORS. See Elisors. c. 6. extend to the case of an escheat upon the death of the tenant last seised without issue, where no immediate tenure of the crown was primogeniti.] A private prerogative allowed found by the inquest. And the 8th section of to the eldest configuration of the stat. 2 and 3 Ed. 6. c. 8. (which is in general terms, and not confined to the particular to choose first after the inheritance is divided. inquisition mentioned in the other clauses of Fleta, lib. 5. c. 10. Insumerica is just primogeniti.

And by 2 and 3 W. 4. § 10. the at- the lands are holden; in the same manner as

ESCHECCUM. A jury or inquisition.

Matt. Paris, Anno 1240.

ESCHIPARE. To build or equip .- Du

Cange. See Eskippamentum.

ESCROW. A deed delivered to a third person, to be the deed of a party making it, upon performed, and then it is to be delivered to the party to whom made. It is to be delivered to the stranger, mentioning the condition; and has relation to the first delivery. 2 Rol. Ab. 25, 26: Co. Lit. 31. A delivery as an escrow signifies, in fact, as a scrowl or writing, which is not to take effect as a deed, till the condition be performed. Co. Lit. 36. See tit. Deed, II. 7.

Where the vendor of a leasehold estate delivered the conveyance as an escrow, to take effect on payment of the residue of the purchase money, the Court of C. P. held that the property in the title deeds of the estate was so vested in the vendee, that the vendor obtaining possession of them, and pawning them, &c. did not confer on the pawnee any right of detaining them after tender of the residue of the purchase money. Hooper v Ramsbottom, 6 W. P. Taunt. 12.

Whether a deed was delivered as an escrow or not, is in all cases of dispute a question for a jury to decide. 2 B. & C. 82.

ESCUAGE. See tit. Tenure, II. 3. ESCURARE. To scour or cleanse. Charta

ESGLISE, Fr. A church; in the old books a division containing the law relative to

advowson, churchwardens, &c. L. Fr. Dict. ESSIGNÆ. The Kings of Kent, so called from the first King Ochta, who was surnamed Ese: he was grandfather of King Ethelbert.

ESKETORES, from the Fr. escher. | Rob. bers or destroyers of other men's lands and fortunes. Plac. Parl. 20 Ed. 1.

ESKIPPAMENTUM. Skippage, tackle or ship furniture. Sir Rob. Cott.

ESKIPPER, Fr.] To ship, and eskipped is used for shipped. Cromp. Jur. Cur.

ESKIPPESON. Shipping or passage by Humphrey Earl of Bucks, in a deed dated 13 Feb. 22 H. 6. covenants with Sir Philip Chetwind, his lieutenant of the castle of Calais, to give him allowance for his soldiers, skippeson and re-skippeson. viz. passage

ESNECY, asnesia. Enitia pars dignitas the act) extends to avoid any such inquisitions geniture; in which sense it may be extended

to the cldest son, and his issue, holding first. | den, who was himself a herald, distinguishes In the statute of Marlebridge, cap. 9. it is called them most accurately. And he reckens up initia pars hareditatis. Co. Lis. 166. See tit. four sorts of them. 1. The eldest sons of Election.

spurs. 7 Co. Rep. 13.

ESPERVARIUS, Fr. espervier.] A sparrow-hawk. Chart Forest. cap. 4.

ESPLEES, expletiæ, from expleo.] The products which ground or land yield; as the hav of the meadows, the herbage of the pasture, corn of the arable; rent and services, &c. And of an advowson, the taking of tithes in king. 4. Esquires by virtue of their offices; gross by the parson; of wood, the felling of as justices of the peace and others who bear wood; of an orchard, the fruits growing there; any office of trust under the crown [if styled of a mill, the taking of toll, &c. These and such like issues are termed esplees. And it is observed that in a writ of right of land, advowson, &c., the demandant ought to allege in his count, that he or his ancestors took the esplees of the thing in demand; otherwise the pleading will not be good. Terms de Ley. Sometimes this word hath been applied to the and must so be named in all legal proceedings. farm, or lands, &c. themselves. Plac. Parl. 30 Ed. 1.

ESPOUSALS, sponsalia.] Are a contract or mutual promise between a man and woman to marry each other; and where marriages may be consummated, espousals go before them. Marriage or matrimony is said to be an espousal de præsenti, and a conjunction of man and woman in a constant society. Wood's Inst. 57. See tit. Marriage.

ESQUIRE, from the Fr. esqu, and the Lat. scutum, in Greek ozvros, which signifies a hide, of which shields were anciently made and afterwards covered.] An esquire was he who, attending a knight in the time of war, did carry a shield, whence he was called escuirer in French, and scutifer or armiger (i. e. armourbearer) in Latin.

Hotoman saith, that those whom the French call esquires were a military kind of vassals, having jus scuti, viz. liberty to bear a shield, and in it the ensigns of their family, in token of their gentility or dignity: but this addition hath not now for a long time had any relation to the office or employment of the person to whom it hath been attributed, as to carrying of arms, &c. but it has been merely a title of dignity, and next in degree to a knight.

A sheriff of a county being a superior officer, retains the title of esquire during his life, in respect of the great trust he has in the com-monwealth. The chiefs of some ancient families are esquires by prescription. Blount.

Esquires and gentlemen are confounded together by Sir Edward Coke, 2 Inst. 668. He there observes that every esquire is a gentleman, and a gentleman is defined to be one qui arma gerit, who bears coat armour; the grant of which adds gentility to a man's family. It For the mode of entering an essoin, see Rast. is indeed a matter somewhat unsettled what 520. constitutes the distinction, or who is a real esquire; for it is not an estate, however large, soins are divers. 1. Essoin de ultra mare, that confers this rank upon its owner. Cam- whereby the defendant shall have forty days.

knights and their eldest sons in perpetual suc-ESPERONS. Spurs; esperons de or, gilt cession. 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of esquire Spelman calls armigeri natalitii; as he denominates the sons themselves of peers armigeri honorarii. 3. Esquires created by the king's letters patent or other investiture, and their eldest sons; see post, Esquires of the esquires by the king in their commissions and appointments]. To these may be added esquires of Knights of the Bath, each of whom constitutes three at his installation; and all foreign, nay Irish peers; for not only these, but even the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in law, Barristers at law seem also now in full possession of the title esquire, though originally, as it should seem, attained by usurpation; and being perhaps nearly the same kind of unnecessary addition to their superior degree, as if it were to be annexed or prefixed to that of M. A. or L. L. D.

The Court of C. P., however, refused to hear an affidavit read, because a barrister named in it was not called esquire. 1 Wils. 224. See 1 Comm. 406. and the notes there. Spelm. Glos. 43. and this Dict. tit. Precedency.

Are such who Esquires of the King. have the title by creation: these, when they are created, have put about their necks a collar of S. S. and a pair of silver spurs is bestowed on them; and they were wont to bear before the prince in war a shield or lance. There are four esquires of the king's body to attend on his majesty's person. Camd. 111. These are now disused.

ESSENDI QUIETUM DE TOLONIO. A writ to be quit of toll: it lies for citizens and burgesses of any city or town that by charter or prescription ought to be exempted from toll, where the same is exacted of them. Reg. Org. 258. See tits. Toll, Corporation, London.

ESSOIGN, OR ESSOIN. Essonium, Fr. essoine-essonzic, Scotch.] An excuse for him that is summoned to appear and answer to an action, or to perform suit to a court baron, &c. by reason of sickness and infirmity, or other just cause of absence. It is a kind of imparlance, or craving of a longer time, that lies in real, personal, and mixed actions and the plaintiff as well as the defendant shall be essoigned to save his default. Co. Lit. 131.

The causes that serve to essoin, and the es-

2. De terra sancta, where defendant shall sufficient. 3 Comm. 277: 3 Term. Rep. K. have a year and a day. 3. De malo veniendi, B. 185. which is likewise called the common essoign. 4. De malo lecti, wherein the defendant may by writ be viewed by four knights. 5. De servitio regis: Bract. lib. 5: Britton, c. 22: such essoign day was until the 11 G. 4. and Fleta, lib. 6. And besides the common essoign 1 W. 4. c. 70. (altered by 1 W. 4. c. 3.) for de malo veniendi, i. e. by falling sick in com- many purposes considered the first day of the ing to the court, and other essoins above-men- term. 3 T. R. 155. But these statutes appear tioned, there were several other excuses, to to have done away with the essoign day as part save a default in real actions; as constraint of of the term. enemies, the falling among thieves, floods of water, and breaking down of bridges, &c. 2 Co. Inst. 125.

After issue joined in dower, quare impedit, &c. one essoin only shall be allowed. Stat. 52 H. 3. c. 13. And in writs of assise, attaints, &c. after the tenant hath appeared, he shall not be essoigned; but the inquest shall be ta-ken by default. Stat. 3 Ed. 1. c. 42. Essoin ultra mare will not be allowed, if the tenant be within the four seas; but it shall be turned to a default; c. 44. There is no essoin permitted for an appellant. St. 13 Ed. 1. c. 28. Nor doth essoin lie where any judgment is given; or the party is distrained by his lands; the sheriff is commanded to make him appear; st. 2.

party is a woman; in a writ of dower; where the party hath an attorney in his suit, &c. Ibid. The essoign day in court is regularly the first day of the term; but the fourth day after is allowed of favour. 1 Lill. 540. 569: 1 Inst. 135: 3 T. R. 185. A corporation (defendants) are not entitled to an essoin. And the court discourages essoins, and will be glad to use any means to prevent such delay of the defendant. 2 Term Rep. 16: 2 Wils. 164. An essoin lies not on a capias to arrest; and the plaintiff may declare and sign judgment, if no plea. 2 Str. 1194.

No essoign was ever allowed in personal actions, on the return of a capias; or even a summons, where the defendant was seen in court, or appeared by attorney: and as a corporation aggregate could not appear in any other manner, they were not entitled to an essoign. At this day, the defendant being in general at liberty to appear by attorney, no essoign is allowed in any personal action whatsoever, even when a peer or member of parliament is defendant. See 2 D. & E. 16: and

Tidd, 108. Essoin DAY of THE TERM. Formerly the first return in every term was, properly speaking, the first day in that term; and thereon the court sat to take essoigns, or excuses for such as did not appear according to the summons of the writ; wherefore this was usually in which the owner stands with regard to his called the essoin day of the term. But the property. And to ascertain this with preciperson summoned had three days' grace, be- sion and accuracy, estates may be considered yond the return of the writ in which to make in a threefold view; first, with regard to the his appearance, and if he appeared on the quantity of interest which the tenant has in

But when essoigns were no longer allowed to be cast in personal actions, the court discon-

The essoign or general return days are now regulated by the I W. 4. c. 3. which (sec. 2.) enacts, that "all writs usually returnable before any of his Majesty's Courts of King's Bench, Common Pleas, or Exchequer, respectively, on general return days, may be made returnable on the third day exclusive before the commencement of each term, or any day, not being Sunday, between that day and the third day exclusive before the last day of the term; and the day for appearance shall, as heretofore, be the third day after such return."

Essoin de Malo Villæ, is when the defendant is in court the first day; but gone without pleading, and being afterwards surprised by sickness, &c. cannot attend, but after the party is seen in court, &c. 12 Ed.2. sends two essoiners, who openly protest in court that he is detained by sickness in such An essoin de servitio regis lies not when the a village, that he cannot come pro lucrari et pro perdere; and this will be admitted, for it lies on the plaintiff to prove whether the essoin is true or not.

> Essoins and Proffers. Words used in the statute 38 H. S. c. 21. See Profer

> ESTABLISHMENT OF DOWER, is the assurance or settlement of dower, made to the wife by the husband on marriage: and assignment of dower signifies the setting it out by the heir afterwards, according to the establishment. Brit. c. 102, 103. See tit. Dower.

> ESTACHE. From the Fr. estacher, to fasten.] A bridge, or stank of stone and tim-

ESTANDARD, or Standard. An ensign

for horsemen in war. See Standard. ESTANQUES. Wears, or kiddles in rivers. See Magna Charta, &c.

ESTATE.

Fr. Estat. Lat. Status.] That title or interest which a man hath in lands or tenements,

An estate in lands, tenements, and hereditaments (says Blackstone), signifies such interest as the tenant hath therein; so that if a man grants all his estate in Dale to A. and his heirs, every thing that he can possibly grant shall pass thereby. Co. Lit. 345. signifies the [state] condition or circumstance fourth day inclusive, the quarto die post, it was the tenement; secondly, with regard to the

be enjoyed; and thirdly, with regard to the fee-simple, and inheritances limited; one spenumber and connexions of the tenants.

First, with regard to the quantity of interest which the tenant has in the tenement, this Dict. tits. Fee and Fee-simple, Tenure, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own as are clogged and confined with conditions or life, or the life of another man; to determine qualifications of any sort, may be divided into at his own decease, or to remain to his deseendants after him; or it is circumscribed within a certain number of years, months, or afterwards fees tail, in consequence of the days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates into such as are freehold, and | such as are less than freehold.

An estate of freehold, liberum tenementum, or frank-tenement, is defined by Britton, c. 32. to be "the passession of the soil by a freeman." And St. Germyn (Dr. & Stud. b. 2. d. 22.) tells us, "that the possession of the land is called, in the law of England, the franktenement, or freehold. Such estate, therefore, and no other, as requires actual possession of as that donation depends upon the concurthe land is, legally speaking, freehold: which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton, § 59. that where a freehold shall pass, it behoveth to have livery of seisin. As therefore estates of inheritance and estates for life, could not, by common law, be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates. 2 Comm. 103, 104.

Mr. Christian, in his note on the above passage, says, a freehold estate seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in or arising from real property of free tenure; that is, now, of all which is not copyhold. The learned commentator himself has elsewhere informed us, that "tithes and spiritual dues are freehold estates, whether the land out of which they issue are bond or free; being a separate and distinct inheritance from the lands themselves." And, in this view, they must be distinguished and excepted from other incorporeal hereditaments issuing out of lands, as rents, &c. which in general will follow the nature of their principal, and cannot be freehold, unless the stock from which they spring be freehold also. 1 Blackst. Tracts, 116.

of inheritance. The former are again divided called a reversion .- Of estates in possession

time at which that quantity of interest is to into inheritances absolute, otherwise called cies of which is usually called fee-tail.

Limited fees, or such estates of inheritance two kinds. 1. Qualified or base fees. 2. Fees conditional; so called at the common law, and statute de donis. As to these latter, see this Dict. tits. Tail and Fee Tail, Tenures .- A base or qualified fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the ease of a grant to A. and his heirs tenants of the manor of Dale; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. This estate is a fee, because, by possibility, it may endure for ever in a man and his heirs: yet, rence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. 2 Comm. See 1 Inst. 27.

Of estates of freehold, not of inheritance, but for life only, some may be called conventional, as being expressly created by the act of the parties; others are merely legal, or created by construction and operation of law. See tit. Freehold .- As to estates for life, expressly created by deed or grant, see this Dict. tit. Life Estate .- As to the estate of tenant in tail after possibility of issue extinct, see tit. Tail and Fee Tail. As to tenant by the Curtesy, and tenant in Dower, see those titles.

Of estates less than freehold there are three sorts. 1. Estates for years. 2. Estates at will: as to both which, see this Dict. tit. Lease. 3. Estates by sufferance: as to which,

see this Dict. tit. Sufferance.

Under the second of the above divisions, Blackstone enumerates copyholds, which originally were mere estates at will. See tit.

Comphold.

Besides these several divisions of estates, in point of interest, another species may be mentioned, viz. estates upon condition; as to which, see at large, tit. Condition, and tits. Mortgage, Statute-Merchant, Statute-Staple,

Elegit.

According to the above division, estates are considered solely with regard to their duration, or the quantity of interest which the owners have therein. With regard to the time of their enjoyment, when the actual receipt of the rents and profits begins, estates may be considered as either in possession or expectancy.—Of expectancies there are two Estates of freehold may then be considered, sorts, one created by the act of the parties, either as estates of inheritance, or estates not called a remainder; the other by act of law,

whereby a present interest passes to and several tenures, see this Dict. tit. Tenure. abides in the tenant, not depending on any subsequent circumstance or contingency, as in the cases of estates executory), little or nothing is to be peculiarly observed; all the estates already spoken of, and treated of under the titles referred to, are of this kind. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law .-- And as to so much of it as relates to Remainders and Reversions, see this Dict. under those titles, and tits. Ex-

ecutory Devise, Limitation.

Estates, with regard to the certainty, and the time of the enjoyment of them, are distinguished by Fearne in the introduction to his Essay on Contingent Remainders and Executory Devises, into, 1. Estates vested in possession. 2 Estates vested in interest, as reversions; vested remainders; such executory devises, future uses, conditional limitatations, and other future interests as are not referred to, or made to depend on, a period or event that is uncertain. 3. Estates contingent; as contingent remainders; and such executory devises, future uses, conditional limitations, and other future interests as are referred to, or made to depend on an event that is uncertain. An estate is vested when there is an immediate fixed right of present or future enjoyment.—An estate is vested in 4 T. R. 89: 11 East, 518. And a similar efpossession when there exists a right of present enjoyment .- An estate is vested in interest when there is a present fixed right of future enjoyment. An estate is contingent when a right of enjoyment is to accrue on an tute equitable assets for the payment of debts, event which is dubious and uncertain.

With respect to the number and connexions of their owners, the tenants who occupy and hold them, estates of any quantity or length of duration, whether in actual possession or expectancy, may be held in four different ways; severalty; in joint-tenancy; in coparcenary: in common.—He that holds lands in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any viz. By matter of record, by matter in wri-other being joined or connected with him in ting, and by matter in pais. Co. Lit. 352. point of interest during his estate therein. If a person is bound in an obligation by This is the most common and usual way of the name of A. B. and is afterwards sued by holding an estate; and all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and in laying down general rules and doctrines, they the obligation, though it be wrong; and forare usually applied to such estates as are held in severalty. As to estates in joint-tenancy, in coparcenary, and in common, see tits. Joint say contrary to his own deed; otherwise he Tenants, Parceners.

Besides the foregoing division of estates than freehold, they may be distinguished as being of three kinds; namely, at common Feoffment, Use, and Trust.

Title, and the references there; and as to the ther. 1 Nels. Abr. 751.

(which are sometimes called estates executed, different nature of estates, according to their

Estates are acquired in divers ways, viz. by descent from a father to the son, &c. Conveyance, or grant from one man to another; by gift or purchase; deed or will: and a feesimple is the largest estate that can be in law. 1 Lil. 541.

There is an estate that is implied, where tenant in tail bargains and sells his land to a man and his heirs; by this he hath an estate descendible, and determinable upon the death of the tenant in tail. Co. Lit.: 10 Rep. 97. If I give lands in Dale to a certain person for life, and after to his heirs, or right heirs, he hath the fee-simple; and if it be to his heirs male, he will have an estate-tail. 1 Rep. 66. A man grants to one and his heirs and assigns for his life, and a year over; this is an estate for life only, 39 Ed. 3. c. 25; Lit. 46. If a lease be made, and not expressed for what number of years, it is an estate at will. 2 Shep. Abr. 81.

The word estate generally in deeds, grants, and conveyances, comprehends the whole in which the party hath an interest or property, and will pass the same. 3 Mod. 46.

It has also been long established, that a devise of a testator's estate includes not only the land, but the whole of his interest in them. 2 Lev. 91: 1 Salk. 236: 2 Vern. 690: fect has been given to the word "estates" in the plural number. 2 T. R. 656: 4 M. & S. 366. See further tit. Will.

Real and copyhold estates are now by stasee tit. Real Estate.

ESTOPPEL, from the Fr. estouper, i. e. oppilare, obstipare.] An impediment or bar to a right of action arising from a man's own act: or where he is forbidden by law to speak against his own deed; for by this act or acceptance he may be estopped to allege or speak the truth. F. N. B. 142: Co. Lit. 332.

Our books mention three kinds of estoppel,

If a person is bound in an obligation by that name on the obligation; now he shall not be received to say in abatement, that he is misnamed, but shall answer according to asmuch as he is the same person that was bound, he is estopped, and forbidden in law to might take advantage of his own wrong, which the law will not suffer. Terms de la into such as are freehold, and such as are less Ley. If a man enters into a bond, with condition to give to another all the goods which are devised to him by the father; in this case law, by way of use, and in equity. See tits. the obligor is estopped to plead that the father made no will, but he may plead that he As to the title to estates, see this Dict. tit. had not any goods devised to him by his fano such indenture was executed. 2 Bos. & another by deed indented for the same term; Pull. 299. But see 3 Term Rep. K. B. 438. this second lease may be good by way of estop. that the defendant may plead such plea as pel. And if the first determine by surrender, tends to show there was no consideration for the bond. See also 3 Term Rep. 439. 441.

In a deed, all the parties are estopped to say any thing against what is contained in it: it but after he gets it by purchase or descent, it stops a lessee to say that the lessor had nothing is a good lease by estoppel. Dyer, 256: in the land, &c. And parties and privies are bound by estoppel. Lit. 58: Co. Lit. 352: 4 shall not estop a person, unless it be of a par-Rep. 53: 1 Moore, 389. None but privies and parties shall regularly have advantage by estoppels: but if a man makes a lease of part a term, whereby he is estopped; and after assign away the term, the assignee will be estopped also. 30 H. 6. 2: 4 Rep. 56. The assignee of a lease by indenture is estopped by the deed which stops his assignor. 2 W. P. Taunt. 278: and see 1 Esp. 217.

In estoppels both parties must be estopped; and therefore, where an infant or seme covert feas, 17. Where the condition of a bond is in makes a lease, they are not estopped to say, that it is not their deed, because they are not nor of D., or to pay such a sum of money as he bound by it; and as to them it is void. Cro. Eliz. 36. See tit. Deed. And though estoppels conclude parties to deeds to say the truth, yet jurors are not concluded, who are sworn ad veritatem de et super præmissis dicendam. For they may find any thing that is out of the record; and are not estopped to find truth in a special verdict. 4 Rep. 53: Lut. 705.

An estoppel shall bind only the heir who claims the right of him to whom the estoppel was. 8 Rep. 53. Acceptance of rent from a disseisor by the disseisee, may be an estoppel: and a widow accepting less than her thirds for dower, is an estoppel, &c. 2 Danv. Abr. 130, 671.

If a feoffment be made to two, and their heirs, and the feoffer afterwards levies a fine to them, and the heirs of one of them; this will be an estoppel to the other to demand feesimple according to the deed; for the fine shall enure as a release. 6 Rep. 7.44. Tenant in tail suffers a recovery, that his issue may avoid; he himself shall be estopped and concluded by it, and may not demand the land against his own recovery. 3 Rep. 3.

When in consequence of the marriage having preceded the settlement, it was requisite for the wife to levy a fine, which was done, to enure to the uses of the settlement, and that such verdict may be pleaded by way of estopsettlement conveyed, among other interests, estates vested in the wife's father, in fee-simple, and of which he was then also in posses- or title. 3 East's Rep. 346. sion (the wife being one of the coheiresses). It was held that such fine operated by way of surrender in the lifetime of his ancestor, and estoppel, and that her moiety became subject survive him, the heir of such surrenderer is to and bound by the uses of such settlement. not estopped by that surrender of his ancestor 2 B. & A. 242.

The taking of a lease by incentu man's own land, whereof he is seiseu in 100,1

So on bond conditioned to perform the covenants in a certain indenture mentioned, the defendant is estopped from pleading that to one man for eighty years, and then to forfeiture, &c. the second lessee shall have the land. Co. Rep. 155. If a lessor, at the time of making the lease, hath nothing in the land. Plowd. 344: Co. Lit. 47. A recital in a deed ticular fact, or where it is material; when it may be an estoppel. Cro. Eliz. 362.

The lord, by deed indentured, reciting that his tenant holds of him by such services, whereas he does not, confirms to the tenant, saving the services; it is no estoppel to the tenant. 35 H. 6. 33: Ploud. 130. If one make a deed by duress of imprisonment, and when he is at large make a defeasance to it; he is estopped to say it was per duress. Bro. Dethe particularity, as to infeoff J. S. of the mastands bound to pay to W. S., or to stand to the sentence of J. S. in a matter of tithes in question between them; here the party is estopped to deny any of these things, which in the condition he did grant. But if a condition be in the generality, to enfeoff one of all his lands in D. or to be nonsuit in all actions, &c. it is no estoppel. Dyer, 196: 18 Ed. 4. 54.

If a man in pleading confess the thing he is charged with he cannot afterwards deny it; though a plaintiff shall not be estopped to allege any thing against that which before he hath said in his writ or declaration; and one may not be estopped by the record upon which he was nonsuited. 21 H. 7. 24: 2 Leon 3.

An estoppel ought to be certain and affirmative, and a matter alleged that is not traversable, shall not estop; one may not be estopped by acceptance before his title accrued; an estoppel must be insisted and relied on; and where there is estoppel against estoppel, it puts the matter at large. Co. Lit. 352: Hob. 207. Estoppels are to be pleaded relying on the estoppel; without demanding judgment si actio, &c. 4 Rep. 53. See tit. Pleading.

If a verdict be found on any fact or title, distinctly put in issue in an action of trespass, pel in another action between the same parties or their privies, in respect of the same fact

If the heir apparent of a copyholder in fee from claiming against the surrenderee. Good-

ers in a

copyhold not being in the seisin cannot make a surrender of their interest, nor will such surrender operate by estoppel against the parties or their heirs. Doe, d. Blacksell, v. Tompkins, 11 East's Rep. 185.

A defendant is estopped by the condition of bond from pleading an indenture of lease. 2

B. & P. 299.

In an action brought by the assignee of a patentee against the patentee, the latter is estopped from showing that it was not a new invention against his own deed. 3 T.R. 439.

In an original writ the defendant was described as T. B. of C. in the county of N.: upon a writ of error brought to reverse the outlawry, the error assigned was that T. B. was not before or at the time of the original writ of, or conversant on C. aforesaid, and that there was not any hamlet, town, or place, of not wild, found within a lordship, and whose the name of C. in that county. The plea to this assignment of errors was that the plaintiff prosecuted his writ with intent to declare upon a bond made by the defendant, by which he was described as T. B. of C. in the county of N. It was held that this was an estoppel. 5 B. & A. 682.

A previous deed operates by way of estop-

pel. 3 Price, 602.

A party who has signed a deed is estopped from saying he was ignorant of its legal effect. 1 Buck. 579.

An owner having given a bill of lading by which freight appears to have been paid before the ship's departure, is estopped as against the assignee of such bill from claiming freight when the vessel arrives. 1 B. & A. 712.

A. having an equitable fee in certain lands, conveyed the same to B. by lease and release. The release recited that A. was legally or equitably entitled to the premises conveyed; and the releasor covenanted he was and stood lawfully or equitably seised in his demesne of and in, and otherwise well entitled to the same. The legal estate was subsequently conveyed to A. who afterwards, for a valuable consideration, conveyed it to C. Upon ejectment brought by B. against C., held-

First, That as there was no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him after the execution of the release.

Secondly, That the release did not operate as an estoppel by virtue of the words "granted," &c., because the release passed nothing but what the releasor had at the time, and A. had not the legal title in the premises when the release was made. 2 B. & Ad. 278.

An obligor sued on a bond reciting a certain consideration is estopped from pleading the consideration was different, unless he can make it appear by his plea that the whole transaction was fraudulent or unlawful. 2 B. & Ad. 544.

ESTOVERS. See tit. Common of Estovers. This word hath been taken for any kind of sustenance; as Bracton uses it, for that sustenance or allowance, which a man committed for felony is to have out of his lands or goods for himself and his family during his imprisonment. Bract. lib. 3. tract. 2. cap. 18. And the stat. 6 Ed. 1. c. 3. applies it to an allowance in meat, clothes, &c., in which sense it has been used for a wife's alimony.

ESTOVERIS HABENDIS, Writ de. A writ at common law, for a woman divorced from her husband, a mensá et thoro, to recover her alimony, sometimes called her estovers. 1 Lev.

See tit. Baron and Feme.

ESTRAY, Extrahura, from the old Fr. Estrayeur.] Is any valuable animal that is church, and two nearest market-towns on two market days, and is not claimed by the owner within a year and a day, it belongs to the king; and now, most commonly, by grant of the crown, to the lord of the liberty. Brit. cap. 17.

It is confirmatory of this origin of the right of taking estrays, that the cattle of the king are not subject to it. 1 Roll. Ab. 878.

It has been suggested that the true reason of the law thus giving the estray to the king or his grantee, and not to the finder, is, that the owner has thus the best chance of having his property restored to him; and it lessens the temptation to commit thefts, as it prevents a man from pretending that he had found as an estray, what he had actually stolen: or according to the vulgar phrase, that he had found that which never was lost.

Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses.—But animals upon which the law sets no value, as a dog or cat: and animals feræ naturæ, as a bear or wolf, cannot be considered as estrays. 1 Comm. 298. Swans may be estrays, but no other fowl, and are to be proclaimed, &c. 1 Roll. Ab. 878. If the beast stray to another lordship within the year, after it hath been an estray, the first lord cannot re-take it, for until the year and day be past, and proclamation made as aforesaid, he hath no property; and therefore the possession of the second lord is good against him. Cro. Eliz. 716: Finch, L. 177. If the cattle were never proclaimed, the owner may take them at any time. And where a beast is proclaimed as the law directs, if the owner claim it in a year and a day, he shall have it again, but must pay the lord for keeping. 1 Roll. Ab. 879: Finch, 177. But if any person finds and takes care of another's property, not being entitled to it as an estray, the owner may recover it or its value, without paying the expenses of keeping. 2 Blackst. Rep. 1117.

telling the marks or proving the property the Fr. Estropier, mutilare, or from the Lat. (which may be done at the trial, if contested); Extirpare.] Any spoil made by tenant for and tendering amends generally is good in life, upon any lands or woods, to the prejudice this case, without showing the particular sum; of him in reversion; it also signifies the because the owner of the estray is no wrong- making land barren by continual ploughing. doer, and knows not how long it has been in Stat. 6 Ed. 1. c. 13. It seems by the derivathe possession of the lord, &c. which makes tion that estrepement is the unreasonable it different from trespass, where a certain sum drawing away the heart of the ground, by must be tendered. 2 Salk. 686. In case of ploughing and sowing it continually, without an estray the lord ought to make a demand of manuring or other good husbandry, whereby what the amends should be for the keeping; it is impaired: and yet estropier signifying and then if the party thinks the demand unmutilare, may no less be applied to the cutting reasonable, he must tender sufficient amends; down trees, or lopping them further than the but if what he tenders is not enough, the lord law allows. In ancient records, we often find shall take issue, and it is to be settled by the vastum et estrepamentum facere; to make jury. Noy, 144. A beast estray is not to be strip and waste. used in any manner, except in case of necessity; as to milk a cow or the like, but not to two cases; the one, by the stat. of Glouc. 6 ride a horse. Cro. Jac. 148: 1 Rol. 673. Estrays of the Forest are mentioned in the sta- depending, as a formedon, writ of right, &c. tute of 27 H. 8. c.7. The king's cattle cannot be estrays or forfeited, &c.

ESTREAT, Extractum.] The true extract, copy, or note, of some original writing or record, and especially of fines amercements, &c. entered on the rolls of a court, to be levied by the bailiff or other officer. F. N. B. 57. 76. Sec stats. Westm. 1 and 3 Ed. 1. c. 45: Westm. 2. 13 Ed. 1. c. 8: 27 Ed. 1. st. 1. c. 2: 3 H. 7.

c. 1: 3 G. 1. c. 15. § 12.

The manner in which fines, penalties, forfeitures, and recognisances, imposed or forfeited by or before justices of the peace, are to be a writ of estrepement might be had at any returned and levied, is now regulated by the

3. G. 4. c. 46. and the 4. G. 4. c. 37.

By 7. G. 4. c. 64. § 31. where recognisances for appearance in cases of felony, misdemeanour, common assault, articles of the peace, or in bastardy, are forfeited, a list of such cases shall, previous to the estreats of such recognisances, be laid before the judge, justice, recorder, or corporate officer, who may make such order as to estreating the same as shall seem just; and no such estreat shall take place without the written order of such justice, recorder, &c.

By the 3. and 4. W. 4. c. 99. provision is made for the due return, estreating, levying of all fines, issues, recognisances, penalties, and deodands, imposed or forfeited, in the House of Lords or the House of Commons, in damages. Ib. 61. And therefore now in an the Courts of Law at Westminster, by the judges of assize, clerks of the market, commissioners of sewers, and coroners, through-

out England. See tit. Recognisance. The Court of Exchequer has no jurisdiction over estreats not returned to it; e. g. estreats of recognisances to try a traverse at the quarter-sessions. The sessions only have

jurisdiction to relieve. 3 Tyr. 53.

Strengthened, applied ESTRECIATUS. to roads. R. Hovedon, p. 783.

ESTREPE, Fr. Estropier.] To make spoils in lands to the damage of another, as of be directed and delivered to the tenant himthe reversioner, &c.

An owner may seize an estray, without | ESTREPEMENT, Estrepamentum, from

This word is used for a writ, which lies in Ed. 1. c. 13. when a person having an action sues to prohibit the tenant from making waste during the suit: the other is for the demandant, who is adjudged to recover seisin of the land in question, after judgment and before execution sued by the writ of habere facias possessionem, to prevent waste being made till he gets into possession. Reg. Orig. 76: Reg. Judic. 33: F. N. B. 60, 61: 3 Inst.

In suing out these two writs, this difference was formerly observed; that in actions merely possessory, where no damages are recovered, time pendente lite, nay, even at the time of suing out the original writ or first process: but in an action where damages were recovered, the demandant could only have a writ of estrepement, if he was apprehensive of waste, after verdict had; for with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the damages. F. N. B. 60, 61. But now it seems to be held by an equitable construction of the stat. of Glouc. and in advancement of the remedy, that a writ of estrepement to prevent waste, may be had in every stage as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands; for perhaps the tenant may not be able to satisfy the demandant his tull action of waste itself to recover the place wasted, and also damages, a writ of estrepement will lie as well before as after judgment For the plaintiff cannot recover damages for more waste than is contained in his original complaint; neither is he at liberty to assign or give in evidence any waste made after suing out the writ: it is therefore reasonable that he should have this writ of preventive justice, since he is in his present suit debarred of any further remedy. 5 Rep. 115.

If a writ of estrepement forbidding waste self, as it may be, and he afterwards proceeds

to commit waste, an action may be carried on] upon the foundation of this writ, wherein the only plea of the tenant can be, non fecit vastum contra prohibitionem; and if upon verdict is be found that he did, the plaintiff may recover costs and damages; or the party may lessee. 10 Rep. 128. Where lands taken on proceed to punish the defendant for the contempt. Moor, 100.

As a writ of estrepement may be directed either to the tenant and his servants, or to the sheriff; if it be directed to the tenant and his servant, and they are duly served with it, if they afterwards commit waste, they may be committed to prison for this contempt of the writ. But it is said not to be so when directed to the sheriff, because he may raise the posse comitatus to resist them who make waste. Hob. 85. Though it hath been adjudged, that the sheriff may likewise imprison offenders if he be put to it; and that he may make a warrant to others to do it. 5 Rep. 115: 2 Inst. 329.

The writ of estrepement lies properly where the plaintiff in a real action shall not recover damages by his action, and as it were supplies damages; for damages and costs may be recovered for waste after the writ of estrepement is brought. See Moor, 100: 2 Inst. 328. If tenants commit waste in houses assigned a feme for dower, on her bringing action of dower, writ of estrepement lies. Rep. 115. See Cro. Eliz. 114: Moor, 622. But pending a writ of partition between coparceners, if the tenant commit waste, this writ will not be granted; because there is equal interest between the parties, and the writ will not lie but where the interest of the tenant is to be disproved. Goldsh. 50: 2 Nels.

In the Chancery, on filing of a bill, and before answer, the court will grant an injunction to stay waste, &c. 1 Lil. 547. See tits. giving evidence, are first selected. Chancery, Waste. ETATE PROBANDA. See Ætate.

ETHELLING, or ÆTHELING, Sax.] Signifies noble; and among the English Saxons it was the title of the prince, or the king's side or on the other; and no evidence ought

cldest son. Camden. See Adeling. EVASION, Evasio. A subtle endeavouring to set aside truth, or to escape the punishment of the law; which will not be endured. If a person says to another that he will not strike him, but will give him a pot of ale to strike first, and accordingly he strikes, the returning of it is punishable; and if the person first striking be killed, it is murder; for no man shall evade the justice of the law by such a pretence to cover his malice. 1 H. P. C. 81. No one may plead ignorance of the law to evade it. &c.

EVENINGS. The delivery at even or night of a certain portion of grass or corn, &c. to a customary tenant, who performs the service of cutting, mowing, or reaping for his lord, given him as a gratuity or encouragement. Kennet's Gloss.

EVES-DROPPERS. See Eaves-droppers. EVICTION, from evince, to overcome.] A extent are evicted or recovered by better title, the plaintiff shall have a new execution. 4 Rep. 66. If a widow is evicted of her dower or thirds, she shall be endowed in the other lands of the heir. 2 Danv. Ab. 670. And if on an exchange of lands, either party is evicted of the lands given in exchange, he may enter on his own lands. 4 Rep. 121.

EVIDENTIA.] Proof by testimony of witnesses, on oath; or by writings or records.

It is called evidence, because thereby the point in issue in a cause to be tried, is to be made evident to the jury; for probationes debent esse evidentes et perspicuæ. Co. Lit. 283. The evidence to a jury ought to be upon the oath of witnesses; or upon matters of record, or by deeds proved, or other like authenticated matter. 1 Lil. Ab. 547. And evidence containeth testimony of witnesses. and all other proofs to be given and produced to a jury for the finding of any issue joined between parties. Co. Lit. 283.

The system of evidence, as now established in our courts of common law, is very full, comprehensive, and refined; a summary of the law on the subject, is here presented.

The nature of the present work will not allow room for the numberless niceties and distinctions of what is, or is not legal evidence to a jury. A few of the general heads and leading maxims relative to this point, as well as in civil or criminal cases, together with some observations on the manner of

Evidence, as has been already remarked, signifies that which demonstrates, makes evident or clear, or ascertains the truth of the very fact or point in issue, either on the one to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of non est factum, and the issue is, whether it be the defendant's deed or no, he cannot give a release of this bond in evidence, for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, viz. that the bond has no existence.

Again; evidence in the trial by jury is of two kinds, either that which is given in proof. or that which the jury may receive by their own private knowledge. As to the latter, see tit. Jury. The former, or proofs (to which in common speech the name of evidence is usually confined,) are either written, or parol, that is, by word of mouth. Written proofs, or evidence, are, 1. Records; and 2. Ancient deeds of 30 years' standing, which prove

Vol. I.—86

themselves; but, 3. Modern deeds; and 4. there is a process to bring them in by writ of Other writings must be attested and verified subpana ad testificandum; which commands by parol evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence pounds to be forfeited to the king; to which the nature of the case will admit of shall the stat. 5 Eliz. c. 9. has added a penalty of always be required, if possible to be had; but 101. to the party aggrieved, and damages if not possible, then the best evidence that can be had shall be allowed. For if it be found there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that positively be proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like), then an attested copy may be produced, or parol evidence given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute), the courts admit of hearsay evidence, or an account of what persons deceased have declared in their lifetime; but such evidence will not be received of any particular facts. \$50, too, books of accounts, or shop-books, are not allowed of themselves to be given in evidence for the owner, but a servant who made the entry may have recourse to them to refresh his memory; and if ed to be secretly concerned in the event; or such servant (who was accustomed to make their interest may be proved in court. Which those entries) be dead, and his hand be proved, the book may be read in evidence. Bull, N. jection to the former class; for no man is to P. 282, 283: Salk. 285. But as this kind of be examined to prove his own infamy. And evidence, even thus regulated, would be much no counsel, attorney, or other person, intrusttoo hard upon the buyer at any long distance ed with the secrets of the cause by the party of time, the stat. 7 Jac. 1, c. 12. (the penners himself, shall be compelled, or perhaps allowof which seem to have imagined that the ed, to give evidence of such conversation or hooks of themselves were evidence at commatters of privacy, as came to his knowledge mon law), confines this species of proof to by virtue of such trust and confidence; but he such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.

But if a fact to be proved has been reduced to paper, this will not prevent its being proved by parol evidence. For instance, a receipt of money may be proved by parol evidence, though a written receipt was given. 4 Esp. So the fact of parties standing in the relation of landlord and tenant may be proved by parol, though there is a written contract, but not the terms of the tenancy. 7 B. & C. So also the fact of partnership, though there be a deed of partnership. Ry. & Mo. Ca. 187. So the fact of a marriage need not necessarily be proved by the register; and the inscriptions on banners at a public meeting may be proved without producing them. 3 B. & A. 566.

equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor if he appears, is he bound to give evidence till such charges are actually paid him; except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in cases of disobedience, are of excellent use in the thorough investigation of truth.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event of the cause. All others are competent witnesses; though the jury, from other circumstances, will judge of their credibility. Infamous persons are such as may be challenged as jurors, propter delictum; and therefore shall never be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a voire dire, if suspectlast is the only method of supporting an obmay be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause. Bull, N. P. 284: 1 Vent. 97. The indecency of evidence is no objection to its being received when it is necessary to the decision of a civil or criminal right. Coup. 729.

One witness (if credible) is sufficient evidence to a jury of any single fact; though, undoubtedly, the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not always demand the testimony of two, as the civil law requires.

Positive proof is always required where from the nature of the case it appears it might possibly have been had. But, next to positive proof, circumstantial evidence, or the doctrine of presumptions, must take place: for when the fact itself cannot be demonstra-With regard to parol evidence, or witnesses, tively evinced, that which comes nearest to

the proof of the fact is the proof of such cir- explained in Bull. Ni. Pri. Part. VI. from Gilcumstances which either necessarily or usually bert's Law of Evidence; and it concludes with attend such facts; and these are called presumptions which are only to be relied upon till the contrary be actually proved. Stabitur præsumptione donec probetur in contrarium. Co. Lit. 373. Violent presumption is many times equal to full proof; for there those circumstances appear which necessarily attend the fact. Ibid. 6. As if a landlord sues for rent due at Michaelmas 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary. Gilb. Evid. 161.

Probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight; as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755, this will prevail to exonerate the tenant; Co. Lit. 373; unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake; for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. So where a bill of exchange negotiated after acceptance. is produced from the hands of the acceptor after it is due, the presumption is that the acceptor has paid it. 1 Stark. 225: 2 Camp. 439. And see Roscoe on Evidence, p. 14.

Light, or rash presumptions, have no weight

or validity at all.

The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the whole truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorney, the counsel, and all bystanders; and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed in the face of the country. And if either in his directions or decisions he mis-states the law by ignorance, inadvertance, or design, the counsel on either side may require him publicly to seal a bill of exceptions, stating the point whereon he is supposed to err: or if the legal effect of a record or other evidence is doubted, this may be tried on a demurrer to evidence. But the most usual course is to apply for a new trial on the ground that the evidence has been improperly admitted. 3 Comm. 367-372.

taking a view of all the general rules of evidence together, from whence the following abstract is given.

1. The first general rule is that the best evidence must be given that the nature of the thing is capable of. The true meaning of this rule is that no such evidence shall be brought as ex natura rei supposes still a greater evidence behind, in the party's possession or power; for such evidence is altogether insufficient and proves nothing. But if it is proved that an original deed, will, &c. is in the hands of the adverse party, or is destroyed without default of the party who ought to produce it, a copy will be admitted; because then such copy is the best evidence.

In general when any written instrument is in the possession of the opposite party, secondary evidence of the contents is inadmissible without proof of a notice to produce the original. But where, from the nature of the proceedings, the party in possession of the instrument has notice that he is to be charged with the possession of it, as in case of trover for a bond, a notice to produce is unnecessary. 14 East, 274: 6 B. & C. 398. If the party refuses to produce the papers required; such a circumstance does not raise any inference against him, it merely entitles the other party to go on secondary evidence. 3 Camp. 363: 1 Stark. 315.

2. No person interested in the question can be a witness. There is no rule in more general use, and none that is so little understood. See 1 Term Rep. 302. And there are some exceptions to it, c. g. 1. A party interested will be admitted in a criminal prosecution in most instances; 2. He may be admitted for the sake of trade and the common usage of business; as porters, apprentices, &c. to prove delivery of goods, &c. though it tend to clear themselves of neglect. See 3 Term Rep. 29: Str. 647. 1083. 3. Where no other evidence is reasonably to be expected. 4. Where he acquires the interest by his own act, after the party who calls him as a witness has a right to his evidence. 5. Where the possibility of interest is very remote. See 1 Term Rep. 163, 164. and more at length, this tit. Div. II. 1.

The general rule was, that no objection could be made to the competency of a witness unless he was directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest. 7 Term Rep. 62: 1 Bing. 260: 4
Bing. 649. But the latter ground of objection has been removed by the 3 and 4 W. 4. c.

42. See the section, post, II.

3. The third general rule is, that hearsay is no evidence. For no evidence is to be admitted but what is upon oath, and if the first speech were without oath, another oath that The true theory of evidence is admirably there was such a speech makes it no more.

Besides, if the speaker be living, it is not the counterfeiting the coin, it was provided that best evidence. But hearsay has been admitted in corroboration of a witness's testimony. And hearsay of members of a family is adbeen repealed, the laws relating to offences mitted to prove a pedigree, and hearsay is admissible to prove public rights; and in some other cases where the party makes a state-ment against his interest. Roscoe on Evidence, 24.

4. In all cases where a general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where

it comes in collaterally.

5. Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum,

verificatione facti tollitur.

6. In every issue the affirmative is to be proved. A negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed until it be proved: but when the affirmative is proved, the other party may contest it with opposite proofs of some matter or proposition totally inconsistent with what is affirmed.

In general, where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. 2 East's Rep.

312. See post II. 3.

Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. 3 East's Rep. 192.

Thus, where the issue involves a culpable omission, it is incumbent on the party making the charge to prove it, although he must prove a negative; for the other party shall be presumed innocent till proved to be guilty. East, 193: 5 B. & C. 327.

7. No evidence need be given of what is agreed by the pleadings. For the jury are only sworn to try the matter in issue between the parties, so that nothing else is properly be-

fore them.

8. Whensoever a man cannot have the advantage of the special matter by pleading, he may give it in evidence on the general issue. See tit. Pleading.

9. If the substance of the issue be proved, it is sufficient. As to this, see also tits. Pleading;

Modo et Forma.

The doctrine of Evidence in CRIMINAL Cases is, in most respects, the same as that upon civil actions. There are, however, a few leading points, wherein by several statutes and resolutions a difference is made between civil and criminal evidence.

1. In all cases of high treason, and misprison of treason, by stats. 1 Ed. 6. c. 12. and 5 written by the same person (2 Hawk. P. C. and 6 Ed. 6. c. 11. two lawful witnesses are 431.); yet undoubtedly the testimony of witrequired to convict a prisoner, unless he shall nesses well acquainted with the party's hand, willingly and without violence confess the that they believe the paper in question to have same. By stat. 1 and 2 P. & M. c. 10. an ex-been written by him, is evidence to be left to ception was made as to treasons in counterfeit- a jury. Lord Preston's case, A. D. 1690, 1694, ing the king's seals or signatures: and by the 4 State Trials, 463: Francia's case, A. D. various acts relating to treasons committed in 1716, 6 State Trials, 69: Layer's case, A. D.

against the coin consolidated, and the crime reduced to felony. By the stat. 7 W. 3. c. 3. in prosecutions for the treasons to which that act extends, the same rule (of requiring two witnesses) is again enforced; with this addition, that the confession of the prisoner, which shall countervail the necessity of such proof. must be in open court. In the construction of which act it hath been holden, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses. is sufficient to convict him of treason. Foster, 240. 244. But hasty unguarded confessions. made to persons having no such authority. ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same stat. 7 W. 3. c. 3. it is declared that both witnesses must be to the same overt act of treason; or one to one overt act, and the other to another overt act of the same species of treason, and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. See 2 State Triuls, 144: Foster, 235. And therefore in Sir John Fenwick's case, in King William's time, where there was but one witness, an act of parliament (stat. 8 W. 3. c. 4.) was made on purpose to attaint him of treason, and he was executed. 5 State Trials, 40. But in all cases where the treason alleged is the assassination of the king, or any direct attempt against his life or his person, the prisoner is, by 39 and 40 G. 3. c. 93. to be tried upon the like evidence as if he stood charged with murder.

In every other accusation one positive witness is sufficient; except in cases of indictments for perjury, where one witness is not sufficient, because then there is only one oath

against another. 10 Mod. 194.

2. From the reversal of Colonel Sydney's attainder by act of parliament in 1689 (8 State Trials, 472.), it may be collected that the mere similitude of hand-writing in two papers shown to a jury, without other concurrent testimony, is no evidence that both were

4 Burr, 644.—See post, II. 3.

any other knowledge of the character of the hand-writing, furnishes no evidence. Peake, 40: 2 Carr. & P. 477. But a witness may form his opinion as to the genuineness of lead more or less strongly to the conclusion, the hand-writing to a document, by inspect- and care must be taken not to draw the coning other documents which are authentic. Roscoe, 69. And the jury may judge whether an instrument is of the hand-writing of the demonstration cannot be required or expected; party by comparing it with other documents in evidence in the cause which are undoubtedly of the party's hand-writing; but not with drawn by the unanimous judgment and condocuments only put in evidence for the pur-Rex v. Morgan, id. in notes.

All presumptive evidence of felony should be admitted cautiously: for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. And Sir Matthew Hale, in particular, lays down two rules most prudent and necessary to be observed. 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

2 Hal. P. C. 200.

presumptions (which have been in general much too technically treated) is well explained and illustrated by an extract from the judgment of C. J. Abbot, in Rex v. Burdett, 4 B. & A. 161.

"A presumption of any fact is properly an inferring of that fact from other facts that are known: it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could be ascertained by inference in a court of law, very few offenders could be brought to justice. In a great portion of trials as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given. The man who is charged with theft is rarely seen to break the house or take the goods: and in cases of murder it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredient poured into the cup. In drawing an inference or a conclusion from facts proved, regard must always be had to the very of the truth, and the better information of nature of the particular case, and the facility the consciences of the jury and justices, there that appears to be afforded either of explana-shall be allowed to the party arraigned the tion or contradiction. No person is to be re- benefit of such credible witnesses to be examquired to explain or contradict, until enough ined upon oath, as can be produced for his has been proved to warrant a reasonable and clearing and justification." At length, by just conclusion against him in the absence of stat. 7 W. 3. c. 3. the same measure of justice explanation or contradiction: but when such was established throughout all the realm, in proof has been given, and the nature of the cases of treason within the act: and it was

1722, Ibid. 279: Henzey's case, A. D. 1758: case is such as to admit of explanation or contradiction (if the conclusion to which the proof A comparison of hand-writings without tends be untrue), and the accused offers no explanation or contradiction, what can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may clusion hastily; but in matters that regard the conduct of men, the certainty of mathematical and it is one of the peculiar advantages of our jurisprudence that the conclusion is to be science of twelve men conversant with the pose of comparison. 2 Moo. & Malk. 133: affairs and business of life, and who know that where reasonable doubt is entertained it is their duty to acquit, and not by the judgment of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtlety and refinement."

Lastly, it was an ancient and commonly received practice (1 State Trials, passim), that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered to the honour of Mary I. that she first desired such evidence to be received in a court of justice. Afterwards the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of exam-The nature of presumptive evidence and of ining witnesses for the prisoner, but not upon oath. 2 Bulst. 147: Cro. Car. 292. The consequence of this still was, that the jury gave less credit to the prisoner's evidence than to that produced by the crown. Sir Edward Coke protests very strongly against this tyrannical practice, declaring that he never read in any act of parliament, book, case, or record, that in criminal cases the party accused shall not have witnesses sworn for him; and therefore there is not so much as scintilla juris against it. 3 Inst. 79. See also 2 Hal. P. C. 283. and his Summary, 264. And the House of Commons were so sensible of this absurdity, that in the bill for abolishing hostilities between England and Scotland (stat. 4 Jac. 1. c. 1.) when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it, notwithstanding the efforts of both the crown and the House of Lords, against the practice in the courts of England, and the express law of Scotland, "That in all such trials for the better discoafterwards declared by stat. 1 Anne, st. 2. c. 9. minster, may be exemplified in the court that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses 173. against him. 4 Comm. 356-360.

Having given the foregoing general view, more minute information on this subject may

be thus classed:

I. Of Written Evidence.

II. Unwritten Evidence: wherein-1. Who may be Witnesses: 2. Compelling Witnesses to appear; as also of the Manner of their giving Evidence. 3. Of Parol Evidence to explain written Documents; and of Presumptive and Hearsay Evidence.

I. Of Written Evidence - Evidence by records and writings is where acts of parliaments, statutes, judgments, fines and recoveries, proceedings of courts, and deeds, &c. are admitted as evidence.

A record may be proved by production, or

Copies of records are either exemplifications: copies made by an authorised officer; or sworn copies.

Exemplifications are copies under the great seal, or under the seal of some particular

court; which seals prove themselves.

Where the law entrusts a particular officer with the making of copies, it gives credit to them in evidence, without further proof. N. P. 229. Thus the chirograph of a fine is evidence of the fine itself, because the chirographer is an officer appointed by the law to make out such copies; but it is not evidence of the proclamations levied upon the fine, which must be proved by an examined copy of the roll, for the chirographer is not appointed to make copies of them. B. N. P. 229,

Not only records, but all public documents which cannot be removed from one place to another, may be evidenced by a copy, proved on oath to have been examined with the ori-

An exemplification of the inrolment of letters patent under the great seal, may be pleaded in evidence. 3 Inst. 173. This expleaded in evidence. 3 Inst. 173. emplification is a copy or transcript of letters patent made from the involment thereof, and sealed with the great seal. But neither an exemplification nor constat was pleadable at common law, because there was only the tenor of an inrolment; and the tenor of a record is not pleadable, but they are now pleadable by stats. 3 and 4 Ed. 6 c. 4: 13 Eliz. c. 6.

A patent may be exemplified under the great seal in Chancery; and also any record or judgment in any of the courts at Westminster, under the proper seal of each court : all which exemplifications may be given in evi- tom, or fact. Salk. 281: Skinner's Rep. 623. dence to a jury. 1 Lil. 583: Shep. 134. A rule made, or writ filed, in any court at West- and sale inrolled is pleaded with a profert, the

Records and involments prove themselves; and a copy of a record or inrolment sworn to. may be given in evidence. Co. Lit. 117. 262. A transcript of a record in another court may be given in evidence to a jury. 1 Lil. Abr. 551. There is a difference between pleading a record, and giving the record in evidence; if it be pleaded, it must be sub pede sigilli, or the judges cannot judge thereof: though where it is given in evidence, if it be not under the seal, the jury may find the same, if they have other good matter of inducement to prove it. Style's Rep. 22.

To prove a copy of a record it is sufficient to prove that the paper agrees with what the officer of the court read as the contents of the record: it is not necessary for the persons examining to exchange papers, and read them alternately. 2 W. P. Taunt. 52 but query?

A general act of parliament may be given in evidence, and need not be pleaded; and of these the printed statute-book is good evidence: but in the case of a private act, a copy of it is to be examined by the records of parliament, and is to be pleaded. Trials per pais, 177.

Local or personal acts of parliament printed by the king's printer, may be produced in evidence, if they have a clause inserted in them for that purpose. See tit. Statutes.

The Gazette has been held evidence of all acts of state. 5 Term Rep. 436. So the articles of war, printed by the king's printer, have been held evidence of such articles. Rex v. Withers, cited in 5 T. R. 442. 446.

The king's proclamation offering a reward for the apprehension of the perpetrators of outrages in certain counties is evidence to prove that acts of outrage had been committed in

those parts. 4 M. & S. 532.

The journals of the House of Lords have always been admitted as evidence of their proceedings, even in criminal cases; Cowp. 17; and the journals of the House of Commons are admissible for the same purpose, although this was formerly doubted, because they are not records. *Ibid*. But the journals are not evi-dence of particular facts stated in the resolutions, which are not a part of the proceedings of the house. 4 State Tr. 39.

Journals of the House of Lords have been held evidence to prove an address of the lords to the king, and the king's answer. 5 Term Rep. K. B. 455. A history of England, or printed trial, may not be read as evidence. Lil. 557. Camden's Britannia was not allowed as evidence: but it has been held that a history may be evidence of the general history of the realm, though not of a particular cus-

By stat. 10 Anne, c. 18. where any bargain

party to answer such profert may produce a proved by one witness at the least. But if

copy of the inrolment.

Inrolment of a deed is proved on certifying it by an examined attested copy: though inrolment of a deed which needs no inrolment, or by which the estate does not pass, is only evidence to some purposes. 3 Lev. 387.

A record of an inferior court hath been rejected in evidence and the party put to prove what was done. And proceedings of county courts, courts baron, &c. may be tried by a jury; for it hath been adjudged that they cannot be proved by the rolls, but by witnesses. Lit. 75. But court rolls of a court baron, when shown, are good evidence; and in many cases copies of the court rolls are allowed as evidence. Trials per pais, 178. 228.

down with the court rolls from steward to out proof of the defendant's execution of it. steward, although not signed by any person, is good evidence to prove the course of descent within the manor. 1 Term Rep. K. B. 466.

An entry in the court rolls of a manor, stating the mode of descent of lands in the manor, is admissible evidence of the mode of among deeds and evidences of lands, may be descent, although no instances of any person's having taken according to it be proved. 5 T.

And so are entries in a steward's book above thirty years' old, and coming from the proper custody; and this, too, without proving the hand-writing of the steward. 4 B. & A. 376.

Entries in the books of the clerk of the peace of deputations formerly granted to gamekeepers by the real owner of the manor are evidence to show that manorial rights were publicly exercised by him. 3 B. & A. 341.

Parchment writings preserved among the muniments of a manor, purporting to be signed by several copyholders of the manor, stating that an unlimited right of common had been found inconvenient, and they had agreed to stock the common in a restricted manner, where admitted as evidence of reputation as to the general right of common. 13 East's Rep. 10.

A surrender of, and admittance to, a copyhold may be proved by the original entries on the court rolls without showing a copy stamped as required by law. 16 East's Rep. 208.

The involment book in which leases are registered in the Bishoprick of Durham, kept in the office of the auditor, is a public muniment, and on proof of the counterpart being lost is receivable in evidence. 1 Holt, N. P.

An examined copy of a charter deposited in the proper public office at Madrid, was admitted to prove the plaintiff's being a corporation according to the laws of Spain. & M. N. P. 190: 1 Camp. 65. n.

With respect to the production of deeds in evidence, the general rule is, that the deed itself must be given in evidence, and must be proof that there was such a lease. 1 Salk.

the opposite party produce the deed on notice, it shall be read without any proof of the execution. Bull. N. P. 254: 3 Term Rep. 41: 3 W. P. Taunt. 60.

But where an instrument was produced at the trial by one of the parties, in consequence of a notice from the other, which appeared to have been executed by the party producing it and others, and to be attested by a witness, the court held that the production of it in that manner did not dispense with the necessity of proving the instrument by the subscribing witness, though unknown before to the party calling for it. 8 East's Rep. 548.

When a deed is in the possession of the defendant, who has notice to produce it, but An ancient customary of a manor, delivered does not, an examined copy is evidence with-

1 Esp. 409.

An ancient deed proves itself, where possession has gone accordingly; but later deeds must be proved by witnesses. Co. Lit. 6.

An old deed proved to have been found given in evidence to a jury; though the executing of it cannot be proved and made out. 3 Salk. 153. A deed may be good evidence, though the seal is broken off; and where a deed is burnt, &c. the judges may allow it to be proved by witnesses, that there was such a deed, and this be given in evidence. 1 Lev.

The attesting witness to a bond wrote the attestation without seeing the obligor execute; and that person gave evidence that the obligor signed the bond, but did not seal and deliver it: the Court of C. P. held, that the signing the bond which purported to be sealed with the obligor's seal, was evidence to be left to a jury of the scaling and delivery. 7. W. P. Taunt. 251. And the court held that the attesting witness to the deed denying having seen the deed executed, other evidence of the execution was admissible. Ibid.

A counterpart is not a duplicate original, being executed by one party only, but it is admissible against the party by whom it is executed, and his assigns, without notice to produce the original. 7 East, 363: 8 East, 487. But as against a third person, a counterpart cannot be read in evidence without accounting for the want of the original, or proving it is in his possession, and he has had a notice to produce. Salk. 287: 2 T. R. 41.

Where a deed was cancelled by fraud, that being proved, it was allowed to be evidence in an action under the deed. Hetl. 138. The recital of a deed is no evidence without showing the deed, or proving that there was such a deed, and it is lost. Co. Lit. 352: Vaugh. a deed, and it is lost. Co. Lit. 352: Vaugh. 74. Recital of a lease, in a deed of release, is good evidence that there was such a lease against the releasor, and those claiming under him, but not against others, except there be 286. A settlement set forth in a bill in Chan-cery, and admitted in the answer; and where dence given to the jury. it was proved that the deed was in the posses-

not to be found. 5 Mod. 384.

A deed, mough scaled and delivered, if not stamped according to act of parliament, cannot be pleaded or given in evidence in any court. See stat. 5 and 6 W. & M. c. 21. and several subsequent statutes; the latter of which extend to bills, notes, receipts, agreements, &c. A deed or an agreement may be stamped at any time, on payment of a penalty; but no stamp can be affixed to a bill of sexchange or promissory note after it is once

of personal property being vested in an executor, or of his appointment; the original will not be admitted as evidence at a trial at law, is not admissible for that purpose. 2 Selw. N. except an answer be put in. Raym. 335. If P. 730. But the probate of a will, devising depositions are taken out of the realm, he who real property, is not evidence as to such property; Bull. N. P. 245; not even where the original will is lost; 2 Campb. 389; except, indeed, as a mere copy, the spiritual court having no power to authenticate such a devise, so far as it relates to land. 1 Phil. on Ev. 344.

But parol evidence of the contents of a will of lands which had been lost was received from a person who had heard it read over in the presence of the testator's family on the day of his funeral. 2 Campb. 390.

In certain cases the ledger-book of the Ecclesiastical Court in which the will is entered,

the court. Bull N. P. 245, 6.

The original book of acts directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration Ch. Prec. 212. See this Dict. tit. Deposiis directed to be granted of the intestate's ef- tions. fects, without producing the letters of administration themselves, notwithstanding subsequent letters of administration granted to another, the first not being recalled. 8 East's

Rep. 187.

A bill in Chancery has been admitted as slight evidence against the complainant: but see 7 Term Rep. K. B. 2. that it is no evidence of the matters stated in it, not even of those on which the prayer for relief is founded; except perhaps in the instance of a family pedi-tuted against a former lord of a manor by a gree set forth in the bill. 7 T. R. 2. n. a. An copyholder, were held to be admissible evianswer in Chancery is evidence against the dence for the lord of the manor in a subsedefendant himself, though not against others.

1 Vent. 66: Trials per pais, 167. But see 4
East's Rep. 53: and 2 Bos. & Pull. 548.
When a party gives an answer in Chancery in evidence at a trial, though he insist to read only such a part of it, yet the other side may require to have the whole read. 5 Mod. 10.

As in case of a variting required to the side may reserve to the side may require to have the whole read. 5 Mod. 10. As in case of a writing permitted to los es

to prove one part of an evidence, which

Depositions of witnesses in Chancery besion of such a one, &c. hath been adjudged a tween the same parties may be given in evigood evidence of the deed of settlement where dence at law, if the witnesses are dead, and the bill and answer proved. Trials per pais, A deed, though scaled and delivered, if not 167. 207. 234. Regular depositions in Chanexchange or promissory note after it is once in Chancery in perpetuam rei memoriam, are made. 4 B. & C. 235. The present Stamp not to be given in evidence, so long as the Act is the 55 G. 3. c. 184. The probate is the only legitimate evidence been adjudged that these depositions to perpetuate testimony, on a bill exhibited, shall makes them is supposed there still, and they shall be read as evidence; but if it appears he is in England, they cannot be read, but he must come in person. 1 Lill. 555. Things done beyond sea may be given in evidence to a jury; and the testimony of a public notary, of things done in a foreign country, will be good evidence. 6 Rep. 47.

Depositions cannot be given in evidence against any person who was not party to the suit; or who does not claim under the plaintiff or defendant in the suit. 7 Barn. & C. 789: 1 Mann & R. 667. And the reason is, because he had not liberty to cross-examine the witis sufficient evidence, being a roll or record of nesses; and it is against natural justice that a man should be concluded in a cause to which he never was a party. Harder. 22. 472: Bumb. 50. pl. 84-91. pl. 148-321. pl. 403: 9 Mod. 229: Carth. 181: Vern. 113: Gilb. Evid. 62:

The answer of the obligor of a bond to a bill filed for a discovery, in which he admitted the bond to have been executed by him, is only secondary evidence, and cannot be received as evidence per se of the execution, without proving that due diligence had been used to discover who the subscribing witness was, who was alleged to be unknown. Call v. Dunning, 4 East's Rep. 53.

Depositions made in an ancient suit insti-

the same name as defendant, and sustaining facts and circumstances of the case, and put the character of executor to a person of the the same, or as much as shall be material, same name as his testator; held, that on the into writing; and subscribe such examinations face of such copy there was prima facie pre-

When a witness in a trial at law gave evidence at variance with what he had originally sworn in an answer in Chancery, an examined copy of that answer was held admissible evidence to contradict him, and that it was not necessary to produce the answer. 4 B. &

Depositions in the ecclesiastical courts may not be given in evidence to a jury at a trial; but a sentence may in a cause of tithes, &c. And the sentence of the Spiritual Court is conclusive evidence in causes within its jurisdiction. 1 Salk. 290: 2 Nels. Abr. 761.

as evidence, the witnesses being dead. 1 Lev. Likewise they have been admitted where a witness hath gone beyond sea. 2 Nels. Abr. 760. The confession of a prisoner before a magistrate, &c. may be given in evidence against him. See 2 Hawk. P. C. c. 46. and the notes there. The examination of an offender need not to be on oath, but must be subscribed by him, if he confess the fact; and justice of the peace who took the same. examination of others must be on oath, and proved by the justice or his clerk, &c. as to their evidence, if they are dead, unable to travel, or kept away by the prisoner. H. P. C. 19. 162; Kel. 18. 55: Wood's Inst. 647.

The examination of an informer before a

justice, taken on oath, and subscribed, may be given in evidence on a trial if he be dead, or not able to travel, &c., which is to be made

out on oath. 2 Hawk. P. C. c. 46.

The examination of a pregnant woman taken before a justice of the peace under stat. 6 G. 2. c. 31. is admissible evidence on application to the quarter sessions to make an order of filiation on the putative father, if the woman die before such application is made; and if not contradicted, ought to be conclusive.

5 Term Rep. K. B. 373.

P. & M. c. 10. justices of peace shall examine persons brought before them for felony and those who brought them, and certify such examination to the next gaol-delivery; but the examination of the prisoner shall be without oath, and the others upon oath; and these examinations shall be read against an offender upon an indictment, if the witnesses be dead. and criminal prosecutions as to the evidence Bull. N. P. 242.

sions of the above statutes are amended and even in a criminal prosecution notice may be given to him to produce papers in his posor commit to prison, any person arrested for felony, or on suspicion of felony, are to take other evidence may be given of their contents. the examination of such persons, and the in- 2 Term Rep. K. B. 201. n.

copy of an answer in Chancery by a person of formation upon oath of those who know the and informations, and deliver the same to the sumptive evidence of identity. Henwell v. proper officer of the court in which the trial Lyon, Term Rep. K. B. Mic. 59 G. 3. 182. is to be. And by § 3. the like directions are given to justices in cases of misdemeanor.

And it should seem that the same rule of law applies to the statutes last mentioned. See

further, tit. Deposition.

By 7 and 8 G. 4. c. 28 § 11. the certificates containing the substance and effect of an indictment and conviction for a previous felony (which under that act renders the party liable to a higher judgment), purporting to be signed by the clerk of the court, or eight officers having the custody of the records, or his deputy, is made evidence (coupled as it always is by the practice of the court, with the identity Depositions before a coroner are admitted of the party) of the first conviction, without

proof of the signature.

A verdict against one, under whom either the plaintiff or defendant claims, may be given in evidence against the party so claiming; but not if neither claim under it. Mich. 1656, B. R. See 2 Barn. & A. 662: 2 Bing. 381: M'Dal. & Y. 509. In ejectment where the plaintiff hath title to several lands, and brings action of ejectment against several defendants, then be given in evidence upon oath by the if he recovers against one, he shall not give justice of the peace who took the same. The that verdict in evidence against the rest. 3 Mod. 141.

In an action on a foreign judgment, it is not sufficient to prove the judge's hand-writing subscribed to it, without proving that the seal affixed thereto is the seal of the court. Henry v. Adey, 3 East's Rep. 221.

The judgment-book is no evidence of the

judgment entered therein, though the record has not been made up, and though the party interested in proving the judgment be no party to the action. 2 New Rep. 474.

A parish certificate of more than thirty years' date, acknowledging the pauper's grandfather and father to belong to the appellant parish, produced by a rated inhabitant of the appellant parish, is evidence. 2 Maul. & Selw. Rep. 337.

In an action for adultery, letters written by By stats. 1 and 2 P. & M. c. 13; 2 and 3 the wife to the husband (while living apart from each other) proved to have been written at the time they bore date, and when there was no reason to suspect collusion, are admissible evidence, without showing distinctly the cause of their living apart, 1 B. & A.

There is no difference between civil actions of papers. In neither case is the party bound By 7 G. 4. c. 64. § 2. (by which the provi- to produce evidence against himself: but

Vol. I.—87

A copy of an attorney's bill, the original of has been given in evidence in such a case. 2. which has been delivered to the defendant, Rol. Ab. 686, 687. An almanac, wherein the may be admitted in evidence without proof of father had written the day of the nativity of notice to produce the original. 2 Bos. & Pull. his son, was allowed in evidence to prove the 237. And notice to the defendant's attorney or agent in such case is sufficient. Ibid. his son, was allowed in evidence to prove the 237. And notice to the defendant's attorney or agent in such case is sufficient. Ibid. East, 290: 8 East, 542: 3 Stark. Ca. 63.

Where a prisoner got possession of a forged note and swallowed it, parol evidence was per- the Stamp Office is evidence of a publication. mitted to be given of its contents, without any notice being given to produce it. Cited 14 East's Rep. 276.

smith's notes or promissory notes are given, swear to the hand and contents of a letter, if ceipt of money or other thing. 1 Salk. 283.

the party signing it, but he may show that he did not receive the sum or thing in question. 2 Term Rep. K. B. 366. But where a receipt sary; as where the hand-writing to be proved for money had been given on unstamped pa- is of a person residing abroad, one who has per, it may be used by a witness who saw it frequently received letters from him in a given to refresh his memory. 4 Esp. 213.

hands of a defendant for a money payment in lieu of tithes, where there was a probability that it had come to him from an ancestor of the same name, is admissible evidence in support

of a modus. 2 Price, 307.

A receipt in full is conclusive evidence, when given under a knowledge of all circum- 236. stances then depending between the parties. Aliter when given without such knowledge. spect franks for the detection of forgeries, has 1 Esp. 175.

But where such a receipt is obtained by fraud, &c. it is a nullity. 1 Campb. 394. n.

be admitted as evidence, though others say it suspected to be imitated hands, were written public books of corporations, &c. shall be evidence. 1 Lev. 25: 1 Lil. 551. But as to Prius, and doubts have been expressed by books of corporations, where things are entered not of record, the originals are to be produced as evidence.

returns given in on oath, pursuant to 55 G. 3. showing the similarity of the hand-writing in c. 155. (which is now repealed,) containing question to the hand-writing of the will: and lists of passengers on board an East India ship, was held evidence to show the value of or by the court. 14 E. R. 327. n: S. P. 7 E. the voyage, as it is a public book kept by the R. 282. n.; and see Roscoe on Evid. 68. authority of an act of parliament. 2 Bing. Where a witness had only seen the party write

The mere production in court of a diploma of doctor of physic under the seal of one of the universities, is not in itself evidence to show

degree. 8 Term Rep. K. B. 303.

A pedigree drawn by a herald at arms will not be admitted for evidence, without showing such letters. Doe v. Wallinger, Mann. Ind. the records or ancient books from whence taken; for the entries in the herald's office are no records, but only circumstancial evidence. there is a witness, must be proved by that wit-See tit. Court of Chivalry as to visitation books. But a pedigree hung up in a family the hand-writing of the witness in case he is mansion is evidence. Coup. 591. And so is dead, or domiciled in a foreign country, or contry in a father's fairly Bills. an entry in a father's family Bible. Ibid. cannot be found, so that there may be a pre-So a copy of an inscription on a grave-stone sumption of his death (7 T. Rep. K. B. 266;

The delivery of a newspaper to the officer at to sustain an indictment for a libel in that

paper. 4 B. & C. 35.

Letters may be produced as evidence against Since no witnesses are present when gold a man, in treason, &c. Although a witness such notes are allowed as evidence of the recipt of money or other thing. 1 Salk. 283. allowed as evidence. Skin. 673. In general A receipt is not conclusive evidence against cases the witness should have gained his knowledge from seeing the party write; but under some circumstances that is not necescourse of correspondence would be admitted An old receipt of a former rector in the to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write. On an indictment for writing a treasonable libel, proof of the hand-writing is sufficient, without proof of the actual writing. Bull. N. P.

A clerk of the post-office, accustomed to inbeen admitted to prove that the hand-writing of an instrument is an imitated, and not a natural hand, though he never saw the party A church-book, some writers say, is not to write; and also to prove that two writings, Cro. Eliz. 411. It is said copies of by the same person. 4 Term Rep. K. B. 497.

But such evidence has been rejected at Nisi some judges as to its admissibility. Gurney

v. Langlands, 5 B. & A. 330.

Where a person had been dead a great num-A book kept at the East India House from ber of years, his hand-writing was proved by no objection was taken to it either at the bar his name, Mr. Sapio, Lord Tenterden held he might still prove his signature L. B. Sapio. I Moo. & M. 39. S. V .: 2 Stark. 164. A witness who has received letters from the party that the party named therein is entitled to that in answer to letters written to him by the witness, may prove the hand-writing, though he has never done anything in consequence of

Every instrument, to the signing of which

or is blind (Ld. Raym. 734); insane (3 Campb. such directions for inspection and examina-283); or since the attestation has been con-tion, and impose such terms upon the party victed of a crime, which renders him incom- requiring the admission, as he shall think fit. petent (Str. 833); or in the case he was inter- If the party required shall consent to the adested at the time of the attestation, which is mission, the judge shall order the same to be therefore a nullity (5 T. R. 371); or has be- made." come interested since. 2 Esp. 697: 2 Campb. 196.

Nor can a party who has executed a deed be permitted to acknowledge it in court; it must be regularly proved by the subscribing

witness. 1 Esp. 89.

But a person who sees an instrument executed, but is not desired by the parties to attest it, cannot by afterwards putting his name to it prove it as an attesting witness. 3 Campb.

An instrument executed abroad, and witnessed by a foreigner residing there, may be proved by evidence of the hand-writing of the witness and of the contracting party, but not by the latter alone. 7 Term Rep. K. B. 265.

If a subscribing witness to a deed be abroad out of the jurisdiction of the court, and not amenable to its process, evidence of his handwriting is admissible, though it do not appear whether he is settled abroad. 2 East's Rep. 250; and see Id. 183.

So if he has set out to leave the kingdom. 1 W. P. Taunton, 461. So also if upon diligent inquiry, an attesting witness is not to be found, having absconded from his creditors. Id. 364. And see Roscoe on Evid. 64.

With a view to saving of expense, two rules were made by the judges in H. T. 2 W. 4. on the recommendation of the law commission. ers, but they appear to have been superseded by the following, issued in H. T. 4 W. 4. in pursuance of the 3 and 4 W. 4. c. 52. § 15.

" Either party after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, of his intention to adduce in evidence certain written or printed documents; and unless the adverse Rol. Ab. 685: 1 Vent. 243. A counsellor, atparty shall consent, by indorsement on such torney, or solicitor, is not to be examined as notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required by summons, to show cause before a judge why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reason-leged from disclosure. Ry. & Moo. 34: 2 able, make an order, that the costs of proving Stewart, 199. n. S. V.: 2 Bro. & B. 4: 1 Moo. any document specified in the notice, which & M. 233. Formerly the rule was extended shall be proved at the trial to the satisfaction further; and in Chancery it has been held that of the judge, or other presiding officer, certified by his endorsement thereon, shall be paid tion by the client to the counsel or attorney by the party so required, whatever may be the for professional assistance. 6 Madd. 47. The result of the cause. Provided that if the judge attorney cannot waive the privilege, but the shall think the application unreasonable, he client can. Ry. & Moo. 390. shall endorse the summons accordingly. Provided also that the judge may give such time or refused to give evidence in actions brought for inquiry or examination of the documents by corporations, as their interest is small or

1 Bos. & Pull. 360: 2 East's Rep. 183. 250); intended to be offered in evidence, and give

"No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons that he does not think it reasonable to require it."

"A judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection; and in the absence of a special order, the same shall be costs in the cause."

See further, tits. Pleading, General Issue,

Copy.

II. Unwritten Evidence: wherein-1. Who may be Witnesses .- The king cannot be a witness under his sign manual, &c. 2 Rol. Ab. 686. Though it has been allowed he may, in relation to a promise made in behalf of another. Hob. 213. A peer produced as an evidence ought to be sworn. 3 Keb. 631. It is no exception to an evidence that he is a judge, or a juror, to try the person; for a judge may give evidence, going off from the bench. 2 Hawk. P. C. c. 46. And a juror may be an evidence as to his particular knowledge: but then it must be on examination in open court, not before his brother jurors. 1 Lil. 552.

Kinsmen though never so near, tenants, servants, masters, attorneys for their clients, and all others that are not infamous and which want not understanding, or are not parties in interest, may give evidence in a cause, though the credit of servants is left to the jury. 2 an evidence against their clients, because they are obliged to keep their secrets; but they may be examined as to any thing of their own knowledge before attained, not as counsel or attorney, &c. 1 Vent. 97.

It has been held that only what is communicated to an attorney for the purpose of bringing a suit, or relating to a suit, is privithe protection extends to every communica-

Members of corporations shall be admitted

great, whereby it may be judged whether they | regard of his interest: and a person any ways will be partial or not. 2 Lev. 231. 241. But concerned in the same title of land in question, they will not generally be admitted; though will not be admitted as evidence. Ibid. 765. inhabitants not free of the corporation may be But it has been held that an heir apparent may good witnesses for the corporation, as their in- be a witness concerning a title of land; and terest is not concerned; and members may be disfranchised on these occasions. Ibid. 236.

A member of a corporation held not admissible as a witness to support the claim of the corporation in an ejectment brought to recover property, though he had released his interest.

3 Y. & J. 19.

In actions against churchwardens and overseers of the poor for recovery of money mispent on the parish account, the evidence of the parishioners not receiving alms shall be allowed. Stat. 3 and 4 W. & M. c. 11. In informations or indictments for not repairing highways and bridges, the evidence of the inhabitants of the town, corporation, &c. where such highways lie, shall be admitted. Stat. 1, Anne, c. 18.

By stat. 27 G. 3. c. 29. in actions on penal statutes, inhabitants of any place are witnesses to prove an offence, though the penalty be given to the poor, or otherwise for the benefit shall be admitted as a witness to the execution, of the said parish or place, provided the penal-

ty does not exceed 201.

And by 54 G. 3. c. 170. § 9. rated inhabitants of any parish, &c., or persons executing offices therein, are rendered competent wit- a good witness to prove the execution of the nesses in any matter relating to the rates or cesses in questions arising out of the poor laws, or in election or allowance of the accounts of

any officer of such parish, &c.

The bail cannot be an evidence for his principal. If the plaintiff makes one a defendant in the suit, on purpose to impeach his testimony, under a pretence of his being a party in interest he may nevertheless be examined de bene esse; and if the plaintiff prove no cause of action against him, his evidence shall be enormous cheats, a person may give evidence allowed in the cause. 2 Lil. Abr. 701. But in his own cause, where nobody else can be a in civil suits, and indictments for trespasses, witness of the circumstances of the fact but &c. the plaintiff or prosecutor usually goes he that suffers. 1 Salk. 286. Upon an inthrough his evidence, and those defendants formation on the statute against usury, he who are not affected are sometimes, by directhat borrows the money, after he hath paid it, tion of the judge, acquitted, and then give evil may be an evidence, but not before. Raym. dence for the other defendant or defendants, 191: 4 Burr. 2251. and sometimes they have been examined without the form of an acquittal. If a man makes two, one who has suffered judgment by dehimself a party in interest, after a plaintiff or fault is not an admissible witness against the defendant has an interest in his evidence, he other to prove that he joined in the contract. may not by this deprive them of the benefit of 4 W. P. Taunton, 752. For if the plaintiff his testimony. Skin. Rep. 586.

is not a good witness to prove the will; but if competent for defendant, since, if the action he release his legacy, he may be a good evi- of contract fail as to one defendant, it must dence. Skin. 704: 4 Campb. 27. A residuary fail as to all. 8 Taunt. 141: Roscoe, 88. But legatee is not, however, rendered competent in tort one defendant suffering judgment by in an action by an executor to recover a debt default may be a witness for another defenddue to a testator, by releasing his claim to the ant for the same reason does not apply. debt for the plaintiff's costs would still diminish the residue. 4 Campb. 27. It is the same In order to render the rejection of of a deed: he that claims any benefit by it on the ground of interest less frequent, it is may not be an evidence to prove that deed, in enacted by the 3 and 4 W. 4. c. 42. § 26. that

yet a remainder-man, who hath a present interest, cannot. 1 Salk. 385. If a legatee is permitted to be sworn and examined, the counsel cannot afterwards except against his evidence. 1 Ld. Raym. 730.

Three witnesses competent at law are competent to prove a nuncupative will, by stat. 4 Anne, c. 16. § 14. The Son of a legatee is no witness to a will in the Spiritual Court; nevertheless it is held, he may be a good evidence to prove a nuncupative will within the intent of the statute of frauds. 1 Ld. Raym. 85.

See tit. Will.

To obviate all difficulties and inconveniences, it was enacted by stat. 25 G. 2 c. 6. that any devise to a person being witness to any will or codicil of real estate, shall be void; and such person shall be admitted as a witness. And that any creditor attesting a will or codicil, by which his debt is charged upon land, notwithstanding such charge, the credit of every such witness being left to the consideration of the court and jury. See tit. Will. I.

A grantee who is a bare trustee, it is said is deed made to himself. 1 P. Wil. 290. If an action is brought against many persons for taking of goods, one of them concerned may be admitted as an evidence against the rest. Comberb. 367. See 1 Mod. 282. In criminal cases, as of robbery on the highway, in action against the hundred; in rapes of women, or where a woman is married by force, &c. a man or a woman may be an evidence in their own cause. 1 Vent. 243. And in private

In an action upon a joint contract against succeed, the witness would be entitled to con-One that hath a legacy given him by will tribution from the other defendant; nor is he

In order to render the rejection of witnesses

if any witness shall be objected to as incom- But it is now settled that it is not the mode of petent on the ground that the verdict or judg-ment in the action on which it shall be pro-posed to examine him would be inadmissible 2 Leach, 496. in evidence for or against him, such witness shall nevertheless be examined; but in that ness on the ground of infamy, it is not only case a verdict or judgment in that action in necessary to prove a conviction, but also a favour of the party on whose behalf he shall judgment; for the conviction may have been have been examined, shall not be admissible quashed on motion in arrest of judgment. in evidence for him or any one claiming under Phil. Ev. 31. him; nor shall a verdict of judgment against the party on whose behalf he shall have been examined be admissible in evidence against by reversal of the judgment. him or any one claiming under him.

but a Jew may, and be sworn on the Old ment to which he is adjudged for the same, Testament. 1 Inst. 6. The oath of a Gentoo, sworn according to the circumstances of his religion, has been admitted in a civil matter. 1 Atk. 21. And by Willes, C. J. an infidel in general is an admissible witness, for the term does not imply that he is an atheist; but wherever it appears that a witness has no idea of a God or religion, he shall not be permitted to give his testimony. 1 Atk. 40. 45.

By 7 and 8 W. 3. c. 34. the solemn affirmation of Quakers was admitted to have the same effect in civil cases as an oath taken in

the usual form.

And now by 9 G. 4. c. 32. § 1. Quakers or Moravians giving evidence in any case, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make a solemn affirmation or declaration, which shall have the same effect and force in all courts and other places where by law an oath is required as an oath; and persons falsely and corruptly affirming or declaring are subject to the same penalties, pains, and forfeitures, as persons guilty of wilful and corrupt perjury.

And by 3 and 4 W. 4. c. 49. Quakers and Moravians are permitted to make a solemn affirmation or declaration instead of taking an oath in all places and for all purposes whatsoever wherein an oath is or shall be required either by the common law or by any act of parliament already or hereafter to be made.

By 3 and 4 W. c. 82. every person belonging to the sect called Separatists, in any case where by law an oath is or may be required, shall, instead of the usual form, be permitted to make the solemn affirmation or declaration therein contained; which affirmation or declaration shall have the effect of an oath; and if false, subject the person making it to the same punishment as for perjury.

Persons convicted of treason, felony, and every species of the crimen falsi, such as forgery, perjury, attaint of false verdict, &c., of præmunire, barratry, bribing a witness to absent himself, or of a conspiracy to accuse another of a capital offence, are incompetent

1 Phil. Ev. 29. witnesses.

Formerly some particular kinds of punishment were thought to be such marks of infamy as wholly to disqualify a witness. 2 Hale, 277. same indictment. State Trials. vol. 2. 414.

In order to show the incompetency of a wit-

Incompetency from infamy may be removed by endurance of punishment; by pardon; and

By 9 G. 4 c. 23. § 3. where any offender An alien infidel may not be an evidence; convicted of a felony has endured the punishthe punishment so endured shall have the like effects and consequences as a pardon under the great seal. By § 4. no misdemeanor, except perjury or subornation of perjury, shall render a party an incompetent witness after he has endured his punishment.

A pardon not only remits the punishment, but clears the offender from all legal disability attached to his crime. The crime, indeed, may be still urged against his credit, but not his competency as a witness. 1 Phil. 35.

By 6 G. 4. c. 25. § 1. in all cases where the king extends the royal mercy to any offender convicted of a capital felony, and by warrant under the sign manual, countersigned by one of the secretaries of state, shall grant to the offender either a free pardon or a pardon upon condition, the discharge of the offender out of custody in case of a free pardon, and the performance of the condition in case of a conditional pardon, shall have the effect of a pardon under the great seal. And by 7 and 8 G. 4. c. 28. this enactment is extended to all cases where the felony is punishable by death or otherwise.

Formerly it was doubted whether persons excommunicated could be witnesses, because, being excluded from the church, they were supposed not to be under the influence of any

But by 53 G. 3. c. 127, § 2, 3. no person excommunicated shall incur any civil penalty or

disability whatsoever.

Persons outlawed in personal actions may be witnesses, because they are punished in their properties, and not in the loss of their reputation: and the outlawry has no manner of influence on their credibility. Bull. N. P. 292, 293: Co. Lit. 6. b.

But in treason or felony, as the judgment of outlawry has the same effect as a judgment after a verdict or confession, the outlaw is of course rendered incompetent. Celier's case,

Sir T. Raymond, 369.

Persons acquitted, or guilty of the same crime (while they remain unconvicted), may be evidence against their fellows. Kel. 17. Though no evidence ought to be given of what an accomplice hath said, who is not in the

An informer may be a witness, though he is | which are degrading to his character, although to have part of the forfeiture, where no other such questions may be legally asked. 4 T. R. witnesses can be had. Wood's Instit. 598. 440: 2 Campb. 268. But a witness cannot See 4 East, 180. Members of either house of by law refuse to answer on the ground only parliament may be witnesses on impeachments. State Trials, vol. 2. 632.

Idiots, madmen, and children (see tit. Infants), are excluded from giving evidence for

want of skill and discernment.

witness, served with a process in a civil cause, refuse to appear, being tendered reasonable jury, after gone from the bar, and he hath charges, and having no lawful excuse, action given his evidence in court: if he doth, the on the case lies against him, whereon damages shall be recovered: and a seme covert not ap. One that is to be a witness at a trial, ought pearing, action may be brought against the not to be examined before the trial, but by the husband and her. Stat. 5 Eliz. c. 9: 1 Leon. 112.

If there is a doubt that a witness will not attend, the best way is to serve him with the original subpæna, keeping a copy: and if he is at any distance from the place of trial, tender reasonable charges: if he does not appear at the trial, call him three times on his subpæna, and then, if occasion requires, the party may bring his action, or move for an attach-

appear and give evidence, being served with against whom they shall be offered, unless it process, the court will put off the trial, and appear to the satisfaction of the judge that the grant attachment against him; and, as refusing to give evidence is a great contempt, court, or dead, or unable from permanent the party may be committed and fined. 1 Salk. sickness to attend. See tit. Depositions. 278

reference is made under a rule of court, the in his presence. State Trials, vol. 4. 227. But court, or a judge thereof, may command the down to the time of the Commonwealth the attendance of witnesses (who may be sworn witnesses in state prosecutions were rarely by the arbitrators) and the production of docu- examined in court, but generally before the ments; and persons disobeying shall be guilty council and attorney-general, and their depoof a contempt; but such persons are to be sitions were then read in evidence at the trial. entitled to their expenses as when attending Since the time of Charles the First this im-

criminal is punishable by fine and imprison- And evidence shall not be given against the ment; and a person was fined one thousand prisoner for any other crime than that for marks in such a case. Hill. 1663. B. R. which prosecuted. Ibid. vol. 3. 947. But upon Dissuading a witness from giving evidence, an indictment for disposing of and putting &c. and disclosing, by jurors or others, evi-away a forged Bank note, knowing it to be dence given, are likewise offences punished forged, the prosecutor may give evidence of by fine and imprisonment. 2 Hawk. P. C. other forged notes having been uttered by the

be examined apart in court, till they have A prisoner may bring evidence to prove that given all they have to say in evidence; so the witnesses gave a different testimony be-that what one has deposed may not induce fore a justice of peace, or at another trial: another to give his evidence to the same effect. Fortesc. 54.

evidence tends to clear or accuse himself of a can be made to the evidence after verdict crime. State Trials, vol. 1. 557. Nor is he given. Ibid. vol. 4. 35. It is justifiable to bound to give any answer which would expose maintain or subsist an evidence, but not to him to punishment, or to a criminal charge, give him any reward; for this, if proved, will as to convict him of usury. 3 Taunt. 324. avoid his testimony. Ibid. vol. 2. 470. Neither is he compellable to answer questions A witness shall not be examined to any

him to the king, or any other. Stat. 46 G. 3.

* A witness shall not be permitted to read his evidence, but he may refer to an entry or 2. Compelling Witnesses to appear; as also a memorandum made by himself to refresh of the Manner of their giving Evidence.—It a his memory. 8 East, 289: 4 Esp. 213. A witness may not recite his evidence to the verdict may be set aside. Cro. Eliz. 159. consent of both parties, and a rule of court for that purpose; and sometimes by a judge's order at chambers witnesses are examined on interrogatories, where such witnesses are about to leave the kingdom.

By 13 G. 3. c. 63. provision is made for examination on interrogatories of witnesses in India; and by 1 W. 4. c. 22. these provisions are extended to all actions in the courts at Westminster. But the examination taken under the act shall not be read in evidence at In a criminal cause, if a witness refuse to any trial without the consent of the party examinant is beyond the jurisdiction of the

No evidence ought to be produced against By 3 and 4 W. 4. c. 42. § 40, 41. where a a man in a trial for his life, but what is given proper practice has been disused, and the wit-Preventing evidence to be given against a nesses have been examined in open court. 22. Prisoner, in order to prove his knowledge of the forgery. Rex v. Wylie, 1 New Rep. 92. ot. Fortesc. 54.

A witness shall not be examined where his Trials, vol. 2. 623. 792. And no objection

sue. Ibid. vol. 2. 343. And where an issue tator: as where the testator had two sons both is not perfect, no evidence can be applied, nor named John, and he devised lands to his son can the justices proceed to trial. Brownl. 42. John: here parol evidence was admitted to 47. 435. If evidence doth not warrant and show which of his sons he meant; and it bemaintain the same thing that is in issue, the ing proved that one of his sons of that name evidence is defective, and may be demurred had been absent several years beyond sea, and upon; but proving the substance is sufficient. that the testator apprehended that he was of facts before and after the time they are laid other should take; for without such evidence in the indictment. And where a place is laid the will must be void. 2 Vern. 98, 337, 625. only for a venue in an indictment, or an appeal (and not made part of the description of the intent of a testator in cancelling a will. the fact), proof of the same crime may be Cowp. 53. made at any other place in the same county; and after a crime hath been proved in the

ant, the least variation as to such place be- defendant owes her nothing, and upon proof tween the evidence and indictment is fatal. 2 thereof a verdict was for the defendant; such Hawk. P. C. c. 46. See 3 Campb. 235: 2 Stark. 385: 7 Barn. & C. 301. It hath been for Lydia Dovey is to be considered as the also adjudged, that where an indictment sets real plaintiff. Id. 257. forth all the special matter, in respect whereof the law implies malice, variance between the admitted to support the general description of indictment and evidence as to the circumstan- the instrument in the declaration, without noces of the fact, does not hurt; so that the sub- tice having been given to the defendant to stance of the matter be found by the evidence.

Ibid.

Documents, and of Presumptive and Hearsay where there is no latent ambiguity. 3 Wils. Evidence.—It seems to have been agreed, as 275: Str. 794: 3 Term Rep. 590: 2 Bos. & a general rule (even before the statute of Pull. 565. But parol evidence may be admitfrauds and perjuries), that no parol evidence ted to explain a latent ambiguity in a will or could be admitted to control what appeared on codicil. 6 Term Rep. 671: 7 Term Rep. 138. the face of a deed or will, not only from the S. P. And that the name of A. was inserted danger of perjury, but from a presumption, in a will by mistake for the name of B. 6 that whatsoever the parties at that time had in Term Rep. 671. And parol evidence may be contemplation, was reduced into writing. 5 Co. admitted to explain a written instrument or 68. a. b.: 3 Co. 155. a.: Kelw. 49.

But this rule has received a relaxation, es- be equivocal. 8 Term Rep. 379. pecially in the courts of equity, where a distinction has been taken between evidence that road under an inclosure act, evidence of conmay be offered to a jury, and such as may be used only to inform the conscience of the court; viz. that in the first case no such evidence should be admitted, because the jury might be an additional rent payable by a tenant, beyond inveigled thereby; but that in the second it that expressed in the written agreement for a could do no hurt, because the court were judges of the whole matter, and could distinon such evidence. 2 Vern. 98. 337. 625.

Cowp. 250.

And the words of a grant from the grant by contemporaneous exposition and constant other considerations than those mentioned in a usage may be extended beyond their natural deed; as where the conditions mentioned in import, so as to confer a right to exercise an office within a city and the liberties thereof, granted only to be exercised within the city. i Campb. 22.

thing that does not relate to the matter in is-; been admitted to explain the intent of the tes-Trials per pais, 425. Evidence may be given dead, the devise was held good, and that the

Parol evidence to prove that a bond was given, in lieu of dower, refused. 1 Wils. 34. county where laid, evidence may be given of Parol proof admitted that the testator intend-other instances of the same crime in another ed his wife executrix should have the residue county, to satisfy the jury. 2 Hawk. P. C. 46. But where a certain place is made part of with condition for payment of money to Lydia the description of the fact against the defend- Dovey, who is a third person, she declares the declaration was properly given in evidence,

In trover for a bond, parol evidence was

produce it. 14 East's Rep. 274.

Parol evidence shall not be admitted to an-3. Of Parol Evidence to explain written nul or substantially vary a written agreement, agreement which, on the face of it, appears to

And to explain an ambiguous award of a temporaneous acts of the occupiers of the land

may be received. 5 Taunt. 752.

Parol evidence shall not be received to prove

lease. 2 Bl. Rep. 1249.

But where in a lease of rabbit warren, the guish what weight and stress ought to be laid lessee covenanted to leave on the warren 10,000 rabbits; it was held that parol evidence Evidence of usage is admissible to explain was admissible to show that by the custom of doubtful words in a charter. Left. 76: the country where the lease was made, 1000 rabbits meant 1200. 3 B. & Ad. 728.

Parol evidence may be admitted to prove the deed were 10,000l. and natural love and affection, and the premises were worth 30,000l., an issue was directed to try whether natural love and affection made any part of the Also to ascertain a fact, parol evidence hath consideration; and it being found that they

did not, the deed was set aside. 7 Bro. P. C. | every such case the person or persons, upon

70. cited 3 Term Rep. 473.

In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. (See tit. Navigation Acts.) And such parol evidence of ownership, arising from possession at a particular period, was not disproved by showing a prior register in the name of another, and a subsequent register to the same person. East's Rep. 130.

Parol evidence of what passed at the time of effecting a policy of insurance is not admissible to restrain the effect of the policy. 1 W.

P. Taunt. 115.

The terms of a written contract cannot be varied by parol evidence unless they were written fraudulently. 1 D. P. c. 686.

What a dead witness has sworn on a former trial between the same parties is evidence in the cause, and may either be read from the judge's notes, or proved upon oath by the notes or recollection of any person who heard it. 3

W. P. Taunt. 262.

With respect to presumptions, the law of England, as well as the civil law, presumes against fraud. 10 Co. 56. So the law always acquaintances. 3 Moore, 183: S. C. 2 Bing. presumes that a man's character is good until 86. And see 4 B. & A. 53. the contrary is shown, or that he is innocent of an imputed offence till his guilt is proved. a child born during wedlock is not the hus-Thus where a woman married again within twelve months after her husband (who had not been heard of since) left the country, the entry in the baptismal register describing the presumption of innocence was held to predominate over the usual continuance of life. 2 B. & A. 386.

Also where a man is bound to do an act, the omission of which would be criminal, his performance of that act will be intended until the contrary appear. 3 East, 192: 2 M. & S. 558. But if a criminal act has once been proved, the law infers malice, and requires exculpatory evidence from the party. Thus in a case of homicide, on proof of the prisoner having killed the deceased, the law presumes malice, unless the former can justify or extenuate the deed. Fost. 256.

It is also a maxim of law that "omnia presumuntur rite et solemniter esse acta donec probetur in contrarium." Thus a man acting in a public office or capacity is presumed to have been duly appointed. 3 Camp. 432.

Persons once in being shall be intended still living, if the contrary is not proved. 2 Rol. Rep. 461. But by stat. 19 Car. 2. c. 6. it is enacted, "that if any person or persons, for whose life or lives estates have been, or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof made of the life or lives of such person or persons respectively, in any action commenced for the recovery of such 46. So what a person accused of a crime

whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements, by the lessors or reversioners, their heirs or assigns, the judges, before whom such action shall be brought, shall direct their jury to give their verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead."

And, by analogy to the above act, the presumption of the duration of life is in all cases now held to end at the expiration of seven years from the time the parties were last heard of. 6 East, 84: B. & A. 433. For presumptions in regard to property, see tits. Easement, Lights, Prescription, Ways.

As to hearsay evidence, it seems that the two principal cases, if indeed not the exclusive cases, in which it is admissible, are pedigrees and prescriptions. 3 Term Rep. 707. Unless we add cases in which no other evidence can be procured, as with respect to possession of premises, &c. 2 Term Rep.

Hearsay evidence in questions of pedigree is limited to relations or members of the family, and does not apply to servants and

Declarations by the wife or husband, that band's child, are inadmissible on an issue to try the legitimacy of the child. Nor is an child as illegitimate, admissible to prove that fact. 1 M. & R. 269: 5 C. & P. 604.

Hearsay evidence of the declaration of a deceased father as to the place of birth of his bastard child, is not admissible to prove the birth-settlement of such child. 8 East's Rep.

Declarations of a party accompanying an act done, and tending to explain such act, are evidence for the latter purpose as part of the

res gestæ.

Hearsay evidence is in some instances admissible originally, and without any proof of the failure of better proof. Thus reputation is sufficient evidence of marriage, although the party adducing it seeks to recover, as heir-at-law, to a deceased brother, and his parents are still living. 4 Bing. 267.
Besides questions of prescription and pedi-

gree, hearsay evidence of reputation is admissible to prove customs or boundaries. But to warrant a presumption from such evidence, the fact to which the reputation or tradition applies must in general be of a public nature.

1 M. & S. 691.

Also what a witness hath been heard to say at another time may be given in evidence, in order either to invalidate or confirm the testimony he gives in court. 2 Hawk. P. C. c. tenements by the lessors or reversioners, in hath been heard to say at another time, may Id. ib.

If a person who gave evidence in a former trial be dead; upon proof of his death, any person who heard him give evidence may be admitted to give the same evidence between the same parties; but a copy of the record of the trial when the evidence was given out ought to be produced. 3 Inst. 2: 2 Lil. Ab. 705.

In criminal cases, evidence given at one trial has been held not to be evidence at an-

other trial. 2 State Trials, 863.

c. 46; Roscoe's Law of Evidence; Phillipps' and Starkies' Law of Evidence; this Dict. tit. Baron and Feme, I. 2, Treason, Witness, and other apposite titles.

EWAGE, from the Fr. eau, water.]

paid for water-passage; see Aquage.

EWBRICE, Sax. ew, i. e. conjugium, and bruce, fractio. Adultery or marriage-breaking: from this Saxon word ew, marriage, we derive our present English woo, to court.

EWE. Stealing or killing, with intent to steal the carcass or skin of any ram, ewe, sheep, or lamb, is a felony, and the offender was liable to suffer death by 7 and 8 G. 4. c. 29. § 25: 9 G. 4. c. 55. (Irish act.) But by the 2 and 3 W. 4. c. 62. transportation for life is substituted for the punishment of death.

Ewe, euva,] is also a German word, signifying law; it is mentioned in Leg. W. 1.

EXACTION, is defined to be a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. The difference between exaction and extortion is this: extortion is where an officer extorts more than his due, when something is due to him; and exaction is, when he wrests a fee or reward where none is due; for which the offender is to be fined and imprisoned, and render to the party twice as much as the money he so takes. Co. Lit. 368: 10 Rep. 100. See tit. Extortion.

EXACTOR REGIS. The king's exactor or collector of taxes: sometimes taken for the sheriff. Niger Liber Scace. par. 1. cap. ult.

EXAMINATION, examinatio. A searching by, or cognizance of a magistrate. By 7 and 8 G. 4. c. 64. § 2 and 3. justices of peace, before committing or bailing any person, charged before them with felony or misdemeanour, shall take down the examination in writing of the witnesses and prisoner, and bind over the parties to appear at the trial, and return the deposition and recognisances to the court. And by § 4. the like duty is imposed on coroners in cases of murder and manslaughter. See this Dict. tits. Commitment, Evidence, Justice.

natores.] Two officers of that court, who ex-vas called the essoign day), the plaintiff on Vol. I.—88

be given in evidence at his trial, for or against | amine, upon eath, witnesses produced by either side, in London, or near it, on such interrogatories as the parties to any suit exhibit for that purpose; and sometimes the parties themselves are, by particular order, likewise examined by them. In the country, witnesses are examined by commissioners, (usually attorneys not concerned in the cause,) on the parties joining in commission, &c. See tit. Depositions.

By 3 and 4 W. c. 94. § 27. the examiners of the Court of Chancery are empowered to ad-See further, as to evidence, Gilbert's Law minister the usual and accustomed oaths, and of Evidence; Bull. Ni. Pri.; 2 Hawk. P. C. to take the usual affirmations of the witnesses examined before them; and all depositions of witnesses so examined are to be taken in the

first person.

EXANNUAL ROLL. In the old way of exhibiting sheriff's accounts, the illeviable fine, and desperate debts were transcribed into a roll under this name; which was yearly read to see what might be gotten. Hale's Sher. Acco. 67.

EXCAMBION, Exchange. See tit. Ex-

EXCAMBIATORES. A word used anciently for exchangers of land: but Cowell supposes them to be such as we now call brokers, that deal upon the Exchange between merchants.

EXCEPTION, exceptio] Is a stop or stay to an action; and divided into dilatory and peremptory. Bract. lib. 5 tract. 5. In law proceedings, it is a denial of a matter alleged in bar to the action; and in Chancery it is what is alleged against the sufficiency of an answer, &c. The counsel in a cause are to take all their exceptions to the record at one time; and before the court hath delivered any opinion thereon. 1 Lil. Ab. 559. And on an indictment for treason, &c. exception is to be taken for mis-naming, false Latin, &c. before any evidence is given in court, or the indictment shall be good. Stat. 7 W. 3. c. 3. See tits. Indictment, Treason.

Where, by a general pardon, any particular crime is excepted; if a person attainted, &c. of that offence, he shall have no benefit of the pardon. 6 Rep. 13: 2 Nels. Ab. 765. And when a pardon is with an exception as to persons, the party who pleads it ought to show that he is not any of the parties excepted. Lev. 26. A negative expression may be taken to enure to the same intent as an exception; for an exception in its nature is but a denial of what is taken to be good by the other party, either in point of law or pleading. And exceptio in non exceptis firmat regulam.

1 Lill. 559.

EXCEPTION, in Scotch Law is used synony-

mously with Defence.

EXCEPTION, DAY OF. Formerly when es-With respect to examinations touching soigns were allowed in personal actions, if a church benefices, see tit. Benefice. defendant did not appear, or cast an assign on EXAMINERS IN THE CHANCERY, examithe first general term day of the term (which defendant did not appear, or cast an assign on the next day might have entered an exception cutting them down is not waste, since waste and obtain a ne recipiatur to prevent the decan only be committed on the thing demised. this exception, so taken and entered, the second day after the return of the writ was called the day of exception.

EXCEPTIONS TO EVIDENCE, &c. See this Dict. tits. Bill of Exceptions, Witness.

Exceptions in Deeds and Writings, keeps the things from passing thereby; being a saving out of the deed, as if the same had not been granted; but it is to be a particular thing out of a general one, as a room out of a house, ground out of a manor, timber out of land, &c. And it must not be of a thing expressly granted in a deed: also it must be of what is severable from, and not inseparably incident to, the grant. Co. Lit. 47: 1 Lev. 287: Cro. El. 244.

Where an exception goeth to the whole thing granted or demised, the exception is void. Cro. El. 6. A man makes a lease of a manor, excepting all courts, &c.; the exception of money, or a bartering or exchanging of the is void as to the courts for having leased the money of one city or country for that of anmanor, it cannot be such without courts. Hob. other: money, in this sense, is either real or 108: Moor, 870. A lease was made of all a imaginary; real, any species current in any man's lands in L. excepting his manor of H., country at a certain price, at which it passes and he had no lands in L. but the said manor; by the authority of the state, and of its own it was adjudged that the manor passed, and that the exception was void. Hob. 170: 2 Nels. Ab. 764. A lease of a house and shops, except the shops; though this may extend to other shops, it is void as to the shops belonging to the house demised, because it is repugnant to the lease. Dyer, 265.

If an exception crosses the grant, or is repugnant to it, the same is void: and if there be a saving or exception out of an exception, it own money, and the weight and fineness of may make a particular thing as if never excepted; as if a lease be made of a rectory, excepting the parsonage-house, saving to the lessee a chamber; this chamber not being excepted out of the lease, shall pass by the lease of the rectory. Hob. 72. 170: Cro. El. 372:

Owen, 20.

ed, but only sufficient nutriment for the trees: for the lessee shall have the pasture growing under them, though the lessor shall have all the benefit of the trees, mast, fruit, &c. and the trees are parcel of the inheritance. 5 Rep. the ducat; and at Florence, Venice, and other 11: 11 Rep. 48.50. But it has been adjudged, that, by an exception of woods, underwood, and coppices, the soil of the coppices is excepted. Poph. 146: Cro. Jac. 487. If a lessee for years assign over his term, excepting the trees, &c. the exception is not good, because no one can have a special property in the trees, but the owner of the land. 2 Nels. 764. Though where lessee for life makes a lease for 157. years, excepting the wood, &c. this may be a good exception, although he hath not any in- B. give a sum of money to A. to bind the barterest in it but as a lessee, in regard he is gain, A. may maintain an action against B. chargeable in waste, &c. and hath not granted for not delivering his horse, without alleging his whole term. Cro. Jac. 296: 1 Lill. Ab. any delivery of, or offer to deliver his own to 560. If trees are excepted out of a demise, B., for the payment of earnest-money vests

ceptions are commonly in leases for life and years; and must be always of a thing in esse. Co. Lit. 47. See tits. Grant, Deed, Lease, Con. dition.

Exceptio REI Judicatæ, an exception or defence in the Scotch Law, that the matter has been adjudged in another court or country, and the judgment carried into effect.

EXCHANGE, Excambium or cambium; with the Civilians, permutatio.] The King's Exchange is the place appointed by the king for exchange of plate or bullion for the king's coin, &c. These places have been divers heretofore; but now there is only one, viz. the Mint in the Tower. See stats. 25 Ed. 3. st. 5. c. 12: 5 and 6 Ed. 6. c. 19. and this Dict. tits. Coin; Money .- There is also a Royal Exchange of Merchants in London.

Exchange among merchants is a commerce intrinsic value; and by imaginary money is understood, all the denominations made use of to express any sum of money, which is not the just value of any real species. Lex Mercatoria.

The methods of exchange for money used in England ought to be par pro pari, according to value for value: and our exchange is grounded on the weight and fineness of our that of other countries, according to their several standards, proportionable in their valuation; which being truly and justly made, reduces the price of the exchange of money of any nation or country to a certainty. this course of exchange is of late abused, and money is become a merchandize, that rises By exception of trees, the soil is not except. and falls in its price in regard to the plenty or scarcity of it. At London, all exchanges are made upon the pound sterling of 20s. In the Low Countries, France and Germany, upon the French crown; Spain and Italy, &c. upon places in the Streights, by the dollar and florin. See tit. Bill of Exchange.

Exchanges of Goods and Merchandize, were the original and natural way of commerce, precedent to buying; for there was no buying till money was invented; though in exchanging both parties are as buyers and sellers, and both equally warrant. 3 Sulk.

If A. and B. agree to exchange horses, and

an action A. must allege a special demand on changes by those conveyances. B. for his horse. 5 Term Rep. K. B. 409.

equal interest in lands or tenements, the one and in the case of Etan College, 2 Wils. part in consideration of the other: and is used pe- 3. p. 453, the court held, that an exchange, in culiarly in our common law for that compen- the strict legal sense of the word, cannot be sation which the warrantor must make to the between three; the principles of it not being warrantee, value for value, it the land war- applicable to more than two distinct contractranted be recovered from the warrantee. Bract. ing parties, for want of the mutuality and relib. 2. cap. 16. Accomp. Conv. 1 vol. 170. ciprocity on which its operation so entirely Also there is a tacit condition of re-entry in depends; and the case above-mentioned, of this deed, on the lands given in exchange, in tenants in common exchanging with joint case of eviction; and on the warranty to tenants, is not irreconcileable to this rule; bevouch and recover over in value, &c. For it cause though four persons may be named, yet either of the parties is evicted, even of a part, they constitute only two distinct parties; and the exchange is defeated. 4 Rep. 121: Cro. consequently there is the same reciprocity as Eliz. 903.

or expressed by any circumlocution. 1 Inst. 50, notis. 51. The estates exchanged must be equal in Sometimes lands intended to pass by exquantity of interest, value is immaterial; as the simple for fee-simple, a lease for twenty years, and the grant or in livery. The lands intended to pass by exchange, not having the qualities and incidents of exchange lands intended to pass by exchange, not having the qualities and incidents of exchange lands intended to pass by exchange, not having the qualities and incidents of exchange lands intended to pass by exchange, not having the qualities and incidents of exchange lands intended to pass by exchange, a lease for twenty years, and the other having the qualities and incidents of exchange lands intended to pass by exchange, a lease for twenty years, and the other having the qualities and incidents of exchange, a lease for twenty years, and the other having the qualities and incidents of exchange, a lease for twenty years, and the other having the qualities and incidents of exchange, and incidents of exchange, and the other having the qualities and incidents of exchange, and the other having the qualities and incidents of exchange lands, may pass by way of gift or grant; as if two persons are seized of two acres of things that lie either in grant or in livery. But no livery of seisin, even in exchanges of and each of them gives livery or seisin upon freehold, is necessary to perfect the convey- his acre given in exchange; here the acres ance; for each party stands in place of the will pass from one to the other, but not in a other, and occupies his right, and each of way of exchange, because there was no word them bath already had corporal possession of of exchange in the deed. Litt. § 62: Perk. his own land. Litt. § 62. Entry, however, 253. must be made on both sides; for it either party die before entry, the exchange is void ple, for lands in tail by way of exchange, or for want of sufficient notoriety. 1 Inst. 50.

An exchange may be made of lands in feesimple, fee-tail, for life, &c. The estates granted are to be equal, as fee-simple for feesimple, &c. though the lands need not be of the same estate-tail, the issue in tail may make equal value, or of the like nature; for a rent in fee issuing out of land, may be exchanged for land in fee. Lit. 63, 64: Co. Lit. 50, 51. If an exchange be made between tenant for life and tenant in tail after possibility of issue extinct, the exchange is good; because their estates are equal. 11 Rep. 80: Moor. 665.

An exchange made between tenant in tail, and another of unequal interest, may be good during his life; but his issue, when of full age, shall avoid it. And exchanges made by infants; by persons non sanæ memoriæ; a husband of the wife's lands, &c. are not void, but voidable only; by the infant at his full age, the heir of the person non sana memoria, and the feme after the death of the husband, who may waive the possession, and disagree to them. Perk. § 277. 281.

Two joint-tenants and two tenants in common may exchange their lands: and, by this deed, freeholds pass without livery and seisin; but the word exchange is to be used; and there must be execution of the exchange, by entry on the lands in the life of the parties, or the feet in future, as well as presently; for if it be

the property of A.'s horse in B. But in such | See tits. Lease, Release, as to making ex-

Littleton expresses himself concerning an Exchange of Lands. A mutual grant of exchange as of a transaction between two; if the transaction were between two persons The word Exchange is so individually re- only. And this applies to any number of perquisite and appropriated by law to this case, sons, if so conjoined, as to make only two disthat it cannot be supplied by any other word, tinet relative parties. 1 Inst. 50. b. 51. a. in

Sometimes lands intended to pass by ex-

A man grants to another lands in fee-simland in tail, for lands for life, &c.; these deeds will not take effect as exchanges. Fitz. Exchange, 15. 64: Co. Lit. 64. If tenant in tail gives his land in exchange, for other land of it good if he will, or avoid the exchange. 1 Rep. 96. A feoffment is made to A. and B. and the heirs of A., and they exchange the land for other lands, this will be good, and they shall hold the lands in the same nature that the land given in exchange was held. Perk. § 277.

If a lord release to the tenant his services in tail, in exchange of land given to the lord in exchange in tail also, it is ill: but if lessee for life of one acre give another acre to his lessor in tail, in exchange for a release from him of that acre, habendum in tail in like manner, it is a good exchange. Perk. § 219. 276. 283. In case two persons make an exchange of land, and limit no estate, each shall have an estate for life by implication: but if an express estate be limited to one for life, and none to the other, it will be void. 19 H. 6.27. And to make a good exchange, both the things must be in esse at the time of the exchange. Co. Lit. 50: 3 Ed. 4, 10.

But an exchange may be made to take efexchange will be void. 1 Inst. 51: 1 Mod. 91. that after the feast of Easter, A. B. shall have such lands in D. in exchange for his lands in appertained to amend that which the inferiors

S., this is good. Perk. § 265.

change may be of uneq ual estates. Moor, c. mouth; and this seems the origin of the Court The condition and warranty in exchanges run to the parties in privity; not to an asssignee, &c. And if after two have exchanged lands, one of them releases to the other the warranty in law, it will not destroy the ed by King William the First, its model being exchange. 4. Rep. 122: 1 Rol. Ab. 815. The taken from the transmarine Exchequer, estabparties themselves and all privies and stran-lished in Normandy long before that time. gers, for the most part, may take advantage of exchanges void by any defect or accident : contra, if they are voidable, &c. 1. Rep. 105: Dyer, 285.

EXCHANGE OF CHURCH LIVINGS. These exchanges are now seldom used, except that parsons sometimes exchange their churches, and the Barons of the Exchequer dealt in affairs resign them into the bishop's hands; and this relating to the state, or public service of the is not a perfect exchange till the parties are crown and realm: and were greatly concerninducted: for if either dies before they are both ed in the preservation of the prerogative, as

284: 2 Comm. 323.

of any benefice with cure of souls, shall corruptly resign or exchange the same; or corruptly take for or in any respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or other in the king's palace; and the acts thereof benefit whatsoever; as well the giver as the were not to be examined or controlled in any taker, shall lose double the value of the sum; half to the crown, and half to him that shall the Exchequer was the great repository of sue for the same. See this Dict. tits. Simony, Advowson.

If two parsons by one instrument agree to exchange their benefices, and in order thereto resign them into the hands the ordinary, such exchange being executed on both parts is good, and each may enjoy the other's living: but the patrons must present them again to each living; and if they refuse to do it, or the ordinary will not admit them respectively, then the change is not executed; and in such case either clerk may return to his former living, even though one of them should be admitted, instituted, and inducted to the benefice of the other: which is expressed in the exchange itself, and the protestation usually added to it. 2 Rep. 74. Rol. Ab. 814.

EXCHANGEORS. Those that return money by bills of exchange. See Excambia-

tores.

EXCHEQUER.

SCACCARIUM, from the Fr. exchequier, i. e. abacus, tabula lusoria, or from the Germ. schaiz, viz. thesaurus. An ancient court of record, wherein all causes touching the revenue and rights of the crown are heard and determined; and where the revenues of the crown are received. Camden in his Britan. p. 113. saith, this court took its name d tabula ad quam assidebant, the cloth which covered it being party coloured, or chequered: we had quest there was very little money in specie in it from the Normans, as appears by the Grand the realm; for then the tenants of knight's fees Custumary, c. 56., where it is described to be answered their lords by military services: an assembly of high justiciers to whom it and till the reign of King Henry I. the rents

justiciers had misdone, and unadvisedly judg-By a special kind of agreement, an ex- ed, and to do right to all, as from the Prince's

of Exchequer Chamber.

Some persons think there was an Exchequer under the Anglo-Saxon kings; but our best historians are of opinion, that it was erect-

Madox's Hist. Excheq.

In the reign of Henry the First there was an Exchequer, which has continued ever since; and the judges of the court were at that time styled Barones Scaccarii, and administered justice to the subjects. In ancient times inducted, the exchange is void. Wood's Inst. well as the revenue of the crown; for at the Exchequer it was the care of the treasurer By stat. 31 Eliz. c. 6. § 8. if any incumbent and barons to see that the rights of the crown were no ways invaded. Lex Constitutionis,

On account of the authority and dignity of the Court of Exchequer, anciently it was held other of the king's ordinary courts of justice: records, wherein the records of the other courts at Westminster &c. were brought to be laid up in the treasury there. And writs of the Chancery were sometimes made forth at the Exchequer: writs of summons to as-

semble parliaments, &c. Ibid.

The Exchequer has been commonly held at Westminster, the usual place of the king's residence; but it hath been sometimes holden at other places, as the king pleased: as at Winchester, &c. And in the Exchequer there are reckoned seven courts; viz. the Court of Pleas; the Court of Accounts; the Court of Receipts; the Court of the Exchequer-Chamber (being the assembly of all the judges of England for difficult matters in law); the Court of Exchequer-Chamber, for Errors in the Court of Exchequer; for Errors in the King's Bench; and the Court of Equity in the Exchequer Chamber. 4 Inst. 119.

But according to the usual division for the dispatch of all common business, the Exchequer is divided into two parts: one whereof is conversant especially in the judicial hearing and deciding of causes pertaining to the prince's coffer's, anciently called Scaccarium Computorum; the other is the Receipt of the Exchequer, which is properly employed in the receiving and payment of money. And it has been observed, that about the time of the conor farms due to the king were generally ren- bound to pay him their first-fruits and annudered in provisions and necessaries for his al tenths. But the Chancery has of late years household; but in that reign the same were obtained a large share in this business. See changed into maney; and afterwards, in succeeding times, the crown revenue was changed or paid into the Exchequer, chiefly in gold and silver. Lex Constitutionis, p. 208.

By 51 H. 3. st. 5: 10 Ed. 1. Stat. Rutl. all sheriffs, bailiffs, &c. were to account in the Exchequer before the treasurer and barons: and annual rolls were to be made of the profits of counties, &c. Also inquisitors to be appointed in every county of debts due to the king. And all fines of counties for the whole year were to be sent into the Exchequer. Stat. de Vicecom. 14 Ed. 2. c. 1. But by the 3 and 4 W. 4. c. 99. sheriffs are no longer to account in the Exchequer, but their accounts are to be audited by the commissioners for auditing the public accounts. See tit. Sheriff. And by the same act the statutes requiring all fines, recognisances, &c. to be certified and estreated twice a year into the Exchequer are repealed, and the same are to be transmitted to the lord high treasurer, or to the commissioners of the treasury, and a duplicate thereof to the commissioners for auditing the public accounts. See tit. Recognisance.

The Court of Exchequer is inferior in rank not only to the Court of King's Bench, but to the Common Pleas also; it is a very ancient court of record, set up by William the Conqueror as a part of the aula Regia, though requeror as a part of the aula Regia, though rethings, at any time depending in the said gulated and reduced to its present order by Court of Exchequer, as a court of equity; and King Edward I., and intended principally to if the chief baron should, from illness, &c. be order the revenues of the crown, and to recov- prevented from sitting for those purposes, his er the king's debts and duties. 4 Inst. 103-116. It is called the Exchequer, scaccarium, warrant under the sign manual, revocable at from the chequered cloth, resembling a chessboard, which covers the table there, and on gree of the coif, to hear and determine the which, when certain of the king's accounts with counters. It consists (as already has of the court are sitting or not; and decrees been observed) of two divisions: the receipt of under this act are declared valid, subject only the Exchequer, which manages the royal revenue: and the court, or judicial part of it; which latter is again subdivided into a court of equity, and a court of common law.

Selden conjectures (Titles of Hon. 2. 5. 16.) to have been anciently made out of such as were barons of the kingdom, or parliamentary were barons of the kingdom, or parliamentary to whom powers are given by the act in all barons: and thence to have derived their name; respects similar to those of the accountant which conjecture receives great strength from Bracton's explanation of Magna Charta, c. 14. which directs that the earls and barons be masters of the court, and another master is amerced by their peers; that is, says he, by the barons of the Exchequer, l. 3. tr. 2. c. 1 & 3.

used to exhibit their bills for the non-payment in matters of revenue as equity. By the same of tithes, in which case the surmise of being act the two masters are empowered to appoint

this Dict. tits. Chancery, Equity, Tithes.

An appeal from the equity side of this court lies immediately to the House of Peers; but from the common law side, in pursuance of the stat. 31 Ed. 3 c. 12. a writ of error must be first brought into the Court of Exchequer-Chamber. And from the determination there had, there lies in the dernier resort, a writ of error to the House of Lords. 3 Comm. 44. See this Dict. tits. Decree, Equity, Error.

In this Court of Equity the proceedings are by English bill and answer, as in Chancery.

In this court the attorney-general brings bills for any matters concerning the king; and any person grieved in any cause prosecuted against him on behalf of the king, may bring his bill against the attorney-general to be relieved in equity, in which case the plaintiff must attend the king's attorney with a copy of the bill, and procure him to answer the same; and Mr. Attorney may call any that are interested in the cause, or any officer or others, to instruct him in the making of his answer so as the king be not prejudiced thereby; and his answer is to be put in without oath. 4 Inst. 109. 112. 118.

By stat. 57 G. 3. c. 18. the lord chief baron of the court, for the time being, is empowered to hear and determine all causes, matters, and majesty may, from time to time, appoint by pleasure, any other of the barons of the desame. The lord chief baron, &c. may sit in are made up, the sums are marked and scored the Court of Equity, whether the other barons to appeal to the House of Lords, or to re-hearing by the chief baron, or other barons so appointed.

By stat. 1 G. 4. c. 35. for the better secur-The Court of Equity is held in the Exchequer. Chamber, before the Lord Treasurer, of Exchequer at Westminster, on account of the Chancellor of the Exchequer, the Chief Baron, and three puisne barons. These Mr. no money shall in future be paid to the deputy remembrancer, but that an accountant general shall be appointed by the lord chief baron, general of Chancery. The accountant general of the Exchequer is also to be one of the also appointed under the act by the lord chief baron for reference in all suits on the equity side of the court between subjects, and to take In this court of equity the clergy have long minutes of all orders and decrees, as well as the king's debtor is no fiction, they being a clerk, and the lord chief baron may appoint

salaries of all these officers are made payable mere words of course, and the court open to out of a fund of 65,000l. of unclaimed cash of all the nation equally. The same still holds the suitors, and the fees to be recovered in with regard to the equity side of the court: the offices of the accountant general, and for there any person may file a bill against masters are to be regulated by orders of the another upon a bare suggestion that he is the

The primary and original business of the not is never controverted. Court of Exchequer is to call the king's debtors to account, by bill filed by the attorney-gene- to a fiction in order to bring an action on the ral; and to recover any lands, tenements, or plea side of the Court of Exchequer, for by hereditaments, any goods, chattels, or other the 2 W. 4. c. 39. generally called "The Uniprofits or benefits, belonging to the crown. So formity of Process Act," the process formerly that by their original constitution the juris- used in this court as well as in the King's diction of the Courts of Common Pleas, King's Bench and Common Pleas for the commence-Bench, and Exchequer, was entirely separate ment of personal actions is abolished, and and distinct; the Common Pleas being in other write substituted; viz. 1. a writ of sumtended to decide all controversies between mons where the action is not of a bailable na. subject and subject; the King's Bench to cor- ture, or it is not intended to hold the defendrect all crimes and misdemeanors that amount ant to special bail; 2. a writ of capias, where to a breach of the king's peace; and the Exchequer, to adjust and recover the king's revenue. See this Dict. tits. Courts, King's custody of the marshal of the King's Bench, Bench, Common Pleas. But as, by a fiction, or the warden of the Fleet, and it is intended almost all sorts of civil actions were allowed to detain him in such custody. to be brought in the King's Bench, in like | The judges of the Exchequer are the chanmanner by another fiction, all kinds of per- cellor of the Exchequer, lord chief baron, and sonal suits might be prosecuted in the court four other barons. of Exchequer. For as all the officers and ministers of this court had, like those of other superior courts, the privilege of suing and The king's attorney-general is made privy to being sued only in their own court, so also all manner of pleas, that are not ordinary and the king's debtors and farmers, and all ac-comptants of the Exchequer, were privileged to sue and implead all manner of persons in name, informations of concealments of custhe same court of equity that they themselves were called into. They had likewise privilege to sue and implead one another, or any king's lands; or upon penal statutes, forceistranger, in the same kind of common law actions (where the personalty only was concerned) as were prosecuted in the Court of the court, and their several duties, are now Common Pleas.

their jurisdiction, which was merely for the benefit of the king's accomptants; and was exercised by the barons only of the Exchequer, and not the treasurer or chancellor. The writ upon which all proceedings were grounded was called a quo minus: in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of; quo minus sufficiens existit (by which he is the less able), to pay the king his debt or rent. And these suits were expressly directed by what is called the statute of Rutland, 10 Ed. 1. c. 11. to be confined to such matters only as specially concerned the king or his ministers of the Exchequer. And by the articuli super cartas, 28 Ed. 1. c. 4. it was enacted that no Common Pleas be thenceforth holden in the Exchequer, contrary to the form of the great charter. But by the suggestion of privilege, any person might be admitted to sue in the Exchequer, as well as the king's ac- first erected in England by statute 31 Ed. 3. comptant. The surmise of being debtor to c. 12. to determine causes upon writs of error,

a keeper of reports and certificates. The the king soon became matter of form, and king's accomptant; but whether he is so or

But it is now no longer necessary to resort

The chancellor, and who is under treasurer, tures, &c.

The number of officers on the plea side of regulated by the 2 and 3 W. 4. c. 110. which This gave origin to the common law part of enacts that (exclusive of the clerk of the pleas, whose office is to be abolished after the death of the present possessor), there shall be five principal officers; viz. three masters and prothonotaries, a clerk of the rules, and a filazer, who are to hold their offices during good behaviour, and are to have such assistants and clerks as the court may think necessary. The office of the clerk of the errors is to be executed by the senior master and prothonotary of the court for the time being.

By the 3 and 4 W. 4.c. 99. a number of other offices in the Court of Exchequer are abolished.

Formerly no attorney could practise in the Exchequer but through a clerk of court, but by the 1 W. 4. c. 70. § 10 and 16. the court was thrown open to all persons admitted or admissible as attorneys of the K. B. and C. P., or who have been admitted to practise in any of the courts of great session in Wales.

THE COURT OF EXCHEQUER-CHAMBER WAS

Exchequer. And to that end it consists of the lord chancellor, and lord treasurer, taking unto them the justices of the King's Bench and Common Pleas; in imitation of which, a second Court of Exchequer-Chamber was erected by stat. 27 Eliz. c. 8. consisting of the justices of the Common Pleas, and the barons of the Exchequer; before whom writs of error may be brought to reverse judgments in certain suits originally begun in the Court of King's Bench. By the late act 1 W. 4. c. 70. § 8. writs of error upon any judgment, given the same amount would do. But at the same by any of the Courts of King's Bench, Comreturnable only before the judges, or judges and barons as the case may be, of the other two courts in the Exchequer-Chamber; a transcript of the record only shall be annexed to the return of the writ, and the Court of Error after errors are duly assigned and issue joined in error, shall at such time as the judges shall appoint, either in term or vacation, review the proceedings, and give judgment as they shall be advised thereon; and such proceedings and judgment shall be entered on the original record, from which judgment in error, nor writ of error shall lie, except returnable in the high court of parliament. See Tidd's Prac. Supp. (9th ed.) 182. See also this Dict. tit. Error. 3 Com. 56.

Into the court also of Exchequer-Chamber (which then consists of all the judges of the three superior courts, and sometimes the lord chancellor also) are sometimes adjourned from the other courts such causes as the judges, upon argument, find to be of great weight and difficulty, before any judgment is given upon them in the court below. 4 Inst. 119: 2

Bulst. 146. THE COURT OF EXCHEQUER IN Scotland was established in its present form by stat. 6 Anne, c. 26. The judges by that act are declared to be the high treasurer of Great Britain, with a chief baron and other four barons, chosen from the serjeants at law, or English barristers, or Scotch advocates of five years standing. This court has a peculiar jurisdiction in the customs and excise, and in all revenue matters, and in all forfeitures and penalties arising to the crown. The judges of this court are also commissioned to pass signatures authorising charters and gifts by the

THE COURT OF EXCHEQUER-CHAMBER IN Ireland was established by the Irish act 40 G. 3. c. 39. but requires further regulations for making its proceedings effective. It consists of the chief justices, chief baron, and the rest of the justices and barons, or any nine of

EXCHEQUER BILLS. See tits. National Debt, Forgery.

EXCISE.

from the common law side of the Court of land imposition paid sometimes on the consumption of the commodity, or frequently upon the retail sail, which is the last stage before the consumption.

This is doubtless (says Blackstone, 1 Comm. 318.), impartially speaking, the most economical way of taxing the subject; the charges of levying, collecting, and managing the excise duties being considerably less in proportion than in other branches of the revenue. also renders the commodity cheaper to the consumer than charging it with customs to time, the rigour and arbitrary proceedings of mon Pleas, and Exchequer, shall hereafter be excise laws seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary wherever it is established, to give the officers a power of entering and searching the houses of such as deal in exciseable commodities, at any hour of the day; and in many cases of the night likewise. And (for the same reasons) the proceedings in case of transgressions are summary and sudden, to the exclusion of the trial by jury.

Its original establishment was in 1643, when it was introduced by the parliament then in rebellion against King Charles I. Its progress was gradual, being at first laid upon those persons and commodities where it was supposed the hardship would be least perceivable; viz. the makers and venders of beer, ale, cyder, and perry; and was afterwards imposed on such a multitude of commodities, that it might fairly be denominated general.

Upon the restoration of Charles II., it having then been long established, and its produce well known, some part of it was given to the crown, by way of purchase for the feodal tenures and other oppressive parts of the hereditary revenue. And notwithstanding the objections eternally raised against it by the interested or the patriotic, it has from time to time been imposed on a vast variety of articles.

It has been very judiciously observed that the grievances of the excise exist more, perhaps, in apprehension than reality. Actions and prosecutions against officers, commissioners, and justices, for misconduct in excise cases, are very rarely heard of in courts of law. It is certainly an evil that a fair dealer cannot have the benefit of any secret improvement in the management of his trade or manufactory; yet it seems more than equivalent to the public at large, that by the survey of the excise, the commodity is preserved from many shameful adulterations, as experience has fully proved since wine was made subject to the excise laws.

By the 7 and 8 G. 4. c. 53. the laws relating to the collection and management of the revenue of excise were consolidated and amended.

& 1. Authorises his majesty to appoint not From the Belg. acciise tributum.] An in- exceeding thirteen commissioners for the collection and management of the revenue of given or promised to give any treat, fee, gratuiexcise throughout the United Kingdom, and ty, or reward, for his obtaining or endeavournot exceeding four assistant commissioners ing to obtain an order for his being instructed. for Scotland and Ireland. Four commissioners When an order for instruction is granted, it to constitute a board, which, as also the com- is directed to an experienced officer, who remissioners respectfully, shall be subject to the ceives such person as his pupil; and the like control of the treasury. § 2. The commis- books as officers have, being delivered to such sioners are to appoint collectors and other pupil, he goes with and attends the officer who subordinate officers, with such salaries as the instructs him, and he takes surveys, and in treasury shall direct. § 4. The board of his own book makes the like entries, as if he commissioners is to sit at the chief office of was an officer, until the instructor certifies excise established by 8 G. 3 in London, and called The Excise Office, to which all other offices in the kingdom shall be subordinate and accountable, and all the places within the bills of mortality, together with the parishes of St. Marylebone and St. Pancras, in the county of Middlesex, shall be under and subject to the jurisdiction of the said head office.

§ 15. The commissioners in Edinburgh and Dublin shall appoint under their hands and seals such persons as they shall think needful, in each market-town throughout the United Kingdom, and in certain towns in Anglesea, to hold in some known and public place offices of excise, for receiving entries and duties, and performing all other things touching the reve-

nue of excise.

§ 16. The chief office in London, and the offices in Edinburgh and Dublin, are to be kept open, except on certain hollidays, from 8 in the morning till 3 in the afternoon; and the offices in every other place from 8 till 2.

The Kingdom of England and Wales (exclusive of the bills of mortality) is divided into about 50 collections; some called by names of particular counties; others by the names of great towns. Where one county is divided into several collections, or where a collection comprehends the contiguous parts of several counties, every collection is subdivided into several districts, within which there is a supervisor; and each district is parcelled into out-rides and foot-walks, within each of which there is a gauger, or surveying-officer. Gilb. Exch. Append.

He who would be made a gauger, must procure a certificate that he is above 21, and under 30 years of age; that he understands the four first rules of arithmetic; that he is of the communion of the church of England; how he has been employed, or what business he hath followed; that he is not incumbered with debts; whether single or married; and if married, how many children he has, for if he has above two, he cannot (by the rules of the office) be admitted. Gilb. Exch. Append.

his sureties; and it must be certified that they standing; but if for three years last he stands are of sufficient ability, and that the said cer- pretty clear of admonitions and reprimands, tificate is of his own hand-writing: such certificate, written by him, must be signed by the supervisor of excise where the party applying go his rounds, and in the intervals of rounds, lives. At the bottom of his certificate must be his affidavit, that neither he, nor any else to before the justices; he is also to peruse the suhis knowledge, hath directly or indirectly, pervisor's diaries; and where he finds an off-

that he is fully instructed. After he is thus certified for, and until he is employed, he is called an expectant, being to wait till a vacan-

cy happens. Gilb. Exch. Append.

The business of the supervisor is to be continually surveying the houses and places of the persons within his district liable to duties: and to observe and see whether the officers duly make their surveys, and make due entries thereof in their books and in their specimen papers; and every supervisor is in his own book to enter what he himself does each day and part thereof; and also set down the behaviour, good and bad, the diligence or negligence of the several officers of his district: and at the end of every six weeks to draw out a diary of every day's business, and of the remarks made each day of the several officers in his district, and to transmit such diary at the end of every six weeks to the chief office. Each commissioner takes and peruses a proportion of these diaries, and when he meets with any remarkable complaint against any officer, he communicates it to the rest, who thereupon come to an agreement, either to admonish, reprimand, reduce or discharge. For small faults, officers are admonished; for great ones reprimanded; for greater, reduced; but for the greatest, discharged. The commissioner who peruses the diary writes in the margin, admonish, reprimand, or as the case is. Gilb. Exch. Append.

These diaries, after having been thus written upon are delivered to the clerk of the diaries, who in a book, called the reprimand book, places the admonitions, reprimands, and the like, to each officer's account, and writes every offender word thereof. Which reprimand book is resorted to upon discovering new faults; and if it is there found that the officer has before been admonished and reprimanded so often that there are no hopes of his amending, he is then discharged, The said book is likewise resorted to when application is made for advancing or preferring an officer into a better Frequent admonitions or reprimands post. He must also nominate two persons to be are a bar to preferment, unless they are of old those of elder date are not much regarded. The collector's business is, every six weeks, to he is to be assisting in prosecuting offenders

cer complained of, is to examine him and the lation of ecclesiastical courts in England, it is supervisor, and having heard both, is in the enacted, that after passing the act, excommu-margin to write his opinion of each fact; he nication, together with all the proceedings officers of his collection perform their duties, and from the vouchers he transcribes into his book the charge on each particular person in his collection. For faults gaugers are reduced, either to be only assistants, or from footwalks to out-rides; supervisors are reduced to be again only gaugers; and collectors are reduced to be supervisors. In some instances discharged officers, after having for a competent time been thereby kept out of pay, are again restored; but if twice discharged, are never again restored, unless one of the discharges appears to have been occasioned by a misrepresentation of the case. Gilb. Exch. Append.

By 7 and 8 G. 4. c. 53 § 7. no person shall be capable of acting in any office relating to contumace capiendo (in form annexed to the the excise, until he shall, before two justices in the county where his employment shall be, or before a baron of the Exchequer, take the oath therein contained, which is to be certified to and recorded by the next Quarter Sessions.

The above act contains a variety of other provisions, which will be found collected and arranged in Burn's Justice, by Marriott, or by Chitty.

The 7 and 8 G. 4. c. 53. by which the laws relative to the excise were consolidated, has been amended by the 4 and 5 W. 4. c. 51.

EXCLUSA, EXCLUSAGIUM. A sluice

for the carrying off water; and the payment to the lord for the benefit of such a sluice, Et duo molendina in eodem maneiro cum aquis exclusagiis, &c. Mong. Ang. tom. 1 p. 398.

EXCOMMENCEMENT, Law French.] Excommunition. Stat. 23 Hen. 8. c. 3.

EXCOMMUNICATION, Excommunicatio.] An ecclesiastical censure, divided into the greater and the lesser; by the former a person was excluded from the communion of tion, and the effect of it, and the proceedings the church; from the company of the faithful; therein, are here preserved as matter of curiand incapacited from performing any legal ous information and as applying in some paract; the latter merely debarred him from the ticulars by analogy to the provisions of the service of the church, and this is now the only statutes in cases of sentences of contumacy. incapacity that arises from a sentence of excommunication.

stituted originally for preserving the purity of serve upon juries, nor be a witness in any the church; but ecclesiastics did not scruple court, nor bring an action, either real or pertheir own power, and inflicted it on the most Litt. § 201. Roberts. Hist. Emp. frivolous occasions. Charles V. 2 vol. 109. &c.

shall smite, or lay violent hands upon any not appear. 8 Journ. 118: 13 Journ. 42. other, either in any church or church-yard, But the 53 G. 3. c. 127. (supra) appears to then ipso facto every person so offending shall have removed the objection. Dodd's Doubtbe deemed excommunicate, and be excluded ful Questions in the Law of Elections, &c. p. from the fellowship and company of Christ's | 39. congregation."

Vol. I.—89

is also to have an eye how the supervisors and following thereupon, shall in all cases (except those after specified in the uct) be discontinued: and that in all causes cognizable in the ecclesiastical courts, when any person duly cited to appear in, or required to comply with the orders or decrees (as well final as interlocutory) of, any ecclesiastical courts, shall refuse to appear or to obey such order or decree, or when any person shall commit a contempt in the face of such court, no sentence of excommunication shall be given or pronounced: but instead thereof the judge shall pronounce such person contumacious and in contempt, and within ten days shall signify the same into Chancery in a form annexed to the act, as hath herctofore been done in signifying excommunications; and thereupon a writ de act) shall issue out of Chancery directed and returnable, and of like force as the former writ de excommunicatio capiendo; and upon the appearance, or obedience or submission of the party, the ecclesiastical judge shall pronounce him absolved from the contumacy, and shall order him to be discharged. The jurisdiction of ecclesiastical courts to excommunicate is reserved in definitive sentences, &c. pronounced as spiritual censures for offences of ecclesiastical cognizance; but it is provided that no person so pronounced excommunicate shall incur any civil penalty or incapacity whatever, except such imprisonment, not exceeding six months, as the ecclesiastical court shall direct, and which sentence shall be signified into Chancery, and thereon the writ de excom. cap. shall issue and be forwarded, and the party be kept in custody for the term directed, or until absolved. The like enactments were made as to Ireland, by stat. 54 G. 3. c. 68.

The ancient decisions as to excommunica-

An excommunicated person was disabled to do any act required to be done by one that The sentence of excommunication was in- is probus and legalis homo. He could not

The votes of persons excommunicated have been frequently objected to at elections, but By stat. 5 and 6 Ed. 6.c. 4. "if any person the decisions of the House of Commons do

In some cases persons incurred excommuni-By stat. 53 G. 3. c. 127. for the better regue cation ipso facto by act of parliament; but by law, and the conviction transmitted to the cated for contempt, &c., they ought to certify

cate, not only all perturbers of the peace of the 741. See post, tit. Excommunicato Capiendo. church, but also felons, and other offenders, &c. And by the ecclesiastical laws, excommunicated persons are not permitted to have not the legal cognizance, the party may have Christian burial.

The bishop's certificate, if he die before the return of the writ, shall not be received, for his successor shall certify; the significavit must mention that the party lived within the a matter of which the Spiritual Court hath not dioceso where he was excommunicated, and conuzance, and he is taken on a writ of exby what bishop; if it be pleaded, the time when is to be shown: and excommunication have a writ out of Chancery to the sheriff, to must be declared in the ecclesiastical court deliver him out of prison. 2 Inst. 623: 12 Co. before they proceed, &c. 8 Rep. 68: Cro. 76: F. N. B. 141. Jac. 82: Moor, Ca. 667: Latch. 174: Hetley, 86. See this Dict. tit. Abatement, I. 2. 6.

ordine; as if they refuse a copy of the libel, at the time of the citation. 7 Term Rep. K. &c., a prohibition shall go with a clause to B. 153. absolve and deliver the party injured. 1 Sid.

to obey and perform the sentence, and the will not quash the writ de excom. cap for that bishop refuseth to accept it, and to assoil him, objection. 7 Term Rep. 153. he shall have a writ to the bishop, requiring him, upon performance of the sentence to as- comes a general act of pardon, which pardons soil him; and the reason thereof is, for that by all contempts, &c., it seems that this offence the excommunication the party is disabled to is taken away without any formal absolusue any action, or to have any remedy for any tion. See Cro. Car. 199: Cro. Jac. 212: 8 wrong done unto him, so long as he shall re- Co. 68: 1 Jon. 227: 2 Lev. 36: Gibs. Cod. main excommunicate; and also the party 1110. grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for him who stands obstinately excommunicated. a matter which belongeth not to the ecclesias- If within forty days after sentence of excomtical conuzance; also the bishop, in those; cases, may be indicted at the suit of the king. 2 Inst. 623.

But if the excommunication be for a just cause, the party must make present satisfaction before he can be absolved, or he must put in caution, that he will hereafter perform that which the bishop shall reasonably and according to law enjoin him; which caution, in the civil law, is of three sorts; 1. Fidejussoria, as when a man bindeth himself with sureties to perform somewhat. 2. Pignoratio, or realis cautio, as when a man engageth goods or mort. N. B. 62. gageth lands for the performance. 3. Juratoria, when the party who is to perform any thing taketh a coporal oath to do it; which offences of ecclesiastical cognizance, is now, last is now the most frequent method.

be against law. 1 Bulst. 122. But was afterwards, on great debate, held to be good: and that the bishop having a discretionary power herein, it was as much in his option to take caution by obligation as by either of the two other methods. 2 Lev. 36: Raym. 225.

Court hath not power to meddle with the body | delivered of record to the sheriff, and there of any persons whatsoever, or to send process | must be twenty days between the teste and the

they were first to be convicted of the offence to take them; for if a person is excommuniordinary. Dyer, 275; 1 Ventr. 146. it into the Chancery, whence it is sent into By stat. 9 Ed. 3. bishops may excommunible R. R., and thence issues process. Cro. Eliz.

> If the judge of any Spiritual Court excommunicates a man for a cause of which he hath an action against him at common law; and he is also liable to be indicted at the suit of the king. 1 Inst. 134: 2 Inst. 527. 623.

If a person be unjustly excommunicated for communicato capiendo, the party grieved shall

It is not necessary that the party should be resident in the diocese at the time of the ex-So if the Spiritual Court proceeds inverso communication; it is sufficient if he were there

If the sentence of the greater instead of the lesser excommunication be pronounced, it is Also if a man be excommunicated, and offers only a ground of appeal: the Court of K. B.

If after a person is excommunicated, there

EXCOMMUNICATO CAPIENDO. A writ directed to the sheriff for apprehending munication has been published in the church, the offender does not submit and abide by the sentence of the Spiritual Court, the bishop may signify, i. e. certify, such contempt to the king in Chancery. Upon which there issues out this writ to the sheriff of the county, called, from the bishop's certificate, a significavit: or, from its effect, a writ de excommunicato capiendo. And the sheriff shall thereupon take the offender and imprison him in the county gaol till he is reconciled to the church, and such reconciliation certified by the bishop. F.

This writ (except in cases of definitive sentences pronounced as spiritual censures for by the statutes 53 Geo. 3. c. 127: 54 Geo. 3. This method of taking caution was held to c. 68), superseded by the writ de contumace capiendo. See the provisions of the statutes under title Excommunication.

By the stat. 5 Eliz. c. 23. writs de excommunicato capiendo shall issue out of the Court of Chancery in term time, and be returnable in B. R. &c. They shall be brought sealed But it hath been adjudged that the Spiritual into the King's Bench, and there opened and return: and if the sheriff return a non est in- thing recovered by judgment of law. 1 Instventus on the writ, a capias with proclamation is to be granted for the party to yield his body to gaol under the penalty of 10l. And if he do not appear on the first capias and proclamation, a second is to go forth, and he is to forfeit 201., &c. This statute is extended to writs de contumace capiendo, under stat. 52 Geo. 3. c. 127.

But, by the statute, if in the excommunicate capiendo, the party excommunicated hath not a sufficient addition, as to his place of dwelling, &c., according to 1 H.5. c.5. he shall not incur the penalties in this act for his contempt, in not rendering himself prisoner upon the capias, &c. 2 Inst. 661.

A writ de excom. cap. stating that the defendant was excommunicated in a cause of defamation and slander merely spiritual, is good.

7 Term Rep. K. B. 153.

A warrant issued in pursuance of a writ de contumace capiendo, stated that the defendant was attached for non-payment of costs, in a cause of appeal and complaint of nullity, lately depending in the Arches Court of Canter-Held that the warrant was insufficient, not stating with certainty the nature of the cause, so as to show that it was one

EXCOMMUNICATO DELIBERANDO. A writ to the sheriff for delivery of an excommunicate person out of prison, upon certificate from the ordinary of his conformity to the ecclesiastical jurisdiction. F. N. B. 63: Reg. Orig. 67. And where a man is unduly excases, by an habeas corpus; and sometimes by pleading, as well as by an excommunicato deliberando: also sometimes by prohibition, &c. And on a general pardon, the party may have a writ to the bishop to absolve him. 12 Rep. 76: Latch. 205: Godb. 272. If a plaintiff in an action be excommunicate, and after he gets letters of absolution, on showing them in court he may have a re-summons, &c. upon his original. 1 Inst. 133.

EXCOMMUNICATO RECIPIENDO, or, rather, Recapiendo.] A writ whereby persons excommunicated being for their obstinacy committed to prison, and unlawfully delivered, before they have given caution to obey the authority of the church, are commanded to be sought after, retaken, and imprisoned again. Reg. Orig. 67. If a person after his commitment escapes, and the sheriff has not returned his writ, a capias excommunicatum de novo shall go, otherwise if the writ be returned.

Mod. Ca. 78.

EXCULPATION, Letters of. The warrant to an offender indicted for citing witnesses in his own defence. Scotch Dict.

Sir Edward Coke, in his Reports, makes two sorts of executions; one final, another with a quousque, tending to an end: an execution final is that which makes money of the defendant's goods, or extends his lands, and delivers them to the plaintiff, which he accepts in satisfaction, and is the end of the suit, and all that the king's writ requires to be done: the other writ with a quousque, though it tendeth to an end, is not final; as in case of a capias ad satisfaciendum, which is not a final execution, but the body of the party is to be taken, to the intent the plaintiff be satisfied his debt, &c., and the imprisonment of the defendant not being absolute, but until he do satisfy the same. 6 Rep. 87.

EXECUTION, in the usual legal sense of the word, is a judicial writ grounded on the judgment of the court from whence it issues; and is supposed to be granted by the court at the request of the party at whose suit it is issued, to give him satisfaction on the judgment which he hath obtained; and therefore an execution cannot be sued out in one court upon a judgment obtained in another. Impey, K. B.

This execution, or putting the law in force, apparently within the jurisdiction of the Ec- is performed in different manners, according clesiastical Court. Rex v. Dugger, 5 B. & A. to the nature of the action upon which it is founded, and of the judgment which is had or

recovered.

If the plaintiff recovers in an action real or mixed, whereby the scisin or possession of land is awarded to him, the writ of execution shall be an habere facias seisinam, or writ of seisin of a freehold; or an habere facias possescommunicated, he may be delivered, in some sionem, or writ of possession of a chattel interest. Finch. L. 470. See this Dict. those titles. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered, in the execution of which the sheriff may take with him the posse comitatus, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered. See post, III. 3. But if it be peaceably yielded up, the delivery of a twig, the turf, or a ring of a door, in the name of seisin, is sufficient execution of the writ. 3 Comm.

> Upon a presentation to a benefice recovered in a quare impedit, or assist of darrien presentment, the execution is by a writ de clerico admittendo; directed not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff. See tits. Admittendo clerico; Advowson.

In other actions, where the judgment is that something special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff EXECUTION, Executio, Signifies the according to the nature of the case. As upon last performance of an act, as of a judgment, an assise of nuisance, or quod permittat prosect. It is the obtaining possession of any ternere, where one part of the judgment is that the nuisance be removed, a writ goes to process against the bail, if any were given; the sheriff to abate it at the charge of the par- who stipulate in this triple alternative, that ty; which likewise issues in case of an in- the defendant shall, if condemned in the suit, dictment. Comb. 10. See tit. Nuisance.

Upon a replevin the writ of execution is the writ de retorno habendo, to have a return of the pay it for him. As therefore the two former cattle distrained; and if the distress be eloigned, the defendant shall have a capias in withernam; but on the plaintiff's tendering the take place. Lutw. 1269. 1273. In order to damages, and submitting to a fine, the process which a writ of scire facias may be sued out in withernam shall be stayed. 2 Leon. 174. against the bail, commanding them to show See tits. Replevin, Distress, Withernam. In cause, why the plaintiff should not have execudetinue, after judgment the plaintiff shall have detinue, after judgment the plaintiff shall have and on such writ, if they show no sufficient liver the goods by repeated distresses of his cause, or the defendant does not surrender chattels. (1 Rol. Ab. 737: Rust. Ent. 215); or else a scire facias against any third person cause the plaintiff may have judgment against in whose hands they may have a the best tand take and take are in the parameters. in whose hands they may happen to be, to show cause why they should not be delivered: and if the defendant still continues obstinate, then (if the judgment be by default or on learning that it is against them. See tits. Bail, Scire Facias, post.

2. The next species of execution is against them. demurrer) the sheriff shall summon an inquest the goods and chattels of the defendant, and to ascertain the value of the goods, and the plaintiff's damages; which (being either so assessed, or by the verdict in case of an issue, Bro. Ab. tit. Damages, 29.) shall be levied on the desendant the sum or debt recovered. the person or goods of the desendant. See tit. This lies as well against privileged persons, Detinue. So that, after all, in replevin and detinue, the only actions for recovering the specific possession of personal chattels, if the wrong-doer be very perverse, he cannot be compelled to the restitution of the identical execute either this writ or the writ of ca. sa. thing taken or detained; but he has still his but must enter peaceably; and may then election to deliver the goods or their value. Keilw. 64.

Executions in actions where money only is recovered, as a debt or damages, are of five sorts. 1. Against the body of the defendant. 2. Against his goods and chattels. 3. Against his goods and the profits of his lands. 4. Against his goods and the possession of his enough to satisfy the judgment and costs; lands. 5. Against all three, his body, lands

and goods.

1. The first of these species of execution is by writ of capias ad satisfaciendum (shortly called a ca. sa.), to take and imprison the body of the debtor till satisfaction be made for the debt, costs, and damages. See this Dict. tit. Capias. Sir Edward Coke gives a singular 344. See further this Dict. tits. Fieri Facias, instance, where a defendant in 14 Ed. 3. was discharged from a capias because he was of so advanced an age that he could not undergo the pain of imprisonment. 1 Inst. 289. This writ is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore when a man is once taken in execution upon his writ, no other process can be sued out against his lands or goods. Only by stat. 21 Jac. 1 c. 24, if the defendant dies while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels.

is returned thereon, the plaintiff may sue out a | fendant is a beneficed clerk, having no lay fee.

satisfy the plaintiff his debt and costs, or surrender himself a prisoner; or that they will branches of the alternative are neither of them complied with, the latter must immediately

peers, &c. as other common persons; and against executors or administrators, with regard to the goods of the deceased. The sheriff may not break open any outer doors to break open an inner door belonging to the defendant, in order to take the goods. 5 Rep. 92: Palm. 54: 8 Taunt. 250: 2 Moo. 207: 4 Taunt. 619. See post, III. 3. And the sheriff may sell the goods and chattels of the defendant, even an estate for years, which is a chattel real, (8 Rep. 171.) till he has raised first paying the landlord of the premises upon which the goods are found the arrears of rent then due, not exceeding one year's rent in the whole. Stat. 8 Anne, c. 14. See tits. Distress, Rent. If part only of the debt be levied on a fieri facias, the plaintiff may have a ca. sa. for the residue. 1 Rol. Ab. 904: Cro. Eliz. Venditioni Exponas.

3. A third species of execution is by writ of levari facias, which effects a man's goods and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rent and profits of his lands, till satisfaction be made to the plaintiff. Finch, L. 471. Little use is now made of this writ; the remedy by elegit, which takes possession of the lands themselves, being much more effectual. But a species of this levari facias may be considered a writ of execution proper only to ecclesiastics, which is given when the sheriff upon If a ca sa. is sued out, and a non est inventus a writ of execution sued, returns that the deIn this case a writ goes to the bishop of the lupon forfeiture of these the body, lands, and diocese, in the nature of a levari or fieri facias, to levy the debt and damages de bonis ecclesiasticis, which are not to be touched by lay hands: and thereupon the bishop sends out a sequestration of the profits of the clerk's benefice, directed to the church wardens to collect the same, and pay them to the plaintiff till the full sum be raised. Reg. Orig. 300: Burn, E. L. 329: 2 Inst. 472: Jenk. 207. See fur-

ther, tit. Levari Facias.
4. The fourth species of execution is by the writ of elegit, which is a judicial writ given by stat. W. 2; 13 Ed. 1. c. 18. either upon judgment for a debt or damages, or upon the forfeiture of a recognisance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two writs of execution last-mentioned (2 and 3), but not the possession of the lands themselves, which was a natural consequence of the fcodal principles prohibiting alienation of lands. See this Dict. tit. Tenure.

It is upon feodal principles, also, that copyhold lands are not liable to be taken in execution upon a judgment. 1 Rol. Ab. 888. But in case of a debt to the king, it appears by Magna Charta, c. 8. that it was allowed by the common law for him to take possession of the

lands till the debt was paid.

and chattels are not sold, but only appraised; and all of them, except oxen and beasts of the plough, are delivered to the plaintiff at such which enables the Court of Exchequer, on apreasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety, or one half of his and of the heirs and assigns of such debtor, in freehold lands, which he had at the time of any lands extended, to be sold as the court the judgment given, whether held in his own shall direct; the conveyance to be made by name, or any other in trust for him, are also to the remembrancer of the court, by bargain be delivered to the plaintiff, to hold till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as till the death of the defendant, if he be tenant for life, or in tail. 2 Inst. 395: stat. 29 Car.

This execution, or seizing of lands by elegit is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay the debt, a ca. sa. may then be had after the elegit; for such elegit is in this case no more in effect than a fieri facias. Hob. 58. See tit. Elegit.

Thus it appears that body and goods may be taken in execution; or land and goods; but not body and land upon any judgment between subject and subject, in the course of the com-

mon law; but

as in the case of recognisances or debts ac- relation to have any other day. See post, IV. knowledged on statute merchant, or statute 1. and tit. Judgment. staple (pursuant to stat. 13 Ed. 1. de Mercatoribas; 27 Ed. 3. c. 9. see this Dict. those titles;) the following divisions:

goods, may all be taken at once in execution to compel the payment of the debt. The process hereon is usually called an extent or extendi facias; because the sheriff is to cause the lands, &c. to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied. F. N. B. 131.

See this Dict. tit. Extent.

By stat. 33 H. S. c. 39. all obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute-staple; though, indeed, before this statute, the king was entitled to suc out execution against the body, lands, and goods of his accountant or debtor. 3 Rep. 12. And his debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the king commenced his suit. Stat. 33 H. 8. c. 39.

The king's judgment also affects lands which the king's debt hath at or after the time of contracting his debt, or which any of his officers mentioned in stat. 13 Eliz. c. 4. hath at or after the time of his entering on the office: so that if such officer of the crown aliens for valuable consideration, the land shall be liable to the king's debt, even in the hands of a bona fide purchaser: though the debt due to the By this writ of elegit the defendant's goods king was contracted by the vendor many years after the alienation. 10 Rep. 55, 6: 8 Rep. 171. And see stat. 25 G. 3. c. 35. plication by the attorney-general by motion. to order the estate of any debtor to the king. and sale, to be inrolled in that court.

Judgments between subject and subject related, even at common law, no further back than the first day of the term in which they were recovered, in respect of the lands of the debtor; and did not bind his goods and chattels but from the date of the writ of execution; and by the statute of frauds, 29 Car. 2. c. 3. the judgment shall not bind the land in the hands of a bonâ fide purchaser, but only from the day of actually signing the same, which is directed by the statute to be punctually entered on the record; nor shall the writ of execution bind the goods in the hands of a stranger, or a purchaser (Skin. 257), but only from the actual delivery of the writ to the sheriffor other officer, who is therefore ordered to indorse on the back of it the day of his receiving the same. And now by one of the rules of H. T. 4 W. 4. all judgments shall be enter-5. Upon some prosecutions given by statute; ed of record when signed, and shall not have

The reader may pursue his inquiries under

liable thereto at Common Law, &c.

11. Of the Judgments on which the several 4 W. & M. c. 14. § 5. See tit. Fraud. Executions may be taken out, and by the Election of one of them, &c.

III. 1. By whom, against whom. 2. At what Time Executions may be sued. 3. By whom, and how they shall be executed. 1. How they are to be released and discharged.

IV. 1. To what Time Executions shall relate, so as to avoid Altenation, &c. 2. Of the King's Prerogative in respect

of Executions.

V. 1. Of the Party's Remedy against irregular Executions; 2. Of the Of. fence of obstructing Executions.

cutions, and what Things were liable thereto at Common Law, Ac.—The writs of execution at some measure, choses in action. common law were only a fieri facias on the 53. goods and chattels, and a levari facias to levy the debt or damages upon the lands and chat. estate in fee or for life (3 Co. 13); unless, pertels. The ca. su. was given by construction of the stat. 25 Ed. 3. c. 17. and the elegat, by stat. Westm. 2. c. 15. which make the body liable, and the future profits of lands, &c. I Inst. 154 .: 2 Inst. 394.

where a subject had execution for debt or das cannot, however, sell an equity of redempmages, he could not have the body of the de-'tion, for the legal estate is in the mortgagec. fendant, or his lands, in execution (unless it 3 Atk. 739: 8 East, 497: 2 N. R. 461. were in special cases), was, that the defendant's body might be at liberty, not only to follow his own affairs and business, but also to serve his king and country; and taking away the possession of his lands would hinder the following of his husbandry and tillage. 2 Inst. 394.

Though neither the body nor lands of the debtor on a judgment could be taken in execution at common law, but only his goods; vet in action of debt against an heir, upon the bond of his ancestor, his land which he had by descent was subject to be taken in execution. 3 Rep. 11. In action of debt against the heir upon his ancestor's bond, there was judgment by nihil dicit: and it was held that the plaintiff should have execution against the heir of any of his own lands or goods. Dyer, 89. 149. Judgment was had against removable by him during the term: these in the heir by nil dicit, and a scire facias being brought against him to have execution, he pleaded riens per descent; it was adjudged that this plea was too late after the judgment stranger, for he is to take the goods of the by nil dicit, and the execution shall be on his own lands. Dyer, 344.

But there is a difference between a scire facias and an action of debt brought against an heir upon a bond of his ancestor, in which the heir is named. Poph. 193. On a judgment the goods of B. under a fi. fa., the court held, for the debt of an ancestor, where the heir that though A. had assumed his name and

I. Of the Nature and several Kinds of cution may be taken against such heir to the Executions, and what Things were value of the land, &c. for the debt of his ancestor, as if it were his own debt. Stat. 3 and

If a person have judgment given against where the Party shall be concluded him for debt or damages, or be bound in a recognisance, and dieth, and his heir be within age, no execution shall be sued of the lands during the minority; and against an heir within age, no execution shall be sued upon a statute-merchant or staple, &c. 1 Inst.

No execution for damages recovered in a real action shall be had by capias ad satisfaciendum: but where a man hath judgment to recover lands and damages, he may have execution of both together. 8 Rep. 141.

Whatever may be assigned or granted may be taken on an execution. Nothing can be taken in execution that cannot be sold, as I. Of the Nature and several Kinds of Exc. deeds, writings, &c. Bank notes, &c. cannot be taken in execution, as they remain, in

The sheriff under a fi. fa. cannot sell an haps, an estate pour autre vie (Comb. 391); but he may sell leases or terms for years belonging to the defendant, and execute assignments thereof to the purchasers under his | scal of office (8 T. R. 294: 1 B. & A. 230); The reason why, by the common law, or an annuity for years. Cro. Jac. 79. He

If there are chattels sufficient, the sheriff ought not to take the lands; nor may things fixed to the freehold, goods bought bona fide, goods pawned, &c. be taken in execution. 8

Thus ranges, ovens, and set pots, affixed to a house built by a person against whom an execution has issued, cannot be taken by the sheriff under a f. fa. 1 D. & R. 247: S.C. 5 B. & A. 625.

And where mill machinery and a mill were demised for a term, and the tenant severed the machinery from the mill, without the consent of the landlord, and it was afterwards seized by the sheriff under a fi. fa. and sold by him, it was held that no property passed to the buyer under such sale. 5 B. & A. 826.

But it is otherwise as to the tenant's fixtures general are seizable. 3 East, 44: 4 Moo. 281:

1 Brod. & D. 506.

The sheriff cannot take the goods of a party only at his peril. And if a bailiff on a fi. fa. against the goods of A. take those of B., an action of trespass lies against the sheriff. Doug. 40.

In an action against the sheriff for taking hath made over lands descended to him, exe- passed as his wife, and permitted him to appear to be the owner of the furniture of the law, if a man was outlawed after judgment in house in which they both lived, such furniture debt, the plaintiff was at the end of his suit being her property, was not liable to be taken and he could have no other process after that on an execution against B. 2 Stark. 396.

the partnership effects be taken and sold, the upon process in B. R. and puts in bail; and court will order the sheriff to pay over to the afterwards the plaintiff recovers, and the deother a share of the produce, proportioned to his share in the partnership effects, to be ascertained by the master. Doug. 650. Eddie his election, take execution against the prinv. Davidson.

to satisfy his judgment, the court will order wards meddle with the principal. Cro. Jac. 320. the sheriff to retain for his use money which he has levied in an action at the suit of the the execution must be joined against them: defendant. Doug. 231. But money, the sur-the court cannot divide an execution, which plus of a former execution against the defenis entire, and grounded on the judgment. dant's goods, was refused to be stayed in the Mich. 24. Car. B. R. hands of a former sheriff, for the purpose of satisfying another execution at the suit of the of debt against the defendant 100l. and dasame plaintiff against the same defendant, who mages; then the wife died, and the husband had no other effects on which the sheriff in prayed to have execution upon this judgment: office could levy. Fieldhouse v. Croft, 4 East's the court at first inclined, that it should not Rep. 510: and see 9 East's Rep. 48.

sale of farming stock taken in execution, it is in action; but at last they agreed that the enacted that no sheriff, &c. shall sell or carry off from any lands, any straw, chaff, turnips, or manure, in any case whatever, nor any hay or other produce, contrary to the covenants to Mod. Rep. 179, 180. See tit. Buron & Feme. which the tenant is subject, of which the tenant must give notice; but shall dispose of such crops or produce subject to agreement to spend them on the land; and sheriffs are indemnified for acting under the provisions of the act.

II. Of the judgments on which the several Executions may be taken out, and where the Party shall be concluded by the Election of one of them, &c.-When a judgment is signed, execution may be taken out immediately upon executed after the death of the defendant; it, and need not be delayed till it is entered, it for his executor being privy, is bound as well is a judgment of that court walk in Westmin- supersedeas to it, nor shall any thing stop the ster-Hall, they may send an officer to take sheriff from selling, &c. Cro. Eliz. 73: him up if the plaintiff desire it, without a Comberb. 33. 389. writ of execution. 7 Mod. 52. If execution be not sued within a year and a day after yet it must be intended an execution with satisjudgment, where there is no fault in the de-liaction, and the body of the defendant is no fendant, as if writ of error be not brought, &c. satisfaction, only a pledge for the debt. 5 there must be a scire facias to revive the Rep. 486. When, therefore, a person dies in judgment, which, in that time, may be had without moving the court; but if it be of longer standing, the court is to be moved for it. 1 Inst. 290: 2 Inst. 771. But if the defendant be outlawed after judgment (as he may where he cannot be taken in execution, or hath no lands or goods to pay the debt, &c. when the suit is commenced by original), the

It hath been adjudged that, by the common

personally, but was put to his new original, If on execution against one of two partners, &c. 2 Nels. Ab. 772. If one be arrested fendant renders not himself according to law, in safeguard of his bail, the plaintiff may, at cipal, or his bail, after judgment against them; If the plaintiff cannot find sufficient effects but if he takes the bail, he shall never after-

If one recovers jointly against two in debt,

A man and his wife recovered in an action survive to the husband, but that administra-By stat. 56. G. 3. c. 50. for regulating the tion ought to be committed of it, as a thing husband might take out execution, for that by the judgment it became his debt due to him in his own right. Cro. Car. 608: 1

If judgment be against two, on the death of one the plaintiff shall have execution by scire facias against the survivor; and though he pleads that the other defendent has an heir alive, &c. it will not prevent it. Raym. 26. And where two persons recover in debt, and before execution one of them dies; it has been held that execution may be sued in both their names by the survivor, and it will be no error which may be done without a scire facias. Noy, 150. An execution may be being a perfect judgment of the court before as the testator, and where execution is once entered. Co. Lit. 505. And if the judges of begun it cannot be delayed, unless there apthe Court of B. R. see one against whom there pears irregularity; and audita querela is no

Though a man can have but one execution, execution, it is without satisfaction; so that the plaintiff may have a fieri facias against the goods, or elegit against the lands. This was not so at common law; Hob. 57; but is given by stat. 21 Jac. 1. c. 24. Where a person, however, was taken on a capias utlagatum, and died in prison, the plaintiff having chosen this execution, which is the highest in plaintiff need not renew the judgment by law, it has been held that the defendant dyscire facias to obtain execution after a year. I Inst. 290.

If a sheriff make a seizure under a writ of

fendant in execution under a writ of ca, sa, to the thing recovered, as heir, executor, or until the writ of fi. fa. is returned, though he administrator to him who has judgment. 1 abandon the seizure of the goods. Miller v. Rol. Ab. 889.

Parnel, 6 W. P. Taunt. 370.

party can have no other execution upon that and where tenant in tail recovers and dies judgment; because there can be but one exe- before the execution without issue, he in recution with satisfaction upon one judgment: but if the execution be not returned and filed, have execution for lands, and the executor or another execution may be had: and if only part of the debt be levied on a fieri facias, another writ of execution may be sued out sue out execution of a judgment; but an adfor the residue thereof. 1 Lill. Abr. 565. If ministrator getting judgment in behalf of the one take out any writs of execution, and they intestate, and then dying, neither his executor have no effect, he may have other writs on or administrator shall take out the execution, their failure. Hob. 57.

tion shall escape, any creditor at whose suit see stat. 17. Car. 2. c. 8. he stands charged may retake him by a new capias ad satisfaciendum, or sue forth any atate of an executor, recovers in debt, and other kind of execution, as if the body of such before execution the executor comes of age, prisoner had never been taken in execution. he shall have a scire facias on this judgment; Stat. 8 and 9 W. 3. c. 27. See tit. Escape. for carrying on the suit in right of the execu-Where two are bound jointly and severally, tor made the executor privy thereto. 1 Rol. and judgment is had against both of them, if Ab. 888, 889. one in execution escapes, the creditor may one in execution escapes, the creator may where after interiocutory judgment against take out execution against the other; but if a woman upon a contract, she marries, yet the glaintiff may proceed to judgment and exwill be discharged. Cro. Car. 53. If one in execution be delivered by privilege of parliament, when the privilege ceases the plaintiff faciendum against her following the judgment, may sue out a new execution against him. It is at all events regular, though the plaintiff Stat. 1 Jac. 1 c. 13.

The party for whom the judgment is given, may have a writ of fi. fa, or elegit, or lev. fa. or ca. sa. at his option; or he may have them all in succession until his judgment be satisfied; or, after suing out one, he may abandon it becomes a chattel vested, to which the exit before it is executed, and sue out another; ecutor is entitled. 1 Rol. Ab. 880. or he may even have several writs running

party and party in England, any order shall See tit. Baron and Feme. be made for payment of money by the Court of Chancery, a copy thereof shall be certified and one dies, a scire fucius lies against the into the Court of Chancery in Ireland and other alone, reciting the death: and he caninrolled there, and process issued thereon: and not plead that the heir of him that is dead has so vice versa, on order of the Court of Chan- assets by descent, and demand judgment, if he cery of Ireland, which shall, in like manner, ought to be charged alone; for at common be enforced and executed in England. § 5, 6. law, the charge upon a judgment being person-

has agreed not to issue it, or is restrained by gives the elegit, does not take away the remeinjunction; 1 Stran. 301: S. C. 2 Burr, 600; dy of the plaintiff at common law; and thereor if a writ of error be depending; 1 Mod. 20: fore the party may take out his execution C. T. Hardw. 53; which in general operates which way he pleases; for the words of the as a supersedeas from the time of its allow- statute are, fit in electione; but if he should ance, provided substantial bail be in due time after the allowance of this writ, and revival of

put in and perfected.

son is entitled to, or can sue out execution, Lev. 30: 1 Keb. 92. 123. S. C.

fieri facias, the plaintiff cannot take the de- who is not privy to the judgment, or entitled

If one have judgment to recover lands, and If an execution be executed and filed, the die before execution, his heir shall have it; mainder may sue out execution: an heir is to administrator for damages. Co. Lit. 251: Dyer, 26. The executors of executors may but the administrator de bonis non adminis-In case any prisoner committed in execu- tratis of the first intestate. 5 Rep. 9. And

But if an administrator, durante minori

Where after interlocutory judgment against had notice of the marriage before. 4 East's

Rep. 521.

If a man has judgment for the arrears of rent, and dies, his executor shall sue out execution, and not the heir; for by the recovery

If a statute be entered into, to husband and at the same time, either of the same species wife, and the husband dies, the wife shall take (Tidd, 995) or of a different species, as a fi. out execution. 1 Rol. Ab. 889. So if husfa. and a ca. sa. 6 Taunt. 370: S. C. 2 band and wife recover lands and damages and the husband dies, the wife shall have executed the call of the control of the same species wife, and the husband dies, the wife shall have executed the call of t See stat. 41 G. 3. (U. K.) c. 90. by which it cution of the damages, and not the executors is provided, that where in any suit between of the husband. 1 Rol. Ab. 342. 889, 890.

If there be judgment in debt against two, Execution cannot be sued out if the party al, survived, and the statute of Westm. 2. that the judgment, take out an elegit to charge the land, the party may have remedy by sugges-III. 1. By whom, against whom.—No per- tion, or else by audita querela. Raym. 26: I

By the common law, if judgment be given; 2. At what Time Executions may be sued .against a man for debt or damages, and the At common law in real actions, where land defendant dies before execution sued, his heir was recovered, the demandant, after the year, within age is not liable to execution during might take out a scire facias to revive his his minority; but the parol must demur i. e. the plea must stand still) in such case till he ticular in the real action, quoad the lands with comes of age. Co. Lit. 290. a.: 1 Rol. Ab. a certain description, the law required that 140.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as if there be father, and two daughters, and judgment be given for debt against the father, who dies, one of the should not be. 2 Inst. 471: 5 Co. 88: Cro. daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution. quiet, and had taken no process of execution Co. Lit. 290. a.

There can be no execution taken out against a member of parliament during privilege of parliament: also no capias can issue against a peer; for even in the case of a private personal action, with which the execusion at common law, the body was not liable to creditors; and the statute of Ed. 3. which subjects the body does not extend to peers, because their persons are sacred: the law also supposes that persons thus distinguished by the three should not be execution; but if the party land the sacred is the sacred in the personal action, with which the execusion and the law also loved him no scire facias to show cause why supposes that persons thus distinguished by the king have wherewithal otherwise to satisfy had slipped his time he was put to his action

ted upon a prisoner in prison for felony; and judgment was an evidence, was discharged. 2 if he be acquitted of the felony, the sheriff is to Inst. 469: Carth. 30, 31: 1 Sid. 351. keep him. 1 Lil. Ab. 567. But where a person is in prison for criminal matters, he ought proceeding more uniform in both actions, the not to be charged with a civil action without stat of Westm. 2. c 45. gave the scire facias to leave of the court: yet if he be charged, he the plaintiff to revive the judgment, where he shall not be discharged. Raym. 58. See 7 Mod. 153. and this Dict. tit. Prisoner.

A ca. sa. will lie against a man who is outlawed for felony, and he may be taken ment; for the words of the act are, Sive serviin execution at the suit of a common per- tia, sive consuetudines, sive alia quecunque irson. Owen, 69. And if he was taken upon rotulata, which comprehends all judgments and a capias utlagat. which was at the king's suit, give the like remedy on them by scire facias, as he shall be in execution at the suit of the demandant had on a jugdment in a real acparty if he will. Moor, 566. But this is not tion at common law. 1 Sid. 351: 2 Salk. 600. prayer of the party: and if after judgment But though the general rule be that the given, the judges of their own heads, or at the plaintiff cannot take out execution after the request of any person, without prayer of the year and day without a scire facias, yet the plaintiff, commit the defendant to prison; by this he shall not be said to be in execution for the plaintiff. Dyer, 297. If one arrested be in prison for debt, and judgment is had against him; though it be in arrest on a latitat or capias, he shall not be in execution upon the judgment, unless the plaintiff prays it of record, or sues a capias ad satisfaciendum, and if the judgment had been revived by scire fadelivers it to the sheriff. Dyer, 167. 306: cias. N. on R. E. 5 G. 2. But a fi. fa. must Jenk. Cent. 165.

ried before trial, and verdict and judgment sheriff. Imp. K. B. against her by her original name: held that it was regular to issue an habere facias pos- thereby hinders the plaintiff from taking his sessionem, and fi. fa. against her by the same execution within the year, and the plaintiff in name, though the latter was inoperative. Doe, error is nonsuit, or the judgment affirmed, the d. Taggart, v. Butcher, Term Rep. K. B .: defendant in error may proceed to execution Hill. 55 G. 3. 557.

Vol. I.—90

judgment; because the judgment being parthe execution of that judgment should be entered upon the roll, that it might be seen whether execution was delivered of the same thing of which judgment was given: a scire facius issued to show cause why execution Eliz. 416: 6 Mod. 283.

But if the plaintiff, after he had obtained judgment in any personal action, had lain within the year, he was put to a new original upon his judgment, and no scire facias was isuable at law on the judgment, because there was not a judgment for any particular thing their creditors. 6 Co. 52: Hob. 61: Cro. Car. 205. on the judgment, and the defendant was A capias ad satisfaciendum may be execu-obliged to show how that debt of which the

To remedy this, and to make the forms of had omitted to sue execution within a year

after judgment obtained.

A scire facias lies on a judgment in eject-

rule must be understood with some restric-

If a fi. fa. ca. sa. or elegit be taken out within the year, and returned and awarded on the roll, the same may be continued from term to term to the time of the execution thereof, although after the year; and be as effectual as be left with the proper officer before he will In ejectment against a feme sole who mar- make the entry on the roll returned by the

If the defendant brings a writ of error, and after the year without a scire facias, because

the writ of error was a suparsedeas to the ex-|between the terms; for the four days' rule for ecution, and the plaintiff must acquiesce till judgment (which in all cases of a general verhe hears the judgment above; besides while dict, must have been entered and have expired the cause is still sub judice, it is not known whether the plaintiff shall recover or not, and the year for the execution ought to be accounted from the final judgment given. Cro. Jac. 364: Yelv. 7. 1 Rol. Ab. 899: 4 Leon 197: 5 Co. 88: Carth. 236, 237: 6 Mod. 288.

The court refused to stay execution after verdict and judgment, which was affirmed on error, until the trial of an indictment for perjury against two of the plaintiff's witnesses in the action. Warwick v. Bruce, Term Rep. K.

B. East. 55: G. 3. 140.

Leave refused to take out an execution, after a writ of error, where it did not appear but that the declaration of the defendant, that he would sue out a writ of error and delay the plaintiff was made before an action pending. An affidavit for grounding a rule for leave to take out execution, notwithstanding a writ of error may be sworn before judgment signed. Baskett v. Barnard, Term Rep. K. B. Trin. 55

If the plaintiff hath a judgment, with stay of execution for a year, he may after the year, take out his execution without the scire fa- of the day on which the judgment shall be cias, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it when it appears to be done for his advantage, and at his instance.

6. Mod. 288: 1 Rol. Rep. 104.

But if the defendant had been tied up by an injunction out of Chancery for a year, yet he cannot take out execution without a scire facias, because the courts of law do not take notice of Chancery injunctions as they do of writs of error; besides in that case it had been no breach of the injunction to have taken out the execution within the year, and continued it down by vic' non misit breve, which cannot be done in the case of a writ of error, because that removes the record out of the court where the judgment was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts. 1 Salk. 322: 6 Mod. 288. S. C.

In debt, if defendant acknowledge the action for part, and as to the remainder pleads to issue, and the plaintiff hath judgment for that he confesseth; here he may not have execution till the issue is tried for that which he is to recover damages: though if he releases the damages he may have execution presently for

the rest. Rol. 887.

When a defendant on an indictment for a misdemeanor has received judgment of fine and imprisonment, a lev. fac. may issue immediately, to take his goods in execution for the day of the return of such writ, unless the court fine. 2 B. & A. 609.

Formerly if a cause was tried, and a verdict obtained, in vacation the judgment and execu- 4 c. 67. after the return of a writ of inquiry, tion were delayed by reason of the interval judgment may be signed at the expiration of

previous to the judgment) could not have been so entered until on or after the first day of the following term. Also in case of a nonsuit in vacation, judgment could not, in any case, have been signed until on or after the first day of the term.

But now by the 1 W. 4. sess. 2. c. 7. § 2. the judge who tried the cause may, in case of a nonsuit, or of a verdict for either party, certify under his hand, on the back of the record, at any time before the end of the sittings or assizes, that, in his opinion, execution ought to issue forthwith, or at some day to be named in such certificate, and subject, or not, to any condition or qualification; and in case of a verdict for plaintiff, then either for the whole, or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the postea, with such certificate as a part thereof, shall and may be entered of record as signed, although the distringus juratores, or habeas corpora juratorum, may not be returnable until after such day, provided that the party entitled to such judgment may, if he think fit, postpone the signing thereof. Sect. 3. enacts that the judgment may be entered and recorded as the judgment of the court, although the court may not be sitting on the day of signing it; and that every execution issued under the act shall bear teste on the day it is issued. Sect. 4. provides that the court may afterwards vacate such judgment, or stay or set aside the execution, or arrest the judgment, or grant a new trial as justice may appear to require; and thereupon the party affected by such execution may be restored to all he has lost thereby in the same way as on the reversal of a judgment by writ of error, or otherwise, as the court may direct.

Also by the above statute, § 1. writs of inquiry may be made returnable on any day in term or vacation, final judgment signed, and execution issued forthwith unless the shcriff or other officer, before whom the same may be executed, shall certify that judgment ought not to be signed until the defendant has had an opportunity to apply to the court to set aside the execution of such writ, or a judge shall stay proceedings until a day named, provided in case the signing of judgment be postponed by such certificate or order, or by the choice of the plaintiff, or otherwise, the judgment shall be entered of record as of the

By one of the general rules of H. T. 2 W.

four days from such return, and after a ver- not be done afterwards; if it be, trespass or dict or nonsuit on the day after the appear-false imprisonment lies. 5 Rep. 93: 12 Car. ance day of the return of the distringas or B. R. See tit. Sheriff. haheas corpora, without any rule for judg-

shall not be necessary that any writ of execu-tion should be signed: but no such writ shall allows to a man's habitation, arises from the be sealed till the judgment paper postea, or inquisition, has been seen by the proper officer.

were formerly to be executed in the peculiar his officers in this respect; hence, every man's jurisdictions where given, and could not be removed to be executed by the superior courts. Cro. Car. 34.

But by stat. 19 G. 3. c. 70. § 4. where final judgment shall be obtained in any suit in any inferior court of record, any of the courts at Westminster, on affidavit thereof, and that execution has issued against the defendant's person or effects, and that they are not to be found within the jurisdiction of such inferior court, may cause the record of the judgment to be removed into such superior court, to issue execution thereon in the same manner as in judgment obtained in the said superior

If a judgment given in another court be affirmed or reversed for error in B. R., because the proceedings in the court below are entered upon record in the King's Bench, the party shall have execution in that court. 5 Rep. 88. But where a writ of error is brought in the Exchequer-Chamber, to reverse a judgment in B. R., if the judgment is affirmed there, yet that court cannot make out execution upon the judgment affirmed; but the record must be transmitted back to the Court of King's Bench, where execution must be done. 1 Lill. 565. See tit. Error.

As an execution is an entire thing, he who begins must end it; a new sheriff may dis- look upon the house as belonging to the train an old one to sell the goods on a distrin- tenant, but to him who has recovered. 5 Co. gas nuper vicecom' and to bring the money 91. into court, or sell and deliver the money to the new sheriff; and the authority of the old value according to the return; likewise by the if after request made by the sheriff to B. to seizure the property of the goods, &c. is dideliver these goods, he refuses, the sheriff may vested out of the defendant, and he is diswell justify the breaking and entering his charged, whereby no further remedy can house. 5 Co. 93. a.: 1 Sid. 186. be had against him. 1 Salk. 322: 3 Salk. 159. 5thly. It hath been adjudged

upon a writ of capias ad satisfaciendum for the whole debt upon a fieri fac. according to dwelling-house, without requesting the owner the sum levied; and on an elegit it is held by to open the door; in the same manner as he some, that he shall have fees according to may enter a close, &c. 1 Sid. 186: 1 Keb. what is levied, and by others, for the whole 698. S. C. debt recovered, because the plaintiff may keep 611. the land till he is satisfied the entire debt. 1 or his officers are once in the house, they Salk. 333. Where the sheriff hath a fieri fa-cias or ca. sa. against a man, and before exe-cution he pays him the money, execution may

87.

It is laid down as a general rule in our books, that the sheriff, in executing any judi-By another rule of the same term, r. 75. it cial writ, cannot break open the door of a great regard the law has to every man's safety and quiet, and therefore protects them from 3. By whom, and how they shall be executhe inconveniences which must necessarily ted.—All judgments of inferior courts in debt attend an unlimited power in the sheriff and house is called his castle. 5 Co. 91, &c.: 3 Inst. 162: Moor, 668: Yelv. 28: Cro. Eliz. 908: Dalt. Sher. 350.

Yet in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonweakh are concerned, this general case has the following exceptions:

1st. That whenever the process is at the suit of the king, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 Co. 91. b.

2dly. An outer door may be broken after demand made of admission, in execution of a warrant of commitment from the Speaker of the House of Commons of a member to the Tower for a breach of privilege, this being process of contempt. Burdett v. Abbott, 14 East, 1: 4 Taunt. 401.

3dly. So in a writ of scisin or habere facias possessionem in ejectment, the sheriff may justify breaking open the door if denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently the sheriff must have all power necessary for this end: besides, in this case, the law does not, after the judgment,

4thly. Also this privilege of a man's house relates only to such execution as affects himsheriff continues by virtue of the first writ, so self; and therefore if a fieri facias be directed that when he hath seized, he is compellable to the sheriff to levy the goods of A., and it to return the writ, and liable to answer the happens that A.'s goods are in the house of B.,

5thly. It hath been adjudged that the she-A sheriff shall have his fees for executions riff, on a fieri facias, may break open the door of a barn, standing at a distance from the

house, the door being open, and the owner releaseth the judgment, the body shall be dislocks them in, the sheriff may justify break-charged of the execution. And if the plaining open the door for the setting at liberty the tiff after judgment releaseth all demands, the bailiffs; for if, in this case, he were obliged to execution is discharged. *Ibid.* Where one stay till he could procure a homine replegianis in execution at my suit, and I bid the shedo, it might be highly inconvenient; also it riff let him go; this is a good discharge and seems that, in this case, the locking in the release both to the party and sheriff. Poph. bailiffs is such a disturbance to the execution, 207. that the court will grant an attachment for it. Palm. 52: Cro. Jac. p. 555. S. C.: 2 Rol. Rep.

In execution of criminal process against a party guilty of a misdemeanor, a demand; must be made before an outer door can be broken. Query, whether this is necessary in case of felony? Lannock v. Brown, 2 Barn. Lannock v. Brown, 2 Barn. East's Rep. 243. See tit. Debtors.

the party has no other remedy but an action may have the same. 5 Rep. 86: Dyer, 152. of trespass against the sheriff. 5 Co. 93. a. If one of two defendants taken on a joint

A sheriff finding the doors open may enter a house to search for the body of a debtor, under a writ of cap ad satis. 4 W. P. Taunt. 619. And he may break inner doors of the defendant's house if the defendant is there, and as it seems on reasonable suspicion that he is there. 3 Bos. & Pull. 223. But he cannot on mere suspicion justify breaking the doors of the house of a stranger under civil before judgment. 7 East's Rep. 330. process. 6 Taunt. 246: 2 Mos. 207.

writ, this is a contempt to the court, for which plaintiffs after verdict became alien enemics. an attachment will be granted. 1 Salk. 323. 9 East's Rep. 324.

So if he executes the writ, and makes a false return, the party injured may have an in prison for a year in execution on the judgaction on the case against him. 1 Salk, 323.

seizure of goods under a fi. fa. last delivered 201, may be discharged on application to the to him, yet the plaintiff in a fi. fa. first delivered to the sheriff is entitled to be first satis- future estate remaining liable. fied out of the fruits of that seizure. And if a second fi. fa. be delivered to a sheriff after he has the defendant's goods in possession of a nonsuit, not amounting to 201., is enunder the prior fi. fa. of another, the goods titled to his discharge under the above act. are bound by the second execution, subject to Roylance v. Hauling, Term Rep. K. B. Mic. the first execution, from the date of the d li- 55 G. 3. 282. very of the last writ to the sheriff; and that without warrant on the second writ, or further any part of his weekly allowance in a spuri-

charged.—By a release of all suits execution by his acceptance of such spurious coin bind is gone; for no one can have execution with- a prisoner. 7 Taunt. 7. out prayer and suit, but the king only, in whose case the judges ought to award execution ex officio, without any suit: and a release of all executions bars the king. By release late, so as to avoid Alienation .-- Writs of exeof all debts or duties, the defendant is dis-cution bind the property of goods only from charged of the execution, because the debt or the time of the delivery of the writs to the duty on which it is founded is discharged: sheriff; who, upon receipt thereof, indorses but if the body of a man be taken in execu- the day of the month when received: but tion, and the plaintiff release all actions, yet land is bound from the day of the judgment. he shall remain in execution. Co. Lit. 291. Stat. 29 Car. 2. c. 3: Cro. Car. 149. But the

7thly. So if the sheriff's bailiffs enter the the defendant taken in execution, the plaintiff

A defendant cannot be taken in execution twice on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again if he failed to comply with the terms agreed on, which he did. Blackburn v. Stupart, 2

But if the plaintiff make a release to the If the sheriff, in executing a writ, breaks defendant being in execution, or other act open a door, where he has no authority for so doing by law, yet the execution is good, and discharge ipso facto, but by this means he

If one of two defendants taken on a joint ca. sa. be discharged under an insolvent act, that will not operate as a discharge of the other. 5 East's Rep. 147.

A defendant superseded for not being charged in execution within two terms after judgment, cannot be again arrested and taken in execution upon the same judgment. Aliter if superseded for want of proceeding in time

The court will not stay judgment and exe-If the sheriff refuses to execute any judicial cution on a summary application, because the

By stat. 48 G. 3. c. 123. persons having lain ment of any court whatever, whether of record Although a sheriff make a warrant and or not, for any debt or damages not exceeding courts at Westminster in term time; their

A plaintiff who has lain in prison more than a year under an execution for the costs

If a creditor pay a defendant in custody scizure. Jones v. Atherton, 7 W. P. Taunt. 56. ous or foreign coin (e.g. French), he is en-4. How they are to be released and dis- titled to his discharge. And a turnkey cannot

See further tit. Insolvent Debtors.

IV. 1. To what time Executions shall re-If a judgment is given in action of debt, and judgment must be docketed according to the

directions of stat. 4 and 5 W. & M. c. 20. by | A fieri facias being executed fraudently, a which, for the greater security of purchasers, fieri facias at the suit of another person afterit is enacted, that no judgment not docketed, wards shall stand good, and be preferred; and entered shall affect any lands or tene- and on trial, it is a matter proper to be left to ments as to purchasers or mortgagees, or have a jury. 1 Wils. 44. any preference against heirs, executors, or administrators, in their administration of their same defendant are delivered to the sheriff on ancestors, testators, or intestate's estates. By different days, and no sale is actually made of one of the general rules of H. T. 4 W. 4. the defendant's goods, the first execution must made in pursuance of 3 and 4 W. 4. c. 42. all have the priority, even though the seizure was judgments, whether interlocutory or final, first made under the subsequent execution. 1 shall be entered of record of the day of the Term Rep. 729. But where the sheriff has month and year, whether in term or vacation given a bill of sale to the person claiming unwhen signed, and shall not have relation to der the second execution, this entitles the latany other day. Provided that it shall be com-ter to secure his debt, and the sheriff is liable petent for the court or a judge to order a to the plaintiff who delivered the first writ. judgment to be entered nunc pro tunc. See Ibid. 731. further, tit. Judgment.

The plaintiff takes out execution by fieri defendant hath by purchase after judgment; facias against the defendant: all the goods although he sell the same before execution. and chattels that he had at the time of the execution will be liable to it: and where debt or damages are recovered, the plaintiff shall have execution of any land the defendant had at the time of the judgment; not of the lands he had the day when the first writ was purchased. Rol. Ab. 892. By stat. 29 Car. 2. c. 3. sheriffs may deliver in execution all lands whereof others shall be seised in trust for him against whom execution is had on a at the time of the execution of the writ, for it does not relate back to the judgment. Com.

Rep. 226.

The sale of goods for a valuable consideration, after judgment, and before execution is awarded, is good. And if judgment be given against a lessee for years, and afterwards he selleth the term before execution, the term assigned bona fide is not liable; also if he assign it by fraud, and the assignee sells it to another for a valuable consideration, it is not liable to execution in the hands of the second assignee. Godb. 161: 2 Nels. Abr. 783. If a person has a bill of sale of any goods in nature of a security for money, he shall be preferred for his debt to one who hath obtained a judgment against the debtor before those goods are sold; for, till execution lodged in the sheriff's hands, a man is owner of his goods, and may dispose of them as he thinks Preced. Ch. 286. But where a man generally tion filed or delivered, or judgment by default, keeps possession of goods after sale, it will confession, or nil dicit, in any action commake the same void against others, by the menced adversely, and not by collusion for the Preced. Ch. 286. But where a man generally statute of fraudulent conveyances. goods, by agreement, was to have the possesanother got judgment against the same person, and took those goods in execution: it was adjudged they were liable, and that the first execution was by fraud, and void against any there is an execution against goods or chattels, subsequent creditor; because there was no of a tenant for life, or years, the plaintiff bechange of the possession, and so no alteration fore removal of the goods by the execution is of property. Ibid. 287. See tit. Fraud.

Where two writs of fieri facias against the

Execution may be made of lands that the

Roll. 892.

By the Bankrupt Act 6 G. 4. c. 16. § 81. executions levied two calendar months previous to a commission of a bankrupt being sucd out are valid, notwithstanding a prior act of bankruptcy, provided the parties at whose suit they are levied had no notice of such act of

bankruptey.

By § 108. "no creditor having security for his debt, or having made any attachment in judgment, &c.; but such only as are so held London or in any other place by virtue of any custom there used of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by scizure upon or any mortgage of, or lien upon any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." For decisions upon the former part of this clause see 5 B. & C. 392: 6 B. & C. 479: 8 B. & C. 160. 444

The latter portion has been materially altered by the 1 W. 4. c. 7. § 7. which enacts that no judgment signed, or execution issued fit, and they are not bound by the judgment. on a cognovit actionem, signed after declarapurpose of fraudulent preference, shall be where, on an execution, the owner of the within the 6 G. 4. c. 16. § 108. Judgments, or executions on warrants of attorney, or cogsion of them upon certain terms; afterwards novits, &c. where the action is not commenced adversely, are still within its operation. 4 B. & Ad. 87.

The stat. 8 Anne, c. 14. directs that where to pay the landlord the rent of the land, &c more be due, paying a year's rent, the plain- under it; but if the lands were aliened in tiff may proceed in his execution, and the whole, or in part, as by granting a jointure sheriff shall levy the rent paid, as well as the before the debt contracted, such alience claims

execution money.

But a ground-landlord cannot come in for a year's rent in the case of an execution against an under lessee; for the statute only extends to the immediate landlord. Str. 787. And the landlord must give the sheriff notice, or he is not bound. 1 Str. 97: vide 2 Wils. 140.

But if a sheriff knowing that rent is due to the landlord proceeds to sell the tenant's goods under a fi. fa. without retaining the year's rent, he is liable to the landlord for it under this statute, although no specific notice has been given him by the landlord that such rent is due to him. 3 B. & A. 645: See also 2 B. & B. 67. S. C.: 4 Moore, 473.

And where under this statute the sheriff had retained the year's rent, the court on motion ordered such rent to be paid to the landlord, though notice was not given to the sheriff until after the removal of the goods from the premises. 3 B. & A. 440. See 5 B. & A. 88: 6 Price, 19; 7 Price, 566.

A claim on the part of the landlord may be supported for beforehand rent, or rent stipulated to be paid in advance, as being rent due under the statute at the time of the seizure. 7 Price, 670.

But the landlord of premises on which goods have been seized under an extent in aid is not entitled under this statute to call on the sheriff to pay a year's rent due before the teste of the writ. 2 Price, 17.

By the 11 G. 4. and 1 W. 4. c. 11. the provisions of the above act are extended to cases of goods attached by writs of pone per vadios, or writs of extract thereon, issuing out of the

eourts in the county of Durham.

2. Of the King's Prerogative in respect of Executions.—The king, by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election. Hob. 60: 2 Inst. the usual method.

19: 2 Rol. Ab. 472.

same relates to the time of the awarding thereof, which is the teste of the writ, as it was in the case of a common person at law; for though by the 29 Car. 2. c. 3. no execution shall bind the property of goods, but from the time of the delivery of the writ to the sheriff; yet as this act does not extend to the king, an extent of a later teste supersedes an execution of the goods by a former writ; because by the king's prerogative at common law, if there had been an execution at the subject's suit and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to private property. 2 New Abr. 365.

binds the lands of the debtor, into whose hands damages is shown. 1 Chit. Rep. 134. soever they come, because it is in the nature of an original charge upon the land itself, and money is levied and paid, and the judgment

so as there be not above a year due; and if | therefore must subject every body that claims prior to the charge, and in such case the land is not subject. See 2 Rol. Ab. 156, 157: Moore, 126: 3 Leon. 239, 240: 4 Leon. 10.

Execution for the king's debt, or prerogative execution, is always preferred before any other executions. 7 Rep. 20. And if a defendant is taken by capias ad satisfaciendum, and before the return thereof, a prerogative writ issues from the Exchequer, for the debt of the king, tested a day before he was taken, here he shall be held in execution for the king's debt and that of the subject. Dyer, 197. Lands entailed in the hands of the issue in tail, when subject to the king's extent, and where not, see 7 Rep. 21. See also this Dict. tits. King, Extent.

Process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to have priority within 33 Hen. 8. c. 39. § 74. before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process: the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. Butler v. Butler, 1 East, 338: Att. Gen. v. Aldersey, Mich. 1786. S. P. ib.

V. 1. Of the Party's Remedy against irregular Executions .-- A defendant cannot plead to any writ of execution (though he may in bar of execution to a scire facias brought;) but if he hath any matter after judgment to discharge him of the execution, he is to have audita querela. Co. Lit. 290. Or, move the court for relief, which is now

If the writ of execution be irregular, the As to the king's execution of goods, the defendant may move the court to set it aside, 1 Bing. 171. 190.) and discharge him out of custody if taken on a ca. sa. &c.; or that the goods or money levied on a ft. fa. &c. may be restored to him. But the plaintiff is only bound to repay the sum which has been properly paid by the defendant. 2 D. P. C. 33. A third person whose goods are taken under a fi. fa. may also move the court to have them restored. But if the right be not clear, the court will leave him to his action against the sheriff: or they will sometimes direct an issue for trying it, and retain the money in court to abide the event. On setting aside a judgment and execution for irregularity, the court will restrain the defendant from bringing an If the king's debt be prior on record, it action of trespass, unless a strong case for

Where the plaintiff has execution, and the

afterwards reversed, the party shall have resti- | the sheriff; the sheriff, on receipt of this wartution without a scire facias; because it appears on the record that the money is paid, and there is a certainty of what was lost:

London, the recorder, after reporting to the otherwise, where it was levied, but not paid; king in person the case of the several prisonotherwise, where it was levied, but not paid, and receiving his royal pleasure that the the matter of fact, viz. the sum levied, &c. I have must take its course, issues his warrant to the sheriffs, directing them to do execution for irregularity, there needs no sci. fa. for restitution; but if it be not made, an attachment shall be granted upon the rule for a contempt. 2 Salk. 588: Tidd's Pract.

An execution sued out against the goods of a defendant was set aside, the defendant having been, pending the action, discharged under the Insolvent Debtor's Act; and the proceeding being considered reprehensible, costs were

given. 8 Price, 607.

2. Of the Offence of obstructing Executions. -There were anciently castles, fortresses, and liberties, where they resisted the sheriff in executing the king's writs, which creating great inconvenience, the statute of Westm. 2. c. 39. (13 Ed. 1.) hindered the sheriff from returning rescuers to the king's writ of execution, and directed him to take the posse comitatus. See the stat. and 2 New Abr. 368.

The judges construed the words of the statute to extend only to executions, and not to writs on mesne process; that the sheriff was not obliged to carry the posse comitatus where the man was bailable, for they did not presume that in such cases the king's writ would be disobeyed. 2 New Abr. 368.

The original of commitment for contempts seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges who awarded such process must have the same authority to vindicate it; hence, if any one offers any contempt to his process, either by word or deed, he is subject to imprisonment during pleasure, viz. from whence they shall not be delivered without the king's special commandment. 2 New Abr. 368. See tits. Debt, Error.

See further, as to Executions in civil cases, Com. Dig.: Bac. Ab. by Gwillim and Dodd,

that title, &c.

Execution of Criminals, must in all cases, as well capital as otherwise, be performed by the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as is still practised in the court of the lord high steward upon the execution of a peer. 2 Hale, 409: Co. P. c. 31. Though in the court of the peers in parliament it is done by writ from the king; afterwards it was established, that in case of life, before justices of gaol delivery or commissioners of oyer and terminer, the judges may command execution to be done without any writ. Finch, 478. And now the usage is for the judge to sign the calendar, a list of all the prisoner's names, with the separate judgments in the margin, which is left with execution shall be had; but if he deny it, and

In the case of Ferrers, it was resolved, by all the judges, that if a peer convicted of murder before the lords in parliament, and the day appointed by them for execution pursuant to the statute should elapse before such execution or decree, a new time may be appointed for the execution, either by the high court of parliament before which such peer shall have been attainted, or by K. B., the parliament not sitting, the record of attainder being properly removed into that court. Fost. C. L. 140.

And the Court of K. B. may command execution to be done in all cases without any other writ or warrant but an award of the court upon the judgment. 2 Hale's Hist.

It is held by Coke (3 Inst. 52.) and Hale (2 H. P. C. 272. 412.) that even the king cannot change the punishment of the law, by altering hanging (or burning when used) into beheading; though, when beheading is part of the sentence, the king may remit the rest. And notwithstanding some examples to the contrary, Coke maintains that judicandum est legibus non exemplis. But others have thought, and more justly, that this prerogative being founded in mercy, and immemorially exercised by the crown, is part of the common law. Fost. 270: F. N. B. 244. b.: 19 Rym. Fæd. 284. For hitherto, in every instance, all these exchanges have been far more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons (viz. by remitting a severer kind of death, on condition that the criminal submits to a milder), is a matter that may bear consideration. 4 Comm. 404. There are ancient precedents wherein men condemned to be hanged for felony have been beheaded by force of a special warrant from the king. Bract. 104: Staundf. 13.

Subsequent justices have no power by the stat. 1 Ed. 6. c. 7. to award execution of persons condemned by former judges; but if judgment has not been passed on the offenders, the other justices may give judgment, and award execution, &c. 2 Hawk. P. C. Execution ought to be in the same county where the criminal was tried and convicted; except the record of the attainder be removed into B. R., which may award execution in the county where it sits. 3 Inst. 31. 211. 217: 2 Hawk.

P. C. c. 51. § 2.

If, upon a record removed, an outlawed person confess himself to be the same person, the king's attorney confesses he is not, he shall ! is either capital or consists in dismembering, he discharged; though if the attorney general it shall not be inflicted in places south of the take issue upon it, the same shall be tried. 2 Forth, in less than 30 days, and north of the Hale's Hist. P. C. 402, 463. If a person, Forth, in less than 40 days after judgment. when attainted, stands mute to a demand why execution shall not go against him, the ordinary execution shall be awarded. 2 Hawk, ry, the latter (as to which, see this Dict. tit. P. C. In case a man condemned to die, come | Pardon) is permanent. to life after he is hanged, as the judgment is not executed till he is dead, he must be hung again. Finch, 389: 2 Hal. P. C. 412: 2 Hawk. P. C.: 4 Comm. 406. And so was the law of old; for if a criminal thus escaped and fled to a sanctuary, he was not permitted to abjure the realm. Fitz. Ab. tit. Coroner, 335.

It was determined by the twelve judges, Mich. 10 G. 3. that, except in the case of murder, the time and place of execution are by law a part of the judgment. 4 Bl. Com. 404. And see now as to murder, 9 G. 4.c. 31. and

2 and 3 W. 4. post.

The body of a traitor or felon is forfeited to the king by the execution; and he may dispose of it as he pleases. The execution of persons under the age of discretion is usually respited, in order to obtain a pardon. 1 Hawk.

P. C. c. 1. § 8.

murder shall be executed the next day but one after that on which sentence is passed, unless that happen to be Sunday, and in that case on the Monday following, and the body be dissected or hung in chains, and sentence shall be pronounced immediately after conviction, unless the court see reasonable cause for postponing it, and such sentence shall express not only the usual judgment of death, but also the time appointed for the execution thereof, and that the body shall be dissected or hung in chains, but the court or judge after sentence may stay the execution.

By § 2. offences, which before the act would have amounted to petit treason, shall be deemed murder only, and be dealt with, indicted, tried, and punished as cases of murder. See further, this Dict. tit Felony, Homicide, Trea-

By the Anatomy Act, 2 and 3 W. 4. c. 75. § 16. so much of the above statute as orders the bodies of persons convicted of murder to be dissected, is repealed, and it is enacted, that in every case of conviction for murder the court shall direct the prisoner either to be hung in chains, or to be buried within the pri- cannot demand such respite of execution by son where he is confined; and that the sen- reason of her being quick with child more than tence pronounced shall express whichever of once; and that she can neither save herself by the two the court shall order.

of several culprits convicted of atrocious murders have been hung in chains; but the exhibition has become so repugnant to the feelings of the people, that it is not probable it will be

repeated.

To enable the crown to extend its clemency to criminals in Scotland, it is provided by stat. 11 G. 1 c. 26. § 10. that where the punishment offender become non compos between the judg-

Execution may be avoided by a reprieve or a pardon, whereof the former is only tempora-

A REPRIEVE, from reprendre to take back. or more immediately from the participle renris, is the withdrawing of the sentence for an interval of time, whereby the execution is suspended. This may be ex arbitrio judicis, either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient; or sometimes, if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commissions expired; but this rather by common usage than of strict right. 2. Hal. P. C. 412.

Every judge who has power to order execu-By 9 G. 4. c. 31. § 34. persons convicted of tion has power to grant a reprieve; and execution is often stayed on condition of transportation. See stat. 8 G. 3. c. 15. for a power given to judges of assize to reprieve for the purpose of obtaining a conditional pardon. And as already stated by the 9. G. 4. c. 31. § 34. the court or judge after sentence may stay the execution. See also this Dict. tits. Transportation, Felony, Clergy. 2 Hawk. P. C. c. 51. But no prisoner convicted of a capital felony at the sessions at the Old Baily for London and Middlesex, &c., ought to be reprieved but in open sessions; and reprieves are not to be granted otherwise but by the king's express warrant. Kel. 4.

Reprieves may also be ex necessitate legis. If a woman quick with child be condemned either for treason or felony, she may allege her being with child in order to get the execution respited; and thercupon the sheriff or marshal shall be commanded to take her into a private room, and to impanel a jury of matrons to try and examine whether she be quick with child or not; and if they find her quick with child the execution shall be respited till her delivery. But it is agreed, that a woman this means from pleading upon her arraign-Since the passing of the latter act the bodies ment, nor from having judgment pronounced against her upon her conviction. Also it is said, both by Staundford and Coke, that a woman can have no advantage from being found with child unless she be also found quick with child. 2 Hawk. P. C.c. 51. § 9,

Another cause of regular reprieve is if the

receive judgment; if after judgment, he shall ought, the judges of the court may amerce not be ordered for execution: for the law him. New Nat. B. R. 43. See Execution, knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is, therefore, an invariable rule, when any time intervenes be- out of the Chancery to execute a judgment in tween the attainder and the award of execu-tion, to demand of the prisoner what he hath brought to remove the record, and reverse the to allege why execution should not be award- judgment; if he that brings the writ of error ed against him, and if he appears to be insane, do not take care to have the record transcribthe judge, in his discretion, may and ought to ed, and the writ of error returned up in duc reprieve him.

By 39 and 40 G. 3. c. 94. in all cases where it shall be given in evidence on the trial of executive power of these kingdoms is vested, any person tried for treason, murder, or felo- by our laws, in a single person, the king or ny, that such person was insane at the time queen, for the time being. 1 Comm. 190. &c. of committing the offence, if the jury find that See tit. King such person was insane at the time of committing the offence, the court shall order such man's last will and testament to perform or

pleasure shall be known.

The party may also plead in bar of execution; which plea may be either pregnancy of the will: he answers to the heres designatus, which above), the king's pardon, an act of or testamentarius in the civil law, as to debts, grace, (see tit. Pardon); or, lastly, diversity goods, and chattels of his testator. Terms de of person, viz. that he is not the same that was attainted, and the like. In this last case a jury shall be impannelled to try this collateral issue, namely, the identity of his person, and not whether guilty or innocent, for that has been decided before; and in these collateral issues the trial shall be instanter, and no time allowed the prisoner to make his defence, or produce his witnesses, unless he will make oath that he is not the person attainted. 1 Sid. 72: Fost. 42. Neither shall any peremptory challenges of the jury be allowed the prisoner; though formerly such challenges were held to be allowable whenever a man's life was in question. 1 Lev. 61: Fost. 42. 46: Staundf. P. C. 163: Co. Lit. 157: Hal. Sum. See Trial, II.

EXECUTIONE FACIENDA, is a writ commanding execution of a judgment, and diversely

used. Reg. Orig.

EXECUTIONE FACIENDA IN WITHERNAMIUM.

See tit. Replevin.

EXECUTIONE JUDICII, is a writ directed to the judge of an inferior court to do execution upon a judgment therein, or to return some reasonable cause wherefore he delays the execution. F. N. B 20. If execution be not done on the first writ, an alias shall issue, and a pluries with this clause, vel causam nobis significes, quare, &c. And if upon this writ execution is not done, or some reasonable cause returned why it is delayed, the party shall have an attachment against him who ought to have done the execution, returnable in B. R. or C.

ment and the award of execution. 1 Hal. P. B. New Nat. Br. 43. If the judgment be in C. 370. For regularly, though a man be a court of record, this writ shall be directed to compos when he commits a capital crime, yet the justices of the court where the judgment if he becomes non compos after, he shall not was given, and not unto the officer of the be indicted; if after indictment, he shall not court; for if the officer will not execute the be convicted; if after conviction, he shall not writs directed unto him, nor return them as he III. 3. and the stat. 19 G. 3. c. 70. there mentioned.

One may have a writ de executione judicii time. 1 Lil. Abr. 562.

EXECUTIVE POWER. The supreme

EXECUTOR, Lat.] One appointed by a person into strict custody till his majesty's execute the contents thereof after the testator's decease; and to have the disposing of all the testator's substance, according to the tenor of

Ley.
The rights, powers, and duties of EXECU-TORS and ADMINISTRATORS, being in many respects similar, and the several determinations in the books being generally applicable to both, it seems most methodical and useful to consider them together; for which purpose reference is made from tit. Administrator to this place. The present summary is founded on the Commentaries, having various points and heads from other sources interwoven with that excellent ground-work. See 2 Comm. c. 32.

> I. 1. Of the Appointment of Administrators in Cases of Intestacy. 2. How Administrations may be revoked.

II. Of the Appointment of Executors, and particular Administrators; and see

III. Of Administrations to next of Kin, or on Failure of them; and see V. 8.

IV. Of the Distinction in Interest between Executors and Administrators.

V. Of the Rights, Power, and Duty, of Executors and Administrators. 1. Of Executor de son tort. 2. Of burying the Deceased. 3. Proving the Will. 4. Making Inventory. 5. Collecting the Goods. 6. Paying the Debts in due Order of Priority. 7. Paying Legacies; and see title

Vol. I.—91

testates.

VI. 1. Of Actions and Suits by and against Executor and Admistrators, &c.; and herein of devastavit. 2. Of costs.

I. 1. Of the Appointment of Administrators in Cases of Intestacy.—In case a person makes no disposition of his effects by will, he is said to die intestate; and in such cases it is said, that by the old law the king was entitled ministration which he hath duly granted; but to seize upon his goods, as the general trustee of the kingdom. 9 Rep. 38. b. This prenot by law to have them, he may revoke them. rogative the king continued to exercise for 1 Lil. 38. For just cause they may be rerogauve the king continued to exercise for 1 Let. 38. For just cause they may be resome time, by his own ministers of justice; voked,—as where a person is a lunatic, &c. and probably in the county-court, where mathal And if granted where not grantable, they may ters of all kinds were determined; and it was be repealed by the delegates. 1 Let. 157. 186. granted as a franchise to many lords of manors. If administration is granted, and atterwards a nod others, who have to this day a prescriptive will is produced and proved, the administration to grant administration to their intestate tion shall be revoked; and all acts done by the tenants and suitors, in their own courts baron, administrator are void. 2 Rol. Ab. 907. If and other courts, or to have their wills there a citation is granted accinet a stranger adtenants and suitors, in their own courts baron, administrator are void. 2 Rol. Ab. 907. If and other courts, or to have their wills there proved, in case they make any. 9 Rep. 37. Ministrator, and his administration is revoked Afterwards the crown, in favour of the church, by sentence, yet all acts done by him bond invested the prelates with this branch of the fide as administration being only voidable, the goods, and keep them without wasting; and also might give, alien, or sell them at his and also might give, alien, or sell them at his being thus, probably, merely the king's almother in his diocese. Finch Law, 173, 174:

13 Eliz. c. 5. And when the first administration is merely against a stranger administration is granted against a stranger administrator, and his administration is granted against a stranger administrator, and his administration is granted against a stranger administrator, and his administration is granted against a stranger administrator, and his administration is granted against a stranger administrator, and his administration is granted against a stranger administrator, and his administration is granted against a stranger administrator, and his administration is granted against a stranger administrator, and his administration is granted against a stranger administrator, and his administrator are void. 2 Rol. Ab. 907. If a citation is granted against a stranger administrator are void. 2 Rol. Ab. 907. If a citation is granted against a stranger administrator are void. 2 Rol. Ab. 907. If a citation is granted against a stranger administrator are void. 2 Rol. Ab. 907. If a citation is granted against a stranger administrator. After a citation is granted against a stranger administrator. After a citation is granted against a stranger administrator. After a citation is granted against a stranger administrator. After a citation is granted against a stranger admin Plowd. 277.

As the ordinary had thus the disposition of intestates' effects, the probate of wills, of course, followed; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his goods was superseded

thereby.

By degrees, through an abuse of this power of the ordinary, often complained of before it was redressed, the Popish clergy secured the intestate's estate to themselves, without paying even his lawful debts; for which reason it was enacted by stat. Westm. 2. (13 Ed. 1. A. D. 1285) c. 19. that the ordinary shall be bound to pay the debts of the intestate, so far as his goods will extend, in the same manner as executors were bound in case of a will. But still the residue remained in the hands of such a case as this it seems that the second the ordinary; and the continued abuse of this power at length produced the stat. 31 Ed. 3. law against the first, for money had and re-c. 11. (A. D. 1357), which provides that in case ceived, &c., or trover for any goods remaining of intestacy, the ordinary shall depute the near- in his possession, or by him converted, and not est and most lawful friends of the deceased to duly administered. administer his goods, which administrators are put upon the same footing, with regard to ministration is void, the administrator who, suits, and to accounting, as executors. The under that administration, takes the goods, is next and most lawful friend is interpreted to a trespasser. Letters of administration obtainbe the next of blood, who is under no legal ed by fraud are void. 3 Rep. 78: 6 Rep. 18, disabilities. 9 Rep. 39. The stat. 21 H. 8. c. 19: 8 Rep. 143. 5. enlarges the power of the ecclesiastical

Legacy. 8. Distribution of the Resi-judge a little more; permitting him to grant due, to the Executor himself or next administration either to the widow or the next of Kin; and herein. 9. Of the Cus. of kin, or to both of them, at his discretion; toms of London and York, as to In- and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept which he pleases. 1 Sid. 179: Raym. 93: 1 Show. 351: 1 Salk. 36.

On this footing now stands the general law relative to the appointment of administrators. Who are the next of blood, or, as it is usually called, next of kin, is stated post, III. and

V. 8.

2. How Administrations may be revoked .-The ordinary ought not to repeal letters of adan appeal from the grant of the administration, to suspend the former decree. 5 Rep. 30. Administration was granted to J. S., and he released all actions, and afterwards the administration was revoked, and declared void: this release was held good. 1 Brownl. Qu. If it had been without consideration? If an administrator gives goods away, and then administration is revoked or repealed, 'tis said the gift is good; except by covin, when it shall be void only against a creditor by statute: and where the administrator, after many goods administered, had his administration revoked, and it was committed to B., who sued the first administrator for goods unduly administered, it was held that there was no remedy but in Chancery. 6 Rep. 19: Clayt. 44: 4 Shep. Ab. 89. See Hob. 266. But in administrator might maintain an action at

In 2 Leon. 155. it is said, where the first ad-

See the several cases on this part of the sub-

ject collected in 1 Comm. Dig. tit. Adminis- The appointment of an executor is essential trator (B. S.); the result of which as given in to the making of the will (Went. c. 1: Plowd. 4 Burn's Ecclesiastical Law, 236.) is, that an 281.); and it may be performed either by exadministration may be repealed, although not press words, or such as strongly imply the arbitrarily, yet where there shall be a just same: but if the testator makes an incomplete cause for so doing; of which the temporal will, without naming any executors; or if he courts are to judge.

II. Of the Appointment of Executars, and particular Administrators.—All persons are capable of being executors that are capable of making wills, and many others besides; as femes coverts and infants: nay, even infants executors. West. Symb. p. 1. § 635.

A mayor and commonalty may be made executors. I Rol. Ab. 915. And if the king is of the office of executor on attaining the age

account. 5 Rep. 29.

It seems agreed, that, by our law, an alien, or one born out of the allegiance of our king, may be an executor or administrator; also it hath been adjudged, that such a one shall have administration of leases as well as personal things, because he hath them in auter droit, and not to his own use. Off. of Ex. 17.

Formerly an excommunicated person could not be an executor or administrator; for by the excommunication he was excluded from the body of the church, and was incapable to lay out the goods of the deceased to pious uses. 85. But now by 53 G. 3. c. 127. he is relieve as the administration in the latter case always

ed from all civil disabilities.

By 9 and 10 W. 3. 32, persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true or the Holy Scriptures, shall for the second offence be disabled from being executors. But this statute is repealed as far as denying the Trinity by 53 G. 3. c. 160.

Idiots and lunatics are incapable of becoming executors or administrators. Bac. Ab. administration ought to be granted, because Executors, (A) 5. Therefore it has been he who is of age may execute the will. agreed, that if an executor become non compos, the Spiritual Court may commit administra-

tion to another. 1 Salk. 36.

to be joint executors, and they are accounted ministrator pendente lite. And he may grant in law but as one person. See post, V. 3. 5 .- this administration as well touching an ex-Such joint executors shall not be charged by coutorship as the right to administration. 2 the acts of their companions, any further than P. W. 589: 2 Atk. 286. for effects actually come to their hands. Moor, 620: Cro. Eliz. 318: 2 Leon. 209. But if of kin, be out of the kingdom, the ecclesiastitwo or more executors join in a receipt (in cal courts have, and always had, the power, bewriting), and one of them only actually re- fore probate obtained or letters of administraceives the money, each is liable for the whole tration issued, of granting to another an adas to creditors at law, but not as to legatees, ministration durante absentia. 3 Bac. Abr. or next of kin. 1 Salk. 318. If joint ex- 56. Executors (G.) ecutors, by agreement among themselves, But when probaagree that each shall intermeddle with a the executor had gone abroad, they did not certain part of the testator's estate, yet each shall be chargeable for the whole (to creditors) administration. To remedy the inconveniby agreeing to the other's receipts. *Hard.* 314. ence the 38 G. 3. c. 87. was passed, which en-

names incapable persons; or if the executors named refuse to act (see 9 Rep. 37: Went. Off. Ex. 38.); in any of these cases administration must be granted cum testamento annexo to some other persons (1 Rol. Ab. 907: Comb. 20.); and then the duty of the administrator, as also when he is constituted only durante minore unborn, or in ventre ses meres, may be made ætate, &c. is very little different from that of an executor. See Glanvil. l. 7. c 6.

An infant was formerly considered capable made executor, he appoints others to take the of 17 years; till which time administration execution of the will upon them, and to take was granted to some other durante minore atate. Went. Off. of Ex. c. 18; 6 Rep. 67; 4

Inst. 335.

But by stat. 38 G. 3. c. 87. § 6, 7. where an infant is sole executor, administration with the wills annexed shall be granted to his guardian, or to such other person as the Spiritual Court shall think fit, until the infant shall attain 21, with the same powers as an administrator has under an administration granted to him durante minore ætate of the next of kin.

Before this act a distinction existed between administration granted during the minority of Co. Lit. 134: Swinb. 349: Godolph. an infant executor and an infant next of kin; continued in force till the next of kin attain-

If administration be granted during the minority of several infants, it determines when any one of them comes of age. Touch. 490: Freem. 425: 3 Keb. 607. And where there are several infant executors, he who first attains 21 shall prove and execute the will. Burn's E. L. 284.

But if one of the executors be of full age, no

Brownl. 46: 1 Mod. 47.

In case of a controversy in the Spiritual Court concerning the right of administration to A man may appoint two or more persons an intestate, the ordinary may appoint an ad-

If the executor named in a will, or the next

But when probate was once granted, and

from the death of a testator, the executor to grandfathers (Pre. Ch. 527: 1 P. Wms. 41.); whom probate has been granted is residing out uncles, or nephews (Atk. 455.), and the females of the jurisdiction of the courts of law and equi- of each class respectively; and, lastly, cousins. ty, the ecclesiastical court may, on the applica- | 4thly. The half blood is admitted to the adtion of any creditor, next of kin, or legatee, ministration as well as the whole; for they grant such special administration as therein- are of the kindred of the intestate, and were after mentioned.

executors resident out of the jurisdiction of the of the half blood shall exclude the uncle of the courts, as out of the realm: a limited administ whole blood (1 Vent. 425.); and the ordinary tration was therefore granted to the nominee may grant administration to the sister of the of a creditor, where the executor was living in half, or the brother of the whole blood, at his Scotland. 2 Add. 54. 505.

rary administration, granted as well cum tes- take out administration, a creditor may, by tamento unnexo, as in cases of complete intes- custom do it. Salk. 38. 6thly. If the execu-

the expiration of five years from the testator's death, or a testator names the executor Vent. 219. And, lastly, the ordinary may, in of A. his executor, and dies before D., in defect of all these, commit administration (as these cases if no one is appointed to act before the period prescribed for the commencement of the office, the ordinary must be approves of: or (in these cases, as well as grant an administration cum testamento an- in that of an executor's refusal, Cro. Eliz. 92.) nexo until there be an executor.

tration of a deceased party is broken, and its nor administrator; his only business being to revival is requisite for the performance of a single act, as to make an assignment of a term of years. In this case an administration de bonis non, limited to such term, will be ceased. 2 Inst. 393. If a bastard who has granted, or else an administration de bonis no kindred, being nullius filius, or any one non of all the goods of the deceased which are else that has no kindred, dies intestate, and left unadministered.

For other instances of temporary and limited administrations see Williams's Law of Executors, 321.

III. Of Administrations to next of Kin, or on Failure of them.—If the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted to such administrator as the ces administration may be granted, upon sestats. 31 Ed. 3. c. 11. and 29 H. 8. c. 4. (see curity given, to persons not strictly entitled ante, I.) direct; in consequence of which it is to claim administration, see 1 Hag. Ecc. Rep. to be observed, 1st. That the ordinary is 381. 473. 480. 487. compellable to grant administration of the goods of the wife to the husband, or his representatives (Cro. Car. 106: stat. 20. Car. 2. c. Executors and Administrators. The interest 3: 1 P. Wms. 381.); and of the husband's ef- vested in the executor by the will of the defects to the widow, or next of kin. Salk. 36: ceased may be continued and kept alive by those are to be preferred that are the nearest ecutor of A.'s executor is to all intents and in degree to the intestate. 3dly. That this purposes the executor and representative of A. nearness of degree shall be reckoned accord-himself (see Ed. 3. st. 5. c. 5: 1 Leon. 275.); ing to the computation of the civilians (Pre.) but the executor of A.'s administrator, or the Ch. 593.); and not of the canonists, which the administrator of A.'s executor, is not the relaw of England adopts in the descent of real presentative of A. Bro. Abr. tit. Administraestates (see tit. Descent); and therefore, in tor, 7. For the power of an executor is the first place, the children, or, on failure of founded upon the special confidence and acchildren, the parents, of the deceased are en- tual appointment of the deceased; and such titled to administration; both which are in- executor is therefore allowed to transmit that deed in the first degree, but the children are power to another, in whom he hath equal allowed the preference. Godelph. p. 2. c. 34. confidence: but the administrator of A. is

acts that if at the expiration of twelve months | § 1: 2 Vern. 125. Then follow brothers, formerly excluded from inheritances of land. This statute extends as well to the cases of upon feedal reasons. Therefore the brother own discretion. Aleyn. 36: Sty. 74. See There are several other instances of tempo- post, V. 8. 5thly. If none of the kindred will tor refuses, or dies intestate, the administra-Where a man is appointed executor at tion may be granted to the residuary legatee, may grant him letters ad colligendum bona It often happens that the personal adminis- defuncti, which neither make him executor without wife or child, it hath formerly been held (Salk. 37.), that the ordinary might seize his goods, and dispose of them in pios usus. But the usual course now is, for some one to precure letters patent, or other authority from the king; and then the ordinary, of course, grants administration to such appointee of the crown. 3 P. Wms. 33.

In what cases and under what circumstan-

IV. Of the Distinction in Interest between 2dly. That among the kindred, the will of the same executor; so that the ex-

merely the officer of the ordinary, prescribed land, the law is altered by the recent statute to him by act of parliament, in whom the de- of limitation (3 and 4 W. 4. c. 27.), which by ceased has reposed no trust at all; and there- § 6. enacts, "that for the purposes of that act, fore, on the death of that officer, it results an administrator claiming the estate or inteback to the ordinary to appoint another. And, rest of the deceased person of whose chattels with regard to the administrator of A.'s ex- he shall be appointed administrator, shall be ecutor, he has clearly no privity or relation to deemed to claim as if there had been no in-A., being only commissioned to administer terval of time between the death of such dethe effects of the intestate executor, and not ceased person and the grant of the letters of of the original testator. Wherefore, in both administration." these cases, and whenever the course of representation from executor to executor is in- takes upon him to act as executor, without terrupted by any one administration, it is any just authority (as by intermeddling with necessary for the ordinary to commit ad- the goods of the deceased, 5 Rep. 33, 34. and ministration afresh of the goods of the de- many other transactions, Wentw. c. 14: st. 43 ceased not administered by the former exec- Eliz. c. 8.); he is called in law an executor of utor or administrator. And this administrator his own wrong (de son tort), and is liable to all de bonis non is the only legal representative the trouble of an executorship, without any of of the deceased in matters of personal pro- the profits or advantages: but merely doing perty. Sty. 225. But he may, as well as acts of necessity or humanity, as locking up an original administrator, have only a limithe goods, or burying the corpse of the deted or special administration committed to ceased, will not amount to such an intermedhis care, viz. of certain specific effects, such dling as will charge a man as executor of his as a term of years and the like; the rest beomy wrong. Dyer, 166. Such a one cannot ing committed to others. 1 Rol. Ab. 908: bring any action himself in right of the de-Godolph. p. 2. c. 30: Salk. 36: 1 New Abr. ceased (Bro. Abr. tit. Administrator, 8.), but 385. See also the stats. 43 Eliz. c. 8: 30 Car. actions may be brought against him. And in all setting the state of the 2. c. 7.

executor's executor cannot prove the will, begenerally (5 Rep. 31.); for the most obvious cause he is not named therein, and no one conclusion which strangers can form from his can prove a will but he who is named executor in it; but if the first executor had proved wherein he is named executor, but hath not the will, then his executor might have been yet taken probate thereof. 12 Mod. 471. He executor to the first testator, there requiring is chargeable with the debts of the deceased, no new probate. 1 Salk. 299.

thus be executor to the first testator, yet he shall be allowed all payments made to any may take upon him the executorship of his other creditor in the same or superior degree own testator, and refuse to intermeddle with (1 Chan. Cas. 33.), himself only excepted; in the estate of the other: and if the first exect which he differs from a rightful executor. 5 utor refuses (as if he dies before probate), his Rep. 30: Moor, 527. And though, as against executor shall not administer to the first tes- the rightful executor or administrator, he cantator. Dyer, 372.

ecutors and Administrators.—The rights, of assets, whereby the rightful executor may power, duty, and office, of executors and administrators in general are very much the same; excepting, first, that the executor is Wentw. c. 14.

When there is a rightful executor, and a bound to perform a will, which an adminis- stranger possesses himself of the testator's trator is not, unless where a testament is angoods, without doing any further act as exnexed to his administration; and then he differentiation, he is not an executor deson tort, but a fers still less from an executor: and, secondly, trespasser. Dyer, 105: Rol. Ab. 918. See that an executor may do many acts before he 5 Rep. 82. An executor of his own wrong proves the will (Wentw. c. 3.): but an adminate may be sued as executor; and he shall be nistrator may do nothing till letters of adminate for legacies as well as a rightful execunistration are issued; for the former derives tor. Noy, 13. Though an executor de son his power from the will, and not from the tort cannot maintain any suit or action, be-

his executor from the time of his death; in an awarded for the whole debt, though he medadministrator from the time of the grant of the dled with a thing of very small value. letters of administration. 5 B. & A. 714. But Noy, 69. with respect to any interest arising out of

1. Of Executor de son tort.-If a stranger c. 7.

All actions by creditors against such an offiIf an executor dies before probate, such an cious intruder, he shall be named an executor so far as assets come into his hands. Dyer, Though an executor of an executor may 166. And as against creditors in general, not plead such payment, yet it shall be allowed him in mitigation of damages (12 Mod. V. Of the Rights, Power, and Duty, of Ex- 441. 471.); unless, perhaps, upon a deficiency

probate; the latter owes his entirely to the cause he cannot produce any will to justify appointment of the ordinary. Com. 51. it, yet he will be severely punished for a false The property of a deceased person vests in plea; for in such case the execution shall be

What acts make a person liable as executor

de son tort is a question of law; the jury are | eral executors who have proved the will, vet if to say whether the acts be sufficiently proved. he continue to act after the death of such ex-The slightest circumstance of intermeddling ecutor he may be charged as executor de aon with the testator's goods will constitute a per- tort, though he act under the advice of another son an executor de son tort. 2 Term Rep. K. of the executors who has not proved. Cottle B. 97. 597.

Debt was brought against an executor of his own wrong, who pleaded that he never or administrator must bury the deceased in was executor, nor administered as such; it a manner suitable to the estates which he was held, not to be material whether he had leaves behind him. Necessary funeral expenassets or no, but to prove that he had admin- ses are allowed, previous to all other debts and istered any thing was enough; for this would charges; but if the executor or administrator be make him chargeable with the debt: but if extravagant, it is a species of devastation or he had not pleaded falsely, he would have waste of the substance of the deceased; and been liable for no more than the value of the shall only be prejudicial to himself, and not to goods of the deceased. Style, 120.

himself of goods, and afterwards administra- and this Dict. tit. Devastavit, Funeral. tion is granted him, he may, by virtue thereof, If they neglect to give orders for the funer-retain goods for his own debt. 5 Rep. 30. al, and have sufficient assets for that purpose, And where a man took possession of an intestate's goods wrongfully, and sold them to another, and then took out administration, it was suitable to the testator's degree and circumadjudged that the sale was good by relation.

Stances. 3 Campb. 298.

Moor, 126. An executor de son tort shall be

3. Proving the Will.—The executor or adallowed in equity all such payments which a ministrator durante minore etate, or durante rightful executor ought to have paid. 2 Chanc. absentia, or cum testamento annexo must prove Rep. 33. See further, post, VI. 2. and this the will of the deceased; which is done either Dict. tit. Devastavit.

will, with notice that the testator had made a per testes, in more solemn form of law, in case subsequent will, appointing another executor, and he acted by taking possession of the test p. 1. c. 20. § 4. When the will is so proved, tator's effects, the executor under the second the original must be deposited in the registry will who had obtained probate may maintain of the ordinary; and a copy thereof, in parchtrover for the effects so taken possession of. I D. & R. 409: S. C. 5 B. & A. 744.

goods of the intestate after his death from his widow, in payment of the debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one who had, by such intermeddling, made herself ex- one of them only proves the will, and takes ecutrix de son tort; no fact appearing to give colour to having acted in the character of executrix, except the single act of wrong com- him, and intermeddle with the testator's estate, plained of, in which the defendant participated. but if they all of them refuse the executorship, Qu. How far any payment by an executor de none of them will ever afterwards be admitted son tort to a creditor can be set up as a bar to to prove the will; the ordinary, in this case, an action of trover by lawful executor, &c.; grants administration with the will annexed. though if it be such as the latter would have been bound to make, it shall be recouped in damages. Mountford v. Gibson, 4 East, 441.

An executor de son tort cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful on the summons, and prove the will, the court executor after the action is brought. 3 Term Rep. K. B. 587: 2 H. Blackst. 18.

Nor can he retain for his own debt, of a higher nature, by consent of the rightful executor, given after the bringing of the action by the creditor. 3 Term. Rep. 587.

executor de son tort while he acts under a afterwards; but if there is a refusal by one, power of attorney made to him by one of sev- and the other proves the will, the refusing

v. Aldrich, Term. Rep. K. B. Tr. 55 G. 3. 175.

2. Of burying the Deceased .- The executor the creditors or legatees of the deceased. Salk. If an executor of his own wrong possesses 196: Godolph. p. 2. c. 26. § 2. See post. VI. 2.

in common form, which is only upon his own Where an executor obtained a probate of a oath before the ordinary, or his surrogate; or ment, is made out under the seal of the ordinary, and, delivered to the executor or admin-A creditor of an intestate, who received istrator together with a certificate of its having been proved before him; all which together is usually styled the probate. By stat. 37 G. 3. c. 90. the executor must take probate within six months on penalty of 50l. See tit. Probate.

If there are many executors of a will, and upon him the executorship, it is sufficient for all of them; but the rest after may join with 9 Rep. 37: 1 Rep. 113: Perk. 485.

An executor may refuse an executorship; but the refusal ought to be before the ordinary: if an executor be summoned to accept or refuse the executorship, and he doth not appear may grant administration, &c. which shall be good in law till such executor hath proved the will; but no man can be compelled to take on him the executorship, unless he hath intermeddled with the estate. 1 Leon. 154: Cro. Eliz. 858. Where there are several executors, and Although a person cannot be charged as an they all refuse, none of them shall administer

executor may administer when he will during | if administration be granted pending a cathe life of his co-executor. 1 Rep. 28. If year, this is valid in our law, though, by the there is but one executor, and he administer, law in the Spiritual Court, it may be such he cannot refuse afterwards; and if once he an irregularity as will be sufficient to repeal refuse he cannot administer afterwards. Thus, it. 1 Rol. Rep. 191: Cro. Jac. 463: 2 Rol. where a testator being possessed of lands, &c. Rep. 6. for a term of years, devised the same to the Chief Justice Catline, and made him executor, be administrator must also, at this period, take and died; afterwards the executor wrote a out letters of administration under the seal of and died; afterwards the executor wrote a letter to the judge of the Prerogative Court, intimating that he could not attend the executorship, and desiring him to grant administration to the next of kin to the deceased, which was done accordingly; and after this the executor entered on the lands, and granted the term to another; it was adjudged void, because the letter which he wrote was a sufficient bate before the ordinary; or an administration under the sear of the ordinary; whereby an executorial power the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the sear or the ordinary; whereby an executorial power to collect and administration under the search to collect and administration under the search to collect and administration the ordinary; whereby and administration to collect and administration the ordinary; whereby a refusal; and he may not after refusal take granted by him, are the only proper ones: but upon him the executorship. Moor, 272.

his affairs, the ordinary cannot adjudge him disabled or incapax; but a mandamus shall, refuse him: neither can the ordinary insist upon security from the executor, as the testator has thought him able and qualified. 1 Salk.

And although an executor becomes bankrupt, yet it is said the ordinary cannot grant administration to another: but if an executor become non compos, the Spiritual Court may commit administration for this natural disability. 1 Salk. 307. If an executor takes goods of the testator's, and convert them to his own use; or if he either receive or pay debts tent, and consider that a pound of gold is now of the testator, or give bond for payment; make acquittances for them, or demand the testator's we shall extend the present amount of bona debts as executor; or give away the goods of notabilia to nearly 70l. But the makers of the the testator, &c., these are an administration, canons of 1603 understood this ancient rule to so that he cannot afterwards refuse the ex- be meant of the shillings current in the reign ecutorship, and it has been held, that if the of James I., and have therefore directed (Can. wife of the testator take more apparel than 92.), that five pounds shall for the future be is necessary, it is an administration. Offic. the standard of bona notabilia; so as to make Ex. 39.

a will, or when the right of administration stood) is grounded upon this reasonable founcomes in question, to enter a caveat in the dation: that as the bishops themselves were Spiritual Court, which by their law, is said to originally the administrators to all intestates stand in force for three months. Godolph. in their own diocese, and as the present ad-258: Goldsb. 119: 2 Rol. Rep. 6: Cro. Jac. ministrators are in effect no other than their 463, 464.

of a caveat, and that it is but a mere caution- to collect any goods of the deceased, other ary act done by a stranger, to prevent the or- than such as lay within their own diocese, be-

if the deceased had bona notabilia, or chattels An executor, after a careat entered against to the value of a hundred shillings, in two disthe will, took the usual oath of an executor, tinct dioceses or jurisdictions, then the will and afterwards refused to prove the will; must be proved, or administration taken out, and it was held, that having taken the oath of before the metropolitan of the province, by way executor, the court could not admit him to re- of special prerogative. 4 Inst. 335. Hence fuse afterwards, but ought to grant probate to the courts, where the validity of such wills are him, notwithstanding the caveat, on another's tried, and the offices where they are registercontesting for the administration, &c. 1 Vent. ed, are called the prerogative courts, and the prerogative offices, of the provinces of Canter-As the testator has thought the executor bury and York. Lynedewode, who flourished appointed a proper person to be intrusted with in the beginning of the 15th century, and was official to Archbishop Chichele, interprets these hundred shillings to signify solidos leissue from B. R. for the ordinary to grant pro- gales; of which he tells us seventy-two bate of the will, and admit the executor, if he amounted to a pound of gold, which in his time was valued at fifty nobles, or 16l. 13s. 4d. He therefore computes (Provinc. l. 3. t. 13.) that the hundred shillings, which constituted bona notabilia, were then equal in current money to 231. 3s. 04d. This will account for what is said in our ancient books, that bona notabilia in the diocese of London (4 Inst. 335: Godolph. p. 2. c. 22.), and indeed every where else (Plowd. 281.), were of the value of ten pounds by composition: for, if we pursue the calculations of Lynedewode to their full exalmost equal to an hundred and fifty nobles, the probate fall within the archiepiscopal pre-It is usual when there is a contest about rogative, which prerogative (properly underofficers or substitutes, it was impossible for But it is said that our law takes no notice the bishops, or those who acted under them, dinary from doing wrong; and that, therefore, youd which their episcopal authority extends

not. But if would be extremely troublesome, next of kin; nor shall be compellable to acif as many administrations were to be granted count before any ordinary or judge empoweras there are dioceses within which the deceased had bona notabilia; besides the uncertainty with which creditors and legatees would be at in case different administrators were appointed to ascertain the fund out of which their demands were to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all.

Probate in the court of the archdeacon of Sudbury, to whom the bishop granted full power to prove the wills of all persons deceased within the archdeaconry, was held good, the testator having died within the archdeaconry, Dyer, 23: Cro. Eliz. 347: Sid. 33: Brownl. although he was possessed of a term of years 183. lying within another archdeaconry in the same fraud. Moor. 620: Cro. Eliz. 318: 2 Leon.

G. 3, 119.

province, and has bona notabilia only in one diocese, not in several, it seems formerly to the hands of the executor or administrator, have been thought that a prerogative probate was necessary; but it is now settled that in assez) to make him chargeable to a creditor or such case the Bishop's Court and the Preroga- legatee, so far as such goods and chattels extive Court have concurrent jurisdiction, and a tend. Whatever assets so come to his hands, probate from either is sufficient. Searlett v. he may convert into ready money, to answer The Bishop of London, 1 Haggard R. 625. the demands that may be made upon him. Where one dies possessed of bona notabilia in See 6 Rep. 47: Co. Lit. 374: In actions a diocese, and also in a peculiar within that diocese, or in several peculiars within the same diocese, in that case probate shall not be granted by the bishop of the diocese, but by the metropolitan, inasmuch as they are exempt from ordinary jurisdiction. 3 Phill. R. 247. In a recent case the testator appointed tor coming to the executor, are leases for years, several executors, by some of whom the will was proved in the Prerogative Court of Canterbury. The survivor of the executors died, having made a will and appointed executors, who proved it in the Consistory Court of Llan- in right of the deceased, if he purchase the fee, daff, and no where else, their testator not whereby the lease is extinct, yet this lease having bona notabilia out of the diocese of shall continue to be assets, as to the creditors Llandaff. Sir John Leuch, M. R., held that and legatees. 1 Rep. 87: Bro. Lease, 63. this probate was sufficient to render the executhis probate was sufficient to render the execuThough a plantation be an estate of inherittors of the surviving executor representatives ance, yet, being in a foreign country, it is a
of the original testator. Fowler v. Richards, chattel in the hands of executors to pay debts.

5 Russell R. 39. As to what sort of things 1 Vent. 353. The executor is not only entitled
are bona notabilia, see Williams on Executors, to all personal goods and chattels of the testa177. Goods which a testator has about him
tor, of what nature soever they are, but they
when he dies in things are not have notabiling are also accounted to be in his possession. when he dies in itinere are not bona notabilia are also accounted to be in his possession, to render a prerogative probate necessary. though they are not actually so: for he may Doe v. Ovens, 2 B. & Ad. 423.

4. Making Inventory .- The executor or administrator is to make an inventory of all the things in action; as right of execution on goods and chattels, whether in possession or a judgment, bond, statute, &c. Also to money goods and chattels, whether in possession or a judgment, bond, statute, &c. Also to money action of the deceased, which he is to deliver in to the ordinary upon oath, if thereunto lawfully required. Stat. 21 H. 8. c. 5. By stat. 1 Jac. 2. c. 17. § 6. no administrator shall be cited into court to render an account of the personal estate of his intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate, as a creditor, or

ed by the act of 22 and 23 Car. 2. c. 10. otherwise than as aforesaid. 9 Rep. 30: 2 Inst.

600: Raym. 407.

5. Collecting the Goods.—He is to collect all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law, being the representative of the deceased (Co. Lit. 209.); and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest. Unless such release be obtained by diocese. R. v. Yonge, Term Rep. K. B. E. 56, 209. But in case of administrators it is otherwise. 1 Atk. 460. Whatever is so recovered Where a party dies any where out of the that is of a saleable nature, and may be converted into ready money, is called assets in that is, sufficient or enough (from the French against executors the jury must find assets to what value, for the plaintiff shall recover only according to the value of assets found. 1 Rol. Rep. 58. As to real assets by descent, see this Dict. tits. Assets, Real Estate.

The chattels, real and personal, of the testarent due, corn growing and cut, grass cut and severed, &c., cattle, money, plate, household goods, &c. Co. Lit. 118: Dyer, 130. 537. An executor having a lease for years of land maintain an action against any one who detains them from him: he is likewise entitled to

and carry away the goods. Litt. 60. An ex- | distraining); or upon bonds, covenants, and ecutor may, in convenient time after the tes- the like, under seal. Wentw. c. 12. tator's death, enter into a house descended to the heir, for removing and carrying away the goods so as the door be open, or the key be in the door. Offic, Exec. 8. He may take the goods and chattels to himself, or give power to another to seize them for him. 9 Rep. 38. If an executor with his own goods redeem the goods of the testator; or pays the testator's debts, &c., the goods of the testator shall for so much be changed into the proper goods of the executor. Jenk. Cent. 188.

Where a man by will devises that his lands shall be sold for payment of debts, his executors shall sell the land, to whom it belongs to charge of the debt, whether the executor acts pay the debts. 2 Leon. c. 276. And if lands are devised to executors to be sold for payment of the testator's debts, those executors that act in the executorship, or that will sell. may do it without the others. Co. Lit. 113. By stat. 21 H. S. c. 4, bargains and sales of lands, &c. devised to be sold by executors shall be as good if made by such of the executors only as take upon them the execution of the will, as if all the executors had joined in the sale. If lands are thus devised to pay debts, a surviving executor may sell them.

As to cases where executors take only a power or authority to sell, and not an interest in the land, and what powers survive, see Sug-

den on Powers.

6. Paying the Debts in due Order of Pri. ority.-The executor or administrator must pay the debts of the deceased. In payment of ing to the directions of stat. 4 and 5 W. & M. debts he must observe the rules of priority; c. 20. is by that act put on a level with simple otherwise, on deficiency of assets, if he pay contract debts; and, therefore, such judgment those of a lower degree first, he must answer cannot be pleaded by an executor, to an action those of a higher out of his own estate. And, first, he must pay all funeral charges, and the administravit to debt on such a judgment, the expenses of proving the will, and the like. executor may give in evidence payment of The costs of a suit in equity are to be consi- specialty debts, which exhausted all the efdered as expenses in administering the estate, feets. 6 Term Rep. K. B. 384: 1 Bos. & Pull. and are the great charge upon the estate 307. whether administered in or out of court. 1
Sim. & Stu. 461: and see 4 Madd. 461. 491. ty to a house in trade, of which he himself Secondly, debts due to the king on record or was a partner in a sum of money, the amount specialty. 1 And. 129. See Williams on of which could not be exactly ascertained, Executors, p. 652. Thirdly, such debts as are covenanted to pay the firm all his then debts, by particular statutes to be preferred to all oth- and such other debts as should subsequently ers; money due upon poor rates) stat. 17 G. accrue. A. died without having satisfied the 2. c. 38.); for letters to the Post-office (9 Anne, original debt, and having contracted a further c. 10.); moneys due to friendly societies from debt after the execution of the deed. His their officers; see 10 G. 4. c. 56. § 20. the act case under the execution of the decd. This their officers; see 10 g. 4. c. 56. § 20. the act case under the execution of the decd. This their officers; see 10 g. 4. c. 56. § 20. the act case under the execution of the decd. This their officers; see 10 g. 4. c. 56. § 20. the act case under the execution of the decd. This their officers; see 10 g. 4. c. 56. § 20. the act case under the execution of the decd. This their officers; see 10 g. 4. c. 56. § 20. the act case under the execution of the decd. This their officers; see 10 g. 4. c. 56. § 20. the act case under the execution of the decd. This their officers; see 10 g. 4. c. 56. § 20. the act case under the execution of the decd. This their officers; see 10 g. 4. c. 56. § 20. the act case under the execution of the decd. This case under the execution of the the stat. 4 and 5 W. & M. c. 20.) statutes, and executor may pay any one creditor in equal recognisances. 4 Rep. 60: Cro. Car. 363. degree his whole debt; though he has nothing See Williams on Executors, p. 657. as to what re and are not judgment debts entitled to the executor has no legal notice of the debt. priority. Fifthly, debts due on special conpriority. Pending a bill in equity against an executor, he may pay any other debt of a higher

Lastly, debts on simple contracts, viz. upon notes unsealed and verbal promises. Among these simple contracts, servants' wages are by some (1 Rol. Ab. 927.) with reason preferred to any other: and so stood the ancient law according to Bracton (lib. 2. c. 26.) and Fleta (h. 2. c. 56. § 10.); and see 2 Black. Com. 511: Williams on Executors, 674. Among debts of equal degree the executor or administrator is . allowed to pay himself first, by retaining in his hands so much as his debt amounts to. 10 Mod. 496. If a creditor constitutes his debtor his executor, this is a release or disor not (Plowd. 184: Salk. 299.) provided there be assets sufficient to pay the testator's debts: for though the discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. Salk. 303: 1 Rol. Ab. 921: 5 Rep. 30: 8 Rep. 136. But if a person dies intestate, and the ordinary commits administration to a debtor, the debt is not thereby extinguished, for he comes in only by the act of law, not by the act of the party. 5 Rep. 136: 1 Salk. 306. See also 1 Cha. Rep. 292: Moor. 855: Hutt. 128.

A debt on a judgment against a testator or intestate (not docketed) is put by the statute on a level with simple contract debts. 6 Term.

Rep. 384.

A debt on judgment, not docketed accord-

nature, or of as high a nature, where he has lexecutors in another county than where they legal assets: but where there is a final declaration and they not knowing thereof, pay cree against an executor, if he pays a bond, debts upon specialty it is good. Cro. Eliz. it is a mis-payment; for a decree is in nature | 793. of a judgment. 2 Salk. 507. And after a decree to account in a suit by a creditor on behalf of himself and of all other creditors, the executor cannot pay a creditor in preference, for this is in nature of a judgment for all the creditors: but it is otherwise after a decree to account in a suit by a creditor for himself alone. See Williams on Executors, p.

If there be several debts due on several bonds from the testator, his executor may pay which bond debt he pleases, except an action of debt is actually commenced against him upon one of those honds; and in such case, if, pending an action, another bond creditor brings another action against him, before judgment obtained by either of them, he may prefer which he will, by confessing a judgment to one, and paying him; which judgment he may plead in bar to the other action. Vaugh. 89. See Sid. 21. The usual way is, if there is time, and an executor or adminis paid by the debtor to the legatee, but to the trator is desirous of preferring another creditor of equal degree with him who sues, instantly, before plea, to confess a judgment, be sufficient assets. It is held that the Bank and then plead it with a plené administravit of England, where stock is specifically deultra. And even after an executor has pleaded the general issue he may confess a judgment and plead it at Nisi Prius puis darrein continuance. 5 Taunt. 333. 665; 3 Barn. & Cres. 317. And it is not necessary that the creditor to whom judgment is confessed should have taken out process. 1 Maule & S. 408. And equity will not interpose to prevent such a preference. 3 Ves. & Bea. 53. And an executor de son tort may, after action brought by a single contract creditor, pay a specialty debt and plead the payment in bar of that action. Openham v. Clapp, 2 Barn. & Ad. 309.

If judgment for 100l. is suffered, and the plaintiff compounds for 60l., the judgment for the whole sum shall not be allowed to keep off other creditors. 8 Rep. 133. Judgments are not to be kept on foot by fraud. Sid. 230: 1 Vent. 76.

On a sci. fac. against an executor, he cannot plead fully administered, but must plead specially that no goods of the testator came to his hands whereby he might discharge the debt; for he may have fully administered, and yet be liable to the debt, where goods of the testator's afterwards come to his hands. 1 Lil. 568: Cro. Eliz. 575. In scire facias against executors, upon a judgment against against executors, upon a jungment their testator, they pleaded plene administravit, by paying debts upon bonds ante notitiam. It by paying debts upon bonds ante notitiam. It least for at their peril they will will. 82. S. C. Samuel v. Wake, 1 Bro. C. R. ought to take notice of debts upon record, and R. 144: Ancaster (D.) v. Mayer, Bro. C. R. first pay them; and though the recovery be in another county than that where the testator lived: but where an action is brought against wright v. Bendlowes, 2 Vern. 718: Amb. 581:

Where day of payment is past, the penalty of a bond is the sum due at law; but where the day of payment is not come, the sum in the condition is the debt, and the executor cannot cover the assets any further. The Bank of England v. Morrice, Widow: Ca. Temp. Hard. 228.

A bill may be exhibited in the Chancery against an executor, to discover the testator's personal estate; and thereupon he shall be decreed to pay debts and legacies. Ab. Ca. Eq. 238. If a person being executor, and his testator greatly indebted, be desirous to pay the assets as far as they will go, and that his payments may not be afterwards questioned, he may bring a bill in equity against all the testator's creditors, in order that they may, if they will, contest each other's debts and dispute who ought to be preferred in payment. 2 Vern. 37.

A debt devised by the testator is not to be executor, who can give a sufficient discharge for it, and is answerable to the legatee if there vised by will, must nevertheless permit the executor to transfer it, unless it appear that he has assented to the legacy. Franklin v. Bank of England, 9 Barn. & Cres. 156.

If an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice, which he is obliged to pay, the executor, by bill in Chancery, may force the legatees to refund. Chan. Rep. 136. 149. One legatee paid shall refund against another, and against a creditor of the testator, that can charge the executor only in equity; but if an executor pays a debt upon simple contract, there shall be no refunding to a creditor of a higher nature. 2 Vent. 360.

The following extract from Mr. Cox's admirable notes to his edition of Peere William's Reports; (1 P. Wms. 294, 679.) will serve as a general summary or abridgment of the determinations relative to the application of the different funds of a testator's estate, in pay-

ment of his different debts.

The personal estate of a testator shall, in all cases, be primarily applied in discharge of his personal debt, unless he, by express words, or manifest intention, exempt it. 2 Atk. 625: 3 Atk. 202: Haslewood v. Pope, 3 P. Wms. 324: French v. Chichester, 1 Bro. P. C. 192: Fereys v. Robertson, Bunb. 302: Walker v. Jackson, 2 Atk. 624: Bridgeman v. Dove, 3

Stapleton v. Colville, Talb. 202: Walker v. scended. Thirdly, the real estate specifically Jackson, 2 Atk. 624: Anderton v. Cooke, 1 Bro. devised, subject to a general charge of debts. C. R. 456, 457: and the case of Kynaston & Kynaston, cited there.—Holiday v. Bowman, cited 1 Bro. C. R. 145: Webb v. Jones. 2 Bro.

Every loan creates a debt from the borrower, whether there be a bond or covenant for payment or not. Cope v. Cope, 2 Salk. 449: Howel v. Price, 1 P. Wms. 291: Balsh v. Hyam, 2 P. Wms. 455: King v. King, 3 P. Wms. 458.

So the personal estate shall be liable, although such personal debt be also secured by mortgage. Howel v. Price, 1 P. Wms. 291: Cope v. Cope, 3 Salk. 449: Pockley v. Pockley, sort to that fund on which the second has no 1 Vern. 36: King v. King, 3 P. Wms. 360: lien. Laney v. Athol (D.), 2 Ath. 446: Lacam Galton v. Hancock, 2 Atk. 436: Robinson v. Wertins. 1 Ves. 312: Mogg v. Hodges, 2 Gee, 1 Ves. 251 : Belvedere (E.) v. Rochfort, 6 Bro. P. C. 520: Philips v. Philips, 2 Bro. C. R. 273.

of debts, shall be liable to discharge such mortgaged lands, either descended or devised. the specialty creditor against the real assets, Bartholomew v. May, 1 Atk. 487: Tweedale so far as the latter shall have exhausted the (MSS.) v. Coventry (E.), 1 Bro. C. R. 240. Even though the mortgaged lands be devised C. 4. Sagitary v. Hyde, 1 Vern. 455: Neave v. expressly subject to the incumbrance. 2 P. Wms. 366: Serle v. St. Eloy. So lands de- 2 Vern. 763: Galton v. Hancock, 2 Atk. 436. scended shall exonerate mortgaged lands de- And legatees shall have the same equity as vised. Galton v. Hancock, 2 Atk. 424. So unincumbered lands and mortgaged lands, both being specifically devised, (but expressly, "after payment of all debts,") shall contribute Lucy v. Gardner, Bunb. 137: Lutkins v. in discharge of such mortgage. Carter v. Leigh, Talb. 54. So where lands are subin discharge of such mortgage. Carter v. Barnardiston, 1 P. Wms. 505: 2 Bro. P.

But in all these cases, the debt being considered as the personal debt of the testator himself, the charge on the real estate is merely collateral. The rule therefore is otherwise where the charge is on the real estate principally, although there be a collateral personal deficiency of the personal assets to pay the security. Coventry (Countess) v. Coventry whole. Masters v. Masters, 1 P. Wms. 422: (E.) 2 P. Wms. 222: Freeman v. Edwards, Bligh v. Darnley (E.), 2 P. Wms. 620: Hyde 2 P. Wins. 437: Wilson (E.) v. Darlington, 2 v. Hyde, 3 C. R. 83. P. Wms. 664. in n.: Ward v. Ld. Dudley, 2 Bro. C. R. 316. Or where the debt, although personal in its creation, was contracted origi- one claimant, so as to defeat the claim of anonally by another. Cope v. Cope, 2 Salk. 449:
Bagot v. Oughton, 1 P. Wms. 347: Leman v. Newnham, 1 Vez. 51: Robinson v. Gee, 1 Vez. 251: Parsons v. Freeman, Amb. 115: Lacam v. Mertins, 1 Vez. 312: Lawson v. Hudson, 1 Bro. C. R. 58: Perkyns v. Bayntum, 2 P. Wms. 664. in n.: Shafto v. Shafto, ib.: Basset v. Percival, ib.: Tankerville v. Fawcet, 2 Bro. C. R. 57: Tweddell v. Tweddell, 2 Bro. C. R. 101. 152: Billinghurst v. Walker, 2 Bro. C. R. 604.

With respect to the priority of application of real assets, when the personal estate is either exempt or exhausted, it seems that, first, take place to the defeating of every legacy, the real estate expressly devised for payment of debts shall be applied. Secondly, to the extent of specialty debts, the real estate de- Wms. 190: Ryder v. Wager, Id. 335.

Galton v. Hancock, 2 Atk. 242: Powers v. Corbet, 3 Atk. 566: Wride v. Clarke, 2 Bro. C. R. 261 n.: Davies v. Top, 1d. 259. n.: Donne v. Lewis, 1d. 257.

It being the object of a Court of Equity that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement consistent with the nature of the respective claims, be applied in satisfaction thereof; it has been long settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall re-Ves. 53.

If, therefore, a specialty creditor, whose debt is a lien on the real assets, receive satis-So lands subject to, or devised for, payment faction out of the personal assets, a simple contract creditor shall stand in the place of personal assets in payment of his debt. 2 C. Alderton, 1 Eq. Ab. 144: Wilson v. Fielding, against assets descended. Culpepper v. Aston, 2 C. C. 117: Bowman v. Reeve, Pre. Ch. jected to payment of all debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets. Haslewood v. Pope, 3 P. Wms. 323. So. where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a Bligh v. Darnley (E.), 2 P. Wms. 620: Hyde

But from the principles of these rules it is clear, that they cannot be applied in aid of ther, and therefore a pecuniary legatee shall not stand in the place of a specialty creditor, as against lands devised, though he shall as against land descended. Scott v. Scott, Amb. 383: Clifton v. Burt, 1 P. Wms. 678: and Haslewood v. Pope, 3 P. Wms. 324. But such legatee shall stand in the place of a mortgagee who has exhausted the personal assets to be satisfied out of the mortgaged premises, though specifically devised. Lutkins v. Leigh, Talb. 53: Forrester v. Ld. Leigh, Amb. 171. For the application of the personal assets, in case of the real estate mortgaged, does not

It is now settled that the Court of Chan-him to a devastavit .- See Co. Lit. 111: Keiler. cery will not marshall assets in favour of a 12s: Perk. 570: Pland, 525, 543: 4 Rep. charitable bequest, so as to give it effect out 25: Cro. Eliz. 719: and this Diet. tit. of the personal chattels, it being void so far Legacy. as it touches any interest in land. Mogg v. S. Distribution of the Residue, to the Exe-Hodges, 2 Vez. 52; Attorney General v. Tyn- cutor bruself or next of Kin .- When the debts dal, Amb. 611: Foster v. Blanden, Ind. 701: and legacies are discharged, the surplus or Hillyard v. Taylor, Id. 713. II.: and it is to residuan must be paid to the residuary loga. be observed, that none of the rules abovementer, if any be appointed by the will. Where tioned subject any fund to a claim to which there was no residuary legatee, it was long a it was not before subject, but only take care settles notion that the susplus devolved to the that the election of one claimant shall not pre- executor's own use, by virtue of his executorjudice the claims of the others. 2 Atk. 435; Ship. Peckins, 525.—But whatever ground 1 Vez. 312.

or equitable. Legal assets constitute a fund ing restriction; that although where the exefor the payment of debts according to their cutor had no legacy at all, the residuum legal priority. Equitable are such as can be should in general be his own; yet wherever reached only by the aid of a court of county, there was sufficient on the face of a will (by and are divisible, pari passa, among all the means of a competent legacy or otherwise, creditors. Every thing may be considered as to imply that the testator intended his excenequitable assets, which the debtor has made, subject to his debts generally, and which without his act would not have been so subject. 2 Fould. Eq. 398, n. Equitable assets in the hands of an executor, are in some respects applied as legal assets are; as first to 335: 3 P. Wms. 43, 194: Stra. 559: Lawson pay debts, and then legacies: 1 Vern. 4-2: 2 P. W. 552: but, as already observed, they differ in this, that all the creditors take proportionably, and not in a course of administration, as in the case of legal assets.

A preference, however, is given to specialty creditors out of equitable assets created by statute.

By the 1 W. 4. c. 47. § 9. (repealing and reenacting the 47 Geo. 3. c. 74. which renders the real estate of traders within the bankrupt laws, and which by their wills are not charged with or devised subject to their debts, assets in equity for the payment, as well of their debts due on simple contract as on specialty; and by the 3 and 4 W. 4. c. 104, which makes all real estate, whether freehold, customary, or copyhold, and which is not by will charged with or devised subject to the payment of debts, also assets to be administered in courts of equity for the payment of simple contract and specialty debts; it is enacted that specialty creditors shall be paid in full before those by simple contract. See further tit. Real Estate.

7. Paying Legacies .- When the debts are all discharged, the legacies claim the next regard; which are to be paid by the executor so far as his assets will extend: but he may not give himself the preference herein, as in the case of debts. 2 Vern. 434: 2 P. Wms. 25. See tit. Legacy .- The assent of an executor to legacies is held necessary to entitle the legatee; but as this assent may be compelled, see March 97., it does not seem necessary to state the effect of a dissent where there are assets sufficient to answer both debts and legacies. Where there are not assets, the assent of the executor to a legacy would subject where there are no parties entitled under the

there might once have been for this opinion, Ass its are either real or personal, and legal it was atterwards understood with the followtor should not have the residue, the undivided surplus of the estate should go to the next of kin, the executor then standing upon exactly the same footing as an administrator. Prec. Chanc. 323: 1 P. Wms. 7. 544: 2 P. Wms. v. Lawson, Dom. Proc. 28 April, 1777.

this subject is very ingeniously stated in a note of Mr. Cox's, to his edition of P. Wms. vol. 1. p. 550. But the question is settled by the fellowing act of the legislature.

By stat. 1 Will. 1, c. 10. " for making better provision for the disposal of the undisposed residues of the effects of testators," reciting "that testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate; and that executors so appointed become by law entitled to the whole residue of such estate; and that courts of equity have so far followed the law, as to hold such exeentors entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein; in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the statute of Distributions, if the testator had died intestate." And "that it is desirable that the law should be extended in that respect." It is enacted, that where any person shall die (after 1st September, 1830), having by will or codicil appointed any exeeutor or executors, such executors shall be deemed by courts of equity to be trustees for the person or persons (if any) who would be entitled to the estate under the statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will or codicil that the persons so appointed executors were intended to take such residue beneficially. There is a proviso, that the act shall not affect the rights of executors, statute. land.

It is a curious circumstance, that about 100 years since, a bill was brought into the House of Lords, for a purpose directly contrary, namely, to take away the equitable rule, and to give the surplus to the executor, whenever it was not precisely given away from him. A copy of this bill, introduced by Lord King in 1776, is given in Jemmett's edition of the acts passed in the session 1830, relating

to courts of equity.

Concerning the Administrator also there was formerly much debate, whether or no he could be compelled to make any distribution of the intestate's estate. Godol. p. 2. c. 32. But these controversies were put an end to by the statute commonly called the Statute of Distribution, 22 & 23 Car. 2. c. 10. (explained by 29 Car. 2. c. 30.) whereby it is enacted that the surplusage of intestates, (except of femes coverts, which are left as at common law: stat. 29. Car. 2. c. 3. § 25.) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: one-third shall go to the widow of the intestate, and the residue, in equal proportions, to his children, or if dead, to their representatives, that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, and their representatives: if no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives: but no representatives are admitted among collaterals farther than the children of the intestate's brothers and sisters. Raym. 496: Lord Raym. 571.

The next of kindred here referred to are to be investigated by the rules of consanguinity, as those who are entitled to letters of administration, of whom sufficient has already been said (ante III.) And therefore, by this statute, the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate, and without wife or issue; in exclusion of any brothers and sisters of the deceased. And so the law still remains with respect to the father. (See 1 P. Wms. 48.) And the father need not administer. (Pr. Ch. 260.) But by stat. 1 Jac. 2. c. 17. if the father be dead, and any of the children die intestate, without wife or issue, in the surviving brother. Yet if C. had also been the life-time of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions. -And in case a man die, leaving a wife and a mother, and brothers and sisters, the wife shall have only a moiety, the remainder going to his mother, brothers, and sisters equally. 2

P. Wms. 344.

The act does not extend to Scot- English law previous to the statute of wills, by which (see Glanvil, l. 2. c. 5: Bracton, l. 2. c. 26: Fleta, l. 2. c. 57.) a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children. And so if he had no children the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ de rationabili parte bonorum was given to recover them. F. N. B. 122.

By the same Statute of Distributions it is

directed that no child of the intestate (except his heir at law) on whom he settled in his life-time any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advanceshares, the children, so advanced, shall have so much only as will make them equal. And this with respect to goods and chattels is part of the ancient custom of London, of the province of York, and of Scotland: and with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England under the name of Hotchpot.

It may be observed, that the doctrines and limits of representation, laid down in the Statute of Distribution, seem to have been in some measure also borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided per capita, and sometimes per stirpes; whereas the common law knows no other rule of succession but that per stirpe; only. They are divided per capita, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred and not jure representationis, in the right of another person. As if the next of kin be the intestate's three brothers, A. B. and C., here his effects are divided into three equal portions, and distributed per capita, one to each: but if one of these brothers A. had been dead, leaving three children, and another, B. leaving two, then the distribution must have been per stirpes; viz. one third to A.'s three children, another third to B.'s two children, and a remaining to C. dead without issue, then A.'s and B.'s five children, being all in equal degree to the inestate, would take in their own rights per capita; viz. each of them one-fifth part. Prec.

A question has been made, if a father die intestate, leaving only one son, which son also dies intestate, whether administration should The Statute of Distribution bears, in its be granted to the next of kin, of the father or principle, a near resemblance to our ancient of the son? The latter determination has been

that, by this statute, a right is vested in one child, the whole, two by the custom, and one by the where there is one and no more, (viz.) a right to sue for the estate: and by consequence, if he die before the estate is recovered, and ache be observed, that if the wife be provided for tually in his possession, it must go to his ad- by a jointure before marriage, in bar of her ministrator, and not to the administrator of the customary part, it puts her in a state of nonfather. Palmer v. Alcock, 3 Mod. 58. Vide! Shower, 26. and 2 Vern. 274.

So where a person died intestate, leaving two who were next a-kin, in equal degree to him; one of them died intestate within the year, and before distribution; adjudged, that an interest was vested in him, and his next of kin shall have the administration, like the case of a residuary legatee dying before probate of the will, (viz.) his next of kin shall have the administration, and the next of the testa-

tor. Show. 25.
9. Distribution of the Customs of London and York as to Intestates .- The statute of Distribution expressly excepts and reserves the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestate's effects. So that, though in those places the restraint of devising is removed, their ancient customs remain in full force with respect to the estates of intestates.

In the city of London (Ld. Raym. 1329.) and province of York, (2 Burn. Eccl. Law. 746.) as well as in the kingdom of Scotland, (Ibid. 782.) and probably also in Wales, (concerning which there is little to be gathered, but from the stat. 7 & 8 W. 3. c. 38.) the effects of the intestate after payment of his debts, are in general divided according to the ancient universal doctrine of the pars rationabilis. If the deceased leaves a widow and children, his substance (deducting for the widow's her apparel, and the furniture of her bed-chamber, which in London is called the widow's chamber,) is divided into three parts, one of which belongs to the widow, another to the children, and the third to the administrator; if only a widow, or only children, they shall respectively, in either case, take one moiety and the administrator the other. 1 P. Wms. 341: Salk. 246. If neither widow nor child, the administrator shall have the whole. 2 Show. 175 .- And this portion, or dead man's part, the administrator was wont to apply to his own use. (2 Freem. 85: 1 Vern. 133.) Till the stut. 1 Jac. 2. c. 17. declared that the same should be subject to the statute of Distribution. So that if a man dies worth 1800l. personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom, and two by the statute; and each of the children five, three by the custom, and two by the statute; if he leaves a widow and one child, she shall have specific goods, &c.; Sir Wm. Jones, 173: 1 still eight parts, as before, and the child Saund. 217. n. (1); or in case they are sold, an shall have ten, six by the custom and four action for money had and received to recover by the statute; if he leaves a widow and no their value.

that, by this statute of distribution of intestichild, the widow shall have three-fourths of entity, with regard to the custom only; (2 Vern. 665: 3 P. Wms. 16.) but she shall be entitled to her share of the dead man's part under the Statute of Distribution, unless barred by special agreement. 1 Vern. 15: 2 Chanc. Rep. 252. And if any of the children are advanced by the father in their life-time with any sums of money (not amounting to their full proportionale part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not by the widow, before they are entitled to any benefit under the custom; (2 Freem. 279: 1 Equ. Cas. Abr. 155: 2 P. Wms. 526.) but if they are fully advanced, the custom entitles them to no farther dividend. 2 P. Wms. 527.

Thus far, in the main, the customs of London and of York agree: but besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament (2 Vern. 558.); and if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one it is free from any orphanage custom; and in case of intestacy, shall fall under the Statute of Distributions. Prac. Chanc. 537. The other, that in the province of York, the heir at common law, who inherits any land, either in fee or in tail, is excluded from any filial portion or reasonable part. 2 Burr. 754. See further Williams on Executors, p. 937.

VI. 1. Of Actions and Suits by and against Executors and Administrators, &c .- And herein of Devastavit.-With respect to personal actions founded upon any obligation, contract, debt, covenant, or other duty, it has been a general rule from the earliest times that the right of action on which the deceased might have sued survives him, and vests in his executor or administrator. Executors however could not maintain an action of account at common law, but it was given to them by the stat. of Westm. 2 (1 Ed. 1. stat. 1. c. 3.); to executors of executors by 25 Ed. 3. c. 5; and to administrators by the 31 Ed. 3. c. 11. Where goods, &c. of the testator taken away continued in specie in the hands of a wrongdoer, it has been long decided that replevin and detinue lie for executors to recover the

But it was a principle of the common law, executors or administrators shall have taken that if an injury was done either to the person upon themselves the administration of the or property of another, for which damages only estate and effects of such person; and the could be recovered, the action died with the damages to be recovered in such action shall person to whom or by whom the wrong was be payable in like order of administration done; the rule being where a declaration im- as the simple contract debts of such perputed a tort done either to the person or property of another, and the plea must have been not guilty, actio personalis moritur cum per- or mixed action and for damages, and then sona. This rule was greatly modified by the dies, his executor or administrator, not the 4 E. 3. c. 7. de bonas asportatis in vità testatoris, which gave to executors the like actions but not for the land. Fitz. Admin. 53: to recover damages for trespasses done to their | March, 9. testators, by carrying away their goods and chattels in their lifetimes, as the latter should have had if they had been living. The remedy afforded by this statute was extended to executors of executors by the 25 E. 3. c. 5, and to administrators by an equitable construction of the former act, Cro. Eliz. 384. The 4 E. 3. being a remedial law, was expounded largely, and though it made use of the word tres-passes only, it was held that under it an executor or administrator should have the same cutor or administrator should have the same who has no right till administration commit-actions for any injury done to the personal ted; for his right is the same before as af-estate of the deceased during his life, whereby the probate of the will, and the not proving it had been rendered less beneficial to his reit is only an impediment to the action. I presentatives, as he himself might have had, Salk. 303. whatever might be the form of action. 1 Although an executor derives his title from Saund. 217. n. 1. But that statute does not the will, it is the probate alone which authentiextend to injuries done to the person; there-cates his right, and it is the only evidence of this fore an executor or administrator shall not appointment. The seal of the Ecclesiastical have actions of assault or battery, false im- Court on the probate proves itself. Car. Temp. prisonment, or slander, for such actions do not Hard. 108. survive. Neither did it extend to wrongs done to the freehold, which also died with the party H. T. 4 W. 4. pursuant to the stat. 2 and 4 injured, until the passing of the recent act of W.4.c.42, and which rules were to come into the 3 and 4 W.4.c.42, which by § 2. after operation from and after the first day of the reciting "there was no remedy provided by following Easter Term, unless parliament law for injuries to the real estate of a person should in the meantime otherwise direct, it is deceased in his life-time, nor for certain ordered that in all actions by and against exempted days by a person deceased to not the state of the state wrongs done by a person deceased to another cutors or administrators, the character in in respect of his property, real or personal," which the plaintiff or defendant is stated in enacts: "that an action of trespass or tre any person deceased for an injury to the real An action of debt did not lie against an estate of such person committed in his life-executor or administrator upon a simple contime, for which an action might have been tract, in which the deceased could have waged maintained by such person, so as such injury his law. 1 N. R. 293. And although wager shall have been committed within six calendar of law is now abolished by § 13. of the 3 and months before the death of such deceased per- 4 W. 4. c. 42. it is enacted by the following son; and provided such action shall be brought section, that an action of debt on simple within one year after the death of such per-contract shall in no case be maintainable son; and the damages when recovered shall be against any executor or administrator. part of the personal estate of such person: Nothing can be debt in the executor, which and further that an action of trespass, or tres- was not debt in the testator. Cro. Eliz. 232. pass on the case, as the case may be, may be A promise to pay to an executor, when the maintained against the executors or administic testator is not named, is not good. Cro. Jac. trators of any person deceased for any wrong 570. But a testator may bind his executors committed by him in his lifetime to another as to his goods, though he himself is not bound. in respect of his property, real or personal, so | Ibid. And an excentor may recover a duty as such injury shall have been committed due to the testator, though he be not named, within six calendar months before such person's death, and so as such action shall be upon a collaterar months made are not by brought within six calendar months after such the testator.

son."

If a man have judgment for land in a real heir, shall have execution for the damages,

Counts on promises to a testator, may be joined with counts on promises to an executor, if the damages recovered under the last would be assets in the hands of the executor. Powley v. Newton, 6 W. P. Taunt. 456.

An executor may commence an action be-. fore probate; but he cannot declare upon it without producing in court the letters testamentary: he is not like an administrator, who has no right till administration commit-

By one of the rules made by the judges in

assumpsit to do any collateral thing, as to build I definet tantum : and Le cannot waive the lease an house, &c. which is not a debt, binds exe- without renouncing the whole executorship. cutors. Jenk. Cent. 290. 336. Assumpsit lies upon a contract of the testator; and the reason is the same upon a promise, where the testator had a valuable consideration. Palm. 329. Though a debt upon a simple contract of the testator, cannot be recovered of the executor by action of debt; yet it may by assumpsit. 1 Lev. 200: 9 Rep. 87.

The executrix of an attorney is liable in an action on the case for negligence of her testator in not making due inquiry into the validity of a security upon which his client proposed to advance money. 1 D. &

R. 30.

the father of two illegitimate children for payment of an annuity of 30l. for their support and that of their mother during their joint lives, or in case of the death of the children during the life of the mother, are liable upon the bond for the arrears of the annuity accruing after the death of that child. 1 D. & R. be sued in actions against executors; but ac-548: 5 B. & A. 889.

work and dies before the completion of it, upon them the executorship. 1 Rol. 924: his executors are discharged from this con- Jenk. Cent. 106, 107. If any executor retract, for it is merely personal, and has become fuses to join in an action with his co-executors impossible to be performed. 1 Tyrrwh. Ex. R. 349.

An action does not lie at law against an executor for a general legacy. 5 T. R. 690: 7 B. & C. 542. But it is otherwise in the case of a specific legacy to which the executor has assented. 1 Stra. 70: 3 East, 123.

A defendant may be declared against as an executor or administrator though the process only describes him generally. 3 B. &

B. 4.

If two persons are jointly bound, and one of them dies, the survivor only shall be charged, and not the other's executor. Pasch. 16 Car. When there are two executors, if one of them dies, action is to be brought against the surviving executor, and not the executor of the deceased: but in equity the testator's goods are liable in whosesoever's hands they 1 Leon. 304: Chan. Rep. 57.

If there be no assets, the obligee executor may sue the heir of the obligor testator in action of debt upon his bond. 1 Salk. 304: 1

Lil. Abr. 575.

An executor shall be charged with rent in the detinet, if he hath assets; and if he continues the possession, he shall be charged in the debet and detinet, in respect of the perception of the profits, whether he hath assets or not. 1 Lev. 127.

If an executor has a term, and the rent reserved is more than the value of the premises, in action brought against him for it in the debet and detinet, he may plead the special matter, viz. That he hath no assets, and that the &c. the recovery shall be de bonis testaloris, land is of less value than the rent, and demand &c. 2 Rol. Rep. 400. See on this subject

But see 4 B. & Ad. 241. in which it was held, that where a term of years becomes vested in executors, and the yearly value is less than the reserved rent, the executors are liable in the debet and detinet as assignces, for so much of the rent as the premises are worth.

If an executor releases all actions, suits, and demands, it extends only to demands in his own right, not such as he hath as executor.

One executor cannot regularly sue another at law; but he may have relief in equity: in Executors of an obligor of a bond given by the eye of the law all are but as one executor; and most acts done by, or to any of them, are esteemed acts done by or to all of them. 1 Rol. Ab. 918. If where one executor is sued, he plead that there is another executor, he rught to show that he hath administered. I Lev. 161. And he only that administers is to tions brought by executors are to be in the But if an author undertakes to compose a name of all of them, though some do not take he must be summoned and severed.

An executor is not disabled by outlawry to

By the stat. of Frauds, 29 Car. 2. b. 3. no action shall charge an-executor to answer damages out of his own estate, upon any proanis to another, unless there be some writing thereof signed by the party to be charged therewith. See Rann v. Hughes, 4 Bro.

A promissory note, by which the makers as on demand with interest, renders them personally liable. 2 B. & B. 460. S. C .: 5 Moore,

Against an administrator and for him, action will lie, as for and against an executor, and he shall be charged to the value of the goods, and no further: unless it be by his own false plea, or by wasting the goods of the mtestate. An executor or administrator shall i ver lo c'arged de bonis propriis, but where he doth some wrong; as by selling the testa. tor's goods, and converting the money to his own use, concealing or wasting them, or by pleading what is false. Dyer, 210: 2 Rol. Rep. 295. But this plea must be of a fact within his own knowledge. If an administrator plead plene administravit, and it is found against him, the judgment shall be de honis propriis, because it is a false plea, and that upon his own knowledge. 2 Cro. 191. Contra where he pleads such a plea, and that he hath no more than to satisfy such a judgment, judgment if he ought not to be charged in the Williams on Executors, p. 1216. Upon plene

administravit pleaded by an administrator, It has been the constant habit of courts of the plaintiff must prove his debt, or he equity to charge the representatives of trusshall recover but a penny damages, though tees with breaches of trust, and this whether there be assets; because the plea only admits they derive benefit from the breach of trust the debt, but not the quantum. 1 Salk. or not. 1 Scho. & Lef. 272: 17 Ves. 489.

tors or executors in any action brought an executor or administrator; an administraagainst them for the debt of the intestate: ex. tor de bonis non may sue forth a scire facias, cept where they have wasted the goods of the and take execution upon such judgment. If deceased. See Cro. Eliz. 503: Yelv. 168: an executor makes himself a stranger to the Hut. 69: 2 Rol. Rep. 87: 1 Salk. 207: 3 Salk. will of the testator, or pleads Ne unques exe-106. Where an administrator is plaintiff, he cutor, or any false plea, and it is found must show by whom administration was against him, judgment shall be de bonis progranted; for that only entitles him to the ac- priis: in other cases de bonis testatoris. Cro. tion; but if an administrator is defendant, the Jac. 447. plaintiff need not set forth by whom administration was granted, for it may not be within the sheriff return a devastavit, the plaintiff his knowledge. Sid. 228: 1 Lutw. 301. Geneshall have judgment and execution de bonis rally an administrator shall be charged by propriis of the defendant; and if nulla bona his knowledge. Sur. 220: I Lucus. 301. Gene-shall have Judgment; and if nulla bona rally an administrator shall be charged by propriis of the defendant; and if nulla bona others for any debt or duty due from the de-be returned, he may have a capias ad satisceased, as he himself might have been charg-faciend. or an elegit. 2 Nels. 791: Dyer, 185. ed in his life-time; so far as he hath any But one executor shall not be charged with a of the intestate's estate to discharge the same. devastavit made by his companion; for the Co. Lit. 219: Dyer, 14.

At common law executors or administrators could not distrain for arrears either of rent issuing out of land, the property of third parties, or of rents of lands whereof the deceased was owner, where such arrears had thing by negligence or fraud, &c. it is a deaccrued in his-lifetime; but by virtue of the vastavit, and he shall be charged for so much 32 H. 8. c. 87. and 3 and 4. W. 4. c. 42. § 37. out of his own goods. 8 Rep. 133. And a executors may make a distress in all cases new executor may have an action against a where it might have been had by their testa-

tor or intestate during his life.

An executor or administrator is entitled to able to creditors, &c. Hob. 266. all the equitable interests of the deceased, and may in his representative capacity enforce them in a court of equity. Com. Dig. Chan-

An executor or administrator may exhibit a bill for the discovery of the personal estate of the deceased; 1 Vern. 106; institute a suit against creditors for the purpose of having own name, for a debt due by simple contract their several claims adjusted by the decree of to the testator, this shall charge him as much the court, where he finds the affairs of the as if he had received the money; for the new testator so complicated as to render the administration of the estate unsafe; 2 Vern. 37; is quasi a payment to him. Off. of Ex. 158: and where there is a deficiency of assets to Yelv. 10: 1 Lev. 189. pay creditors, file a bill to compel a legatee to refund his legacy. 3 East, 123.

trator is liable in his representative character come to an agreement, that he shall pay the to all equitable demands with regard to per- executor such a sum at a future day, and the sonal property which existed against the de- party fails, this is a devastavit; and he shall ceased at the time of his death.

4.19.

Executors and administrators are in almost every respect considered in courts of equity run in arrear, and then suffer judgment for as trustees. Hence they will entertain a bill it: and want of assets to pay before the for a personal legacy, or the distribution of incurring of it by the administrator shall not an intestate's personal estate; 1 Vern. 134; be intended unless it be expressly pleaded. 2 and compel an executor or administrator, as Lev. 40. they do an express trustee, to discover and set forth an account of the assets, and of his ap- executor lends plication of them.

6. By stat. 17 Car. 2. c. 8. § 1. on any judgment after verdict, had by or in the name of

If on a scire facias against an executor. act of one shall charge the other no further than the goods of the testator in his hands amount to. Cro. Eliz. 318.

If an executor does any waste, or misemploys the estate of the deceased, or doth any former executor, who wasted the goods of the deceased; or the old one may remain charge-

Formerly if an executor wasted goods, and left an executor, and died leaving assets, his executor should not be chargeable, because it was a personal tort. 2 Lev. 120. But now it is otherwise by the stat. 4 and 5 W. & M.

If an executor takes an obligation in his security hath extinguished the old right, and

So if the executor sues a person in trover and conversion, in which he has a right to On the other hand an executor or administ recover; and afterwards he and the defendant Toller, answer ad valorem. 2 Lev. 189: 2 Jon. 88. S. C.: 1 Vern. 474, S. C.

It is a devastavit to permit interest to

But it does not amount to a domatunit if an belonging to the testator, but not wanted for

Vol. I.—93

the immediate uses of the will, if he exer- | § 5. Acts done under voidable letters of adcises a fair and reasonable discretion on the ministration shall be valid; but the next of subject. 3 B. & A. 360.

nature of a trustee of an estate. Chan. Cases, in equity.

2. Of Costs.—Previous to the late act of proving, shall be void. the 3 and 4 W. 4. c. 42. executors and administrators were not liable to costs when plaintiffs upon a nonsuit or verdict where the ac- court of equity, in a suit instituted for that tion was brought upon a contract entered into purpose. by the deceased, or for a wrong done in his life-time; but they were where they sued on administrations, executors, or administrators a contract made with or for a wrong done to themselves, 1 Salk, 314; 2 Taunt, 116. Also EXECUTORY ESTATE. themselves. 1 Salk. 314: 2 Taunt. 116. Also they were made to pay costs in cases where they misconducted themselves or were guilty of a wilful default, as where they knowingly brought a wrong action; were guilty of a discontinuance, 1 W. Bl. 451; for not proceeding to trial according to notice. Tidd, 979, 9th ed.; or upon a judgment of non pros. Ibid.

Now by the 31 \ of the above statute it is enacted, that in every action brought by an executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts, shall otherwise order, be liable to pay costs to the defendant, in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action occurring to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

Executors and administrators, when defendants, have no privilege with respect to costs; and are liable to pay them de bonis propriis if there are no assets. Tidd, 1016, 8th

ed. 9 B. & C. 658.

Under title, VI. 1. the fourteenth section of 3 and 4 W. 4. c. 42., which by the preceding clause abolished wager of law, is incorrectly stated. By that section "an action of debt on simple contract shall be maintainable in any court of common law against any ex-

ecutor or administrator."

By a bill which has passed through the House of Commons, and which in all probability will shortly become a law (§ 29.), the assent of an executor or administrator shall not vest in a legatee the legal title to any personal estate, other than such chattels as may pass by delivery, but such title shall remain vested in the executor or administrator, until is no need of a particular estate to support it, he shall have executed an assignment or re- the only use of which is to make the remainlease in writing of such personal estate.

§ 3. An executor may renounce the executorship of any person of whom his testator

shall have been executor.

§ 4. Letters of administration granted where there is an executor, but before probate, shall be voidable only.

kin, and other persons receiving property, An executor in case of a devastavit is in except purchasers, shall be liable to account

§ 6. Deeds executed by an executor before

§ 7. An executor or administrator may be discharged from his office by the decree of a

§ 8. The act is not to extend to the wills,

Is where an estate in fee created by deed or fine is to be afterwards executed by entry, livery, writ, &c. Leases for years, rents, annuities, conditions, &c. are called inheritances executory. Wood's Inst. 293 Estates executed are when they pass presently to the person to whom conveyed, without any after act. 2 Inst. 513. See tit Estate.

EXECUTORY DEVISE. The devise of a fu-ture interest. A devise that vests not at the death of the testator, but depends on some contingency which must happen before it can

vest. 1 Eq. Cas. Abr. 486.

An executory devise differs from a remainder in three very material points. 1. That it needs not any particular estate to support it. 2. That by it a fee-simple or other less estate may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. See tit. Remainder,

and 2 Comm. 172-5.

1. The first case happens when a man devises a future estate to arise upon a contingency: and until that contingency happens does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it; a freehold commencing in future. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise. 1 Sid. 153. For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do if it passes at all), therefore it may commence in futuro; because the principal reason why it cannot commence in future in other cases, is the necessity of actual seisin, which always operates in præsenti. since it may thus commence in futuro, there der, by its unity with the particular estate, a present interest. And hence also it followed, that such an executory devise not being a present interest, could not be barred by a recovery suffered before it commenced. Cro. Jac. 593. See this Dict. tit. Fine and Recovery.

estate, may be limited after a fee. And this settled that such remainder may not be limited happens where a deviser devises his whole es- to take effect, unless upon such contingency tate in fee, but limits a remainder thereon to as must happen (if at all) during the life of the commence on a future contingency. As if a first devisee. 1 Sid. 551: Skinn. 341: 3 P. man devises lands to A. and his heirs; but if he Wms. 358. See post, II. dies before the age of twenty-one, then to B. and his heirs: this remander also, though void in general, subsequent information may be in deed, is good by way of executory devise. thus divided. 2 Mod. 289.

In both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time, as within one or more life or lives in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors. 12 Mod. 287: 1 Vern. 164: 1 Salk. 229. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son, and this hath been decreed to be a good executory devise. Forr. 232. happen. Raym. 28: 1 Lutw. 798. Where a This limit was taken from the time in which an estate may be rendered unalienable by a strict settlement. An executory devise to an unborn son of a man, may be suspended a few months beyond the life of the father, and twenty-one years afterwards, by a posthumous See post I. ad finem.

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for, by law, the first grant of it to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term for years.

Rep. 95.

And, at first, the courts were tender even in the case of a will of restraining the devisee for life from aliening the term, but only held, that in case he died without exerting that act of ownership, the remainder over should then take place; for the restraint of the 592. A remainder of a fee may not be limited power of alienation, especially in very long by the rules of law, after a fee simple; for terms, was introducing a species of perpetuitive when a man hath parted with his whole estate, ty. Bro. tit. Chattels, 23: Dyer, 74. But, there cannot remain any thing for him to dissoon afterwards it was held, that the devisee pose of: but of late times a distinction hath for life hath no power of alienating the term, so as to bar the remainder-man. Dyer, 358: 8 Rep. 96. Yet, in order to prevent the danger of perpetuities, it was settled, that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be in esse during the life of the first devisee; for then, as it is expressed, all the candles are lighted, and are upon condition that if he did not pay the legaconsuming together, and the ultimate remain- cies given by the will within such a time that der is in reality only to that remainder-man then the land should remain to the legatees

2. By executory devise a fee, or other less who happens to survive the rest. It was also

Having said thus much on executory devises

I. Of Executary Devises of Lands of In-

II. Of Executory Devises of Terms for Years, and of personal Goods and Chattels.

I. It is a settled rule of law that where the court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise. 2 Bos. & Pull. 298. See

tit. Remainder, II.

If a particular estate is limited, and the in-heritance passes out of the donor, this is a contingent remainder; but where the fee by a devise is vested in any person and to be vested in another by contingency, this is an executory devise: and in all cases of executory devises, the estates descend until the contingencies contingent estate limited, depends upon a freehold, which is capable of supporting a remainder, it shall never be construed an executory devise, but a remainder. And so it is if the estate be limited by words in præsenti, as when a person devises his lands to the heirs of A. B. who is living, &c. Though if the same were to the heir of A. after his death it would be as good as an executory devise. 2 Saund. 380: 4 Mod. 255.

One by will devises land to his mother for life, and after her death, to his brother in fee; provided, that if his wife, being then enceinte, be delivered of a son, then the land to remain to him in fee, and dies, and the son is born: in this case it was held, that the fee of the brother shall cease and vest in the son, by way of executory devise, on the happening of the contingency; and here such a fee estate enures as a new original devise to take effect when the first fails. Dyer, 33, 127: Cro. Jac. been made between an absolute fee simple, and a fee simple which depends upon a contingency, or is conditionally limited; especially where such a contingency may happen in the course of a few years, or of one or two lives; and where such a remainder is limited by will, it is called an executory devise. 2 Nels. Abr. 797.

An estate devised to a son and his heirs,

remainder, after a fee limited to the son, being ecutory interests limited in defeasance of an upon the contingency of the son's failing in estate tail, are not within the rules against payment of the legacies, was adjudged good perpetuities, for being, with all other limitaby way of executory devise. Cro. Eliz. 833. And where the father devised his lands to his destroyed by the tenant in tail, they are not youngest son and his heirs, and if he die with- within the mischief. 2 Salk. 570: 4 Burr. out issue, the eldest son being alive, then to 1929. him and his heirs; this was held a good remainder in fee to the eldest brother, after the is expedient that all dispositions of real and conditional contingent estate in fee to the personal estates, whereby the produce and

shall have a son or sons who shall attain 21, longer term than the life of a settler, or twenbut if A. shall die without son or sons to in-herit, that the son of B. shall inherit:" this is a fee in A. with an executory devise to the minority of any party living (or in ventre sa mere) at the time of such decease, or the mi-

R. 147.

born, of A. B., and after his decease, or accession to his paternal estate, then to his second son and his heirs male, with remainders over: such second son of A. B. when born, will take duce of timber: nor to the disposition of herian estate in tail male by way of executory devise, determinable on the accession of the family estate, and in the mean time the lands which is not to take effect until after the deterdescend to the heir of the testator. 2 Black.

Rep. 1159.

One devised to his daughter then under age, an estate in fee, and if she died under the age of 21 years, unmarried, and without leaving lawful issue, then to his wife in fee. The daughter married, and died under 21 without added the number of months equal to the peissue, but left her husband surviving her. The riod of gestation. (In the House of Lords.) Court of K. B. held that the devise over did 10 Bing. 140. not take effect, as by the words of the will it was made to depend on the happening of the three events, dying under 21, dying under that age unmarried, and dying under that age without issue. Doe, d. Baldwin & Ux., v. Rawding & Ux., Term Rep. K. B. E. 59 G. 3. 441: and see Doe v. Cook, 7 East, 269. and child of a person in existence when it attains Doe v. Jessop, 12 East, 269. But see 2 Ves. 247. and 3 Ves. jun. 450.

A testator having by his will devised to his son W. F. in fee, and afterwards added, that if he should have no children, child, or issue, the estate should on the decease of W. F., become the property of the testator's heir at law, subject to such legacies as W.F. might bear by have given A. an estate tail in real property; will to the younger branches of the family, it was held that W. F. took an estate in fee, with an executory devise over (in the event of his interest: but if it appear from any clause or leaving no issue living at the time of his death) | circumstance in the will, that the testator into the person who, on the happening of that tended to give it over only in case A. had no event, should become heir at law of the testa- issue living at the time of his death, upon that tor. 3 B. & A. 646.

personal estate to arise after an indefinite cases referred to in Cox's P. W. iii. 262.

&c. and their heirs; this limitation of a fee in | failure of issue is void. 1 Salk. 232. But ex-

By 39 and 40 G. 3. c. 98. reciting 'that it youngest, as depending upon the possibility that he might be alive when his youngest brother died without issue; and his dying without issue was a collateral determination of his estate, whilst the other was living. Godb. by deed or will settle or dispose of any real or personal property, in such manner that the If a devise be "to A. for ever, that is, if he rents or profits shall be accumulated, for a son of B. who shall take if A. die without norities of parties beneficially entitled: all dissue, or if the issue die before 21. 1 Bro. C. rections to the contrary are declared void, and B. 147 the rents, &c. are to go to the parties who If a devise be to the second son, then un- would be entitled if such accumulation were not directed. This act does not extend to provisions for payment of debts, or for raising portions for children, or respecting the protable property in Scotland.

> A limitation by way of executory devise, mination of a life or lives in being, and a term of twenty-one years as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person, is a valid limitation. Secus, if to the term in gross of twenty-one years be

II. Of Executory Devisee of Terms for Years, and of personal Goods and Chattels. -It has now been long fully settled, that a term for years, or any chattel interest, may be given by an executory devise to an unborn the age of twenty-one; and that the limits of executory devises of real and personal property are precisely the same. Fearne. See ante I.

It is very common to bequeath chattel interests to A. and his issue, and if he dies without issue to B. It seems now to be determined, that where the words are such as would in cases of personal property the subsequent limitations are void, and A. has the absolute event the subsequent limitation will be good An executory limitation of either real or as an executory devise. See Fearne, and the

Formerly where a term of years (which is | selves, were given to the first legatee, the probut a chattel) was devised to one; and that if perty being supposed to continue in the exeche died, living another person, it should re- utor: but now that distinction is disregarded: main to the other person during the residue of the term, such a remainder was adjudged void: for a devise of a chattel to one for an hour, was a devise of it forever. Dyer, 74. But it was afterwards held, that a remainder af a term to one, after it was limited to another for life, was good: in a case where a testator having a term, devised that his wife should have the lands for so many years of the term as she should live, and that after her death the residue thereof should go to his son and his assigns; and this was the first case wherein an executory remainder of a

term for years was adjudged good. Dyer, 253. in a real estate. See 2 Comm. c. 25. 11. 3.

358.

A person possessed of a term, devised to his the deceased; and falling under the distribusife for eighteen years, and after to his eldest tion of the executor. Scotch Dict. son for life, after to the son's eldest issue male during life; though he have no such issue at! the time of the devise and death of the devisor. if he has before his own death, he shall have it as an executory devise. 1 Rol. 612. But if one devise a term to his wife for life, the remainder to the second son is void, and no ex- at the county-court by statute, and peers to one life, it hinders not a remainder over. &c. are also exempted by law from serving 1 Eq. Abr. 194.

needs not any particular estate to support it; an exemption from tolls, &c. by the king's and because the person who is to take upon letters patent: and a writ of exemption, or of contingency, hath not a present but future inease to be quit of serving on juries, and all terest, his estate cannot be barred by a common public service. Shep. Epitom. 1049. Where recovery. 2 Nels. Abr. 797, 798. It is held an act directs that the tolls of a navigation executory devises, and limitations of the should be exempt from any taxes, rates, &c. trust of a term, are governed alike. 1 Vern. other than such as the land, which should be

years, devised the lease itself to his wife for her life, and after her death to her children unpreferred; it was insisted for the wife that she had the whole term, the devise being of the lease itself, and the lands are not mentioned throughout the will; but adjudged that the wife had only an estate for so many years of the lease as she should live, and that so much as remained unexpired at her death, was to at present; and more properly a new year's vest in the children upon the contingency of gift. their living at that time. 1 And. 61: 2 Leon. 92: 3 Leon. 89: Gold. 26.

By the rules of the ancient common law Edw. Conf. 1. there could be no future property, to take | EXFREDIARE, from ex and the Sax. frede, place in expectancy, created in personal goods frith, peace.] To break the peace, or commit and chattels: because, being things transitory open violence. Leg. H. 1. c. 13. it would occasion many suits and quarrels, EX GRAVI QUERELA. A writ that and put a stop to the freedom of trade, if such lies for him to whom any lands or tenements limitations were generally allowed. But yet in fee are devised by will (within any city, in last wills and testaments such dispositions town, or borough, wherein lands are deviseawere permitted; though originally, that in- ble by customs and the near of the devicer en-

and therefore if a man, either by deed or will, limits furniture, &c. to A. for life with remainder over to B. this is good. But where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and therefore the law vests in him at once the entire dominion of the property, being analogous to the fee-simple, which a tenant in tail may acquire

EXEMPLIFICATION OF LETTERS

PATENT, &c. See tit. Evidence. EXEMPLIFICATIONE. A writ granted for the exemplification of an original record.

Reg. Orig. 290.

EXEMPTION, exemptio.] A privilege to mainder to his first son for life, and if he dies be free from service or appearance; as knights, without issue, to his second son, &c. the re-clergymen, &c. are exempted from appearing ecutory devise; yet where the dying without from being put upon inquests. 6 Rep. 23. issue living at a person's death may be confined Persons seventy years of age, apothecaries, on juries: and justices of peace, attornics, &c. Where there is an executory devise, there from parish offices. 2 Inst. 247. There is used for the purpose of the navigation, would The husband being possessed of a term for have been subject to if the act had not been made; that goes to exempt the tolls quá tolls altogether from being rated in respect of the line so exempted, leaving the land rateable as before. Res v. The Leeds and Liverpool Canal Company, 5 East, 325. See further the proper titles in this Dict.

EXEMPTION OF TITHES. See tit. Tithes.

EXERCITUALE. A heriot; paid only in arms, horses, or military accoutrements. Leg.

dulgence was only shown when merely the ters and detains them from him is use of the goods, and not the goods them: 241: Old. N

such lands or tenements unto another in tail, Inst. 31 .: 4. and 5. W. & M. c. 22. If a perwith a remainder over in fee, if the tenant in son indicted of felony absent himself so long tail enter, and is seized by force of the entail, that the writ of exigent is awarded, his withand afterwards dieth without issue, he in remainder shall have the writ ex gravi querela, to execute that devise. New Nat. Br. 441. Also where tenant in tail dies without issue of his body, the heir of the donor, or he who hath the reversion of the land, shall have this writ in the nature of a formedon in the reverter. Ibid. If a devisor's heir be ousted by the devisee, by entry on the lands, he may not after have this writ, but is to have his remedy by the ordinary course of the common law. Lit. 311. Abolished after the 31st Dec. 1834, by the 3 and 4 W. 4. c. 27. § 36.

other writing is in a suit in Chancery exhibit. | igent. ed to be proved by witnesses, and the examiner or commissioners appointed certify on the 2. W. 4. it shall not be necessary, that a pluback of it, that the deed or writing was shown ries capias be stamped by the clerk of the warto the witness, to prove it at the time of his examination, and by him sworn to; this is an exigent. See further, this Dict. tit. Outthen called an exhibit in law proceedings. The same under a commission of bankrupt.

EXHIBITION. An allowance for meat and drink, such as was customary among the religious appropriators of churches, who usually made it to the depending vicar: the benefaction settled for the maintaining of scholars in the Universities, not depending on the foundation, are called exhibitions. Paroch. Antiq. 304.

EXHIBITION: in the Scotch law, is the term applied to an action for compelling the pro-

duction of writings.

EXIGENDARIES. See Exigenter.

EXIGENT, or exigi facias.] A judicial writ that lies where the defendant in an action personal cannot be found, nor any thing of his within the county, whereby to be attached or distrained; and is directed to the sheriff, to proclaim and call him five county-court days, one after another, charging him to appear upon pain of outlawry. It is called exigent, because it exacteth the party, i. e. requires his appearance or forthcoming to answer the law; and if he comes not at the last day's proclamation, he is said to be quinquies exactus (five times exacted), and is outlawed. Cromp. Juris. 188.

The statutes requiring proclamations on exigents awarded in civil actions, are 6 H. 8. c. 4. 31 Eliz. c. 3. Exigents are to be awarded against receivers of the king's money, who detain the same; and against conspirators, rioters, &c. Stat. 18 Ed. 3. c. 1. And a writ of proclamation shall be issued to the sheriff, to make three proclamations in the county where the defendant dwells, for him to yield

gent for a criminal matter before conviction, there shall be a writ of proclamation, &c.

drawing will be deemed a flight in law, whereby he will be liable to forfeit his goods; and though he renders himself upon the exigent, after such withdrawing, and is found not guilty, it is said the forfeiture shall stand. 5 Rep. 110: 3 Inst. 232. After a capias directed to the sheriff, to take and imprison a person &c., if he cannot be taken, an exigent is awarded. And after a judgment in a civil action, the exigent is to go forth after the first capias: but Co. before judgment there must be a capias, alias. and pluries. 4 Inst. 177. If the defendant be in prison, or beyond sea, &c. he or his ex-EXHIBIT, exhibitum.] Where a deed or ecutors may reverse the award of the ex-

By r. 94. of the general rules made in H. T. rants to authorise the exigenter to make out

lawry

EXIGENTER, exigendarius.] An officer of the Court of Common Pleas; of which officers there are four in number. They make all exigents and proclamations, in actions where process of outlawry doth lie; and also writs of supersedeas, as well as the prothonataries, upon such exigents made out in their offices. But the issuing writs of supersedeas is taken from them by an officer in the same court, constitu-

ted by letters patent by king James the First.
In the K. B. the filacer is clerk of the ex-

igents

EXIGI FACIAS. See Exigents.

EXILE. A banishment, or driving one away from his country. And this exile is either by restraint, when the government forbids a man, and makes it penal to return; or it is voluntary, where he leaves his country upon disgust, but may come back at pleasure. 2 Lev. 191.

One natural and regular consequence of personal liberty under the laws of England is, that every Englishman may claim a right to abide in his own country so long as he pleases, and is not to be driven from it unless by sentence of the law. Exile and transportation are both punishments unknown to the common law: and wherever the latter is inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or by the express direction of some statute. See Magna Charta c. 29. which expressly declares that no freeman shall be banished unless by the judgment of his peers, or by the laws of the land. And for the provisions of the Ha-beas Corpus Act, str. 31. Car. 2. c. 2. (termhimself, &c. Stat. 31 Eliz. c. 3.

The writ of exigent also lies in an indiciment for felony, where the party indicted cannot be found. And upon suing out an exigent for a criminal matter before conviction.

Soldiers and sailors form necessary excep-

tions to these rules; but it is said the king can- dian of the king's ward, and directed to the not even constitute a man deputy or lord lieu- sheriff or stewards of the court, that they do tenant of Ireland, nor make one a foreign am- dot distrain him, &c. for not doing suit of bassador against his will: since these in real- court. New Nat. Br. 352. And if the sheriff ity might be no more than honourable exiles. distrain tenants in ancient demesne to come Inst. 46.

conviction for composing or publishing a blasphemous or seditious libel, might have been banished the United Kingdom for such length of time as the court should direct. But by the 11. G. 4. and 1. W. 4. c. 73. the punishment of banishment for the above offence was repealed.

See further, on this subject, this Dict. tits. Abjuration, Clergy, Felony, Transportation.

EXILIUM, signifies in legal construction a spoiling: and by the statute of Marlbridge it seems to extend to the injury done to tenants, by altering their tenure, ejecting them, &c. F. N. B. 394. So shall a woman holding &c.; and this is the sense that Fleta deter-land in dower, if she is distrained to do suit mines, who distinguishes between vastum, destructio, and exilium; for he tells us that vastum and destructio are almost the same, and and are properly applied to houses, gardens, or woods; but exilium is when servants are enfranchised, and afterwards unlawfully turned out of their tenements., Fleta, lib. 1. c. 11. See Stat. Marlb. c. 25.

EXITUS. Issue or offspring; and applied to the issues or yearly rents and profits of lands. Stat. Westm. 2. c. 45. See tit. Issues. EXLEGALITUS. He who is prosecuted

as an outlaw. Leg. Edw. Confes. c. 38. EX MERO MOTU. Words used in the king's charters and letters patent, to signify that he grants them of his own will and mere motion, without petition or suggestion of any other: and the intent and effect of these words is to bar all exceptions that might be taken to the charters or letters patent, by alleging that the king in granting them was abused by false take four mainpernors to bring his body besuggestions. Kitch. 352. When the words fore the barons of the Exchequer at a certain ex mero motu are made use of in any charter, they shall be taken most strongly against same time. F. N. B. 129. the king. 1 Co. Rep. 451.

EX OFFICIO. The power a person has by virtue of an office, to do certain acts with in the law with fee, as fee-expectant. out being applied to: as a justice of peace may not only grant surety of the peace, at the complaint or request of any person, but he may demand and take it ex officio at discretion, &c.

Dalt. 270.

Ex Officio Informations. Informations at the suit of the king, filed by the Attorney- of the forest signifies to cut out the ball of the General, as by virtue of his office: without ap-dog's fore-feet, for the preservation of the plying to the court wherein filed for leave, king's game; but the ball of the foot of a masor giving the defendants any opportunity of tiff is not to be taken out, but the three claws showing cause why they should not be filed. of the fore-foot on the right side are to be cut See tit. Information.

for the king's ward, to be free from all suit to who lives near the forest; and was formerly

ring wardship. F. N. B. 158.

A writ of the same nature, sued by the guar- tit. Forest.

to the sheriff's torn or leet, they may have a By the 60 G. 3. c. 8. a person upon a second writ commanding the sheriff to surcease, &c. Ibid. 359. Likewise if a man have lands in divers places in the county, and he is constrained to come to the lect wherethe is not dwelling, when he resides within the pre-cincts of any other leet, &c., then he shall have this writ to the sheriff to discharge him from coming to any other court-leet than in the hundred where he dwelleth. Ibid 357.

By the common law parsons shall not be distrained to come to court-leets for the lands belonging to their churches; and if they be, they may have the writ exoneratione secta, of court for such land; when the heir has lands sufficient in the same county. Ibid.

EXONERETUR. An entry formerly made on the bail-piece upon render of a defendant

to prison in discharge of his bail.

By r. 7. of the general rules of H. T. 1 W. 4. the entry of an exoneretur is no longer ne-

cessary to exonerate the bail.

EX PARTE. Of the one part; as a commission in Chancery ex parte, is that which is taken out and executed by one side or party only, on the other party's neglecting or refusing to join. When both plaintiff and defend-

ant proceed, it is a joint commission.

Ex PARTE TALIS. Is a writ that lies for a baliff or receiver, who having auditors assigned to take his account, cannot obtain of them reasonable allowance, but is cast into prison. And the course in this case is to sue this writ out of the Chancery, directed to the sheriff to day, and to warn the lord to appear at the

EXPECTANT. Having relation to or depending upon; and this word is likewise used

Expectancy. Estates in, are of two sorts; one created by act of the parties called a remainder; the other by act of law, called a reversion. See tits. Estate, Remainder, Rever-

sion, Executory Devise.

EXPEDITATE, expeditare.] In the laws off by the skin. Cromp. Jurisd. 152: Man-EXONERATIONE SECTÆ. A writ lay wood, c. 16. This relates to every man's dog the county-court, hundred-court, leet, &c. du- done once in every three years; and if any person keeps a great dog not expeditated, he EXONERATIONE SECTÆ AD DURIAM BARON'. forfeits to the king 3s. 4d. 4 Inst. 308. See

ed up or cut down to the roots. Fleta, lib. 2. Statute.

EXPENDITORS. Persons appointed by commissioners of sewers to pay, disburse, or expend the money collected by the tax for the repairs of sewers, &c., when paid into their hands by the collectors, on the reparations, amendments, and reformations, ordered by the commissioners, for which they are to render accounts when thereunto required. Laws of Sewers, 87, 88. See tit. Sewers. The steward who supervises the repair of the banks and water courses in Romney Marsh is called the expenditor.

EXPENSÆ LITIS. Costs of suit, allowed a plaintiff or defendant, recovering in his ac-

tion. See tit. Costs.

EXPENSES. By the 7 G. 4. c. 64. § 22, 23, 24, and 25, in all cases of felony, and in certain specified cases of misdemeanor, prosecutors and witnesses attending in court on recognisance or subpæna, or before the examining magistrates, are allowed their expenses for their trouble and loss of time.

By § 26. courts of quarter sessions are empowered to establish the rate of costs and expenses to be allowed, which must be approved tremum. This term is also used for the es-

of by a judge.

By § 27. the above provisions are extended to the Court of Admiralty. See further, tit.

Compensation.

EXPENSIS MILITUM NON LEVAN-DIS, &c. An ancient writ to prohibit the abridged from Tidd's Practice. sheriff from levying any allowance for knights of the shire, upon those that hold lands in ancient demesne. Reg. Orig. 261. For there was also a writ de expensis militum levandis, for levying expenses for knights of the parliament, &c. Reg. Orig. 191. See tit. Parliament.

EXPLEES. The rents or profits of an

estate, &c. See Esplees.

EXPLORATOR. A scout; also a hunts-

man, or chaser.

EXPORTATION. The shipping or carrying out the native commodities of England for other countries; mentioned in the statutes relating to the Customs. See this Dict. tit. Navigation Acts.

EXPOSITION OF DEEDS, shall be favourable, according to the apparent intent; and be reasonable and equal, &c. Co. Lit. 313.

See tit. Deed.

EX POST FACTO, is a term used in the law, signifying something done after, or as arising from, or to affect, another thing that was committed before. An act done, or estate granted, may be made good by matter ex post facto, that was not so at first, by election, &c. As sometimes a thing well done at first, may alternary become ill. 5 Rep. 22: 8 Rep. ifidavit of the insolvency of the latter, and that 146. An ex post facto law is one which operates upon a subject not liable to it at the fat of the chancellor or one of the barons of time the law was made. Such is an act imposing duties of customs on goods imposing duties of customs of cu

EXPEDITATÆ ARBORES. Trees root-; ported before the passing of the act. See tit.

EXPOSURE OF THE PERSON. Is an indictable offence at common law. Sid. 138:

By the 5 G. 4. c. 83. § 4. every person wilfully exposing his person in any public street, with intent to insult any female, shall be deemed a rogue and a vagabond, and may be committed to the House of Correction to hard labour for any time not exceeding three

TO EXTEND, extendere. To value the lands or tenements of one bound by a statute, who hath forfeited his bond, at such an indifferent rate, as by the yearly rent the creditor may in time be paid his debt. F. N. B. See

EXTENDI FACIAS, or EXTENT, extenta.] Is a writ of execution against the body, lands, or goods, or the lands and goods, or the lands only, of the debtor; and it is either for the king or the subject. For the former it is an ancient prerogative writ for obtaining satisfaction of debts originally due or assigned to the crown, or found on an inquisition taken on a writ of extent, or diem clausit extimate or valuation of lands, which, when made to the utmost value, is said to be the full extent; whence come our extended rents, or rack rents.

The following account of this writ is chiefly

I. Of Extents in Chief.

II. Of Extents in Aid. III. Of the Return of Writs of Extent in Chief and in Aid, and the subsequent Proceedings.

IV. Of the Writ of Extent at the Suit of a Subject, and other matters relating

to Extents.

I. Of Extents in Chief .- The writ of extent at the suit of the king is either in chief or in aid. An extent in chief is an adverse proceeding by the king for the recovery of his own debt; an extent in aid is sued out at the instance and for the benefit of the debtor to the crown, or his surety, for the recovery of a debt due to himself. In the former case the king is the real as well as the nominal plaintiff; in the latter he is the nominal plaintiff only.

The king's remedy for the recovery of specialty debts is governed by the 33 H. S. c. 39; and on this statute he may proceed either by scire facias, which is the ordinary mode of proceeding when the debt is doubtful, or the debtor solvent, in which case an extent is the

in the first instance without the intervention | seize the partnership property; but it can only of a scire facias. But when the debtor is sol- sell the interest of the party against whom the went the king has not an election to proceed against him by extent or scire facias; the plus, after payment of the partnership debts latter being the only course. 3 Price, 288. Wightw. 51. 292.

the king may proceed either by action of soever they come, from the teste of the writ. debt, or, after it is recorded, by scire facias, or 8 Co. 171: 5 Price, 428. extent.

equity side of the Court of Exchequer. 2 Str. On the writ it is the duty of the sheriff to take the body of the defendant unless directed to the contrary; and as it contains, like all clause, the sheriff may enter any liberty for before he does so he ought to signify the cause of his coming and request the doors to be opened. 5 Co. 91. b. A defendant taken under an extent cannot be bailed. West. 73. 83. And the king not being bound by the bankrupt laws or insolvent acts (West. 95.), a certificated bankrupt, or person discharged under 262: 8 Price, 671.), even in aid. Bunb. 202.

if the defendant cannot be found, or is not meant to be arrested, is to impanel a jury to inquire as to the defendant's lands and tenements, goods and chattels. The lands of a debtor or accountant to the crown were liable to the debt at common law, as well as his body and goods. 3 Salk 286: 2 Saund. 4 T. R. 411. And under an extent the crown may take as well the legal estate of its debtor vered to the sheriff to be executed, the properas also trust estates (West. 129.) or an equity ty of the goods is vested by the delivery, and of redemption. 1 Price, 207. But copyholds an extent afterwards for the king comes too cannot be taken. Parker, 195.

The time from which lands are bound de. 1294: Doug. 415. 399: 4 Term. Rep. 402. pends upon the nature of the debt to the crown. Judgments bind from the first day of found under an extent, (Godb. 291,) whether the term they are recorded. Dyer, 224, 225: due on record or specialty, or only on simple 8 Co. 171. Recognisances from the caption contract. Ibid. 296. And it is now the pracor time they are entered into. 2 Wms. Saund. tice to find debts due to the king's debtor on 7.(5.) Bonds to the king from the time they bills of exchange and promissory notes, are made by force of the 33 H.S. c. 39. And though it was formerly otherwise. West. 27, it seems that simple contract debts, found on 28.164, 165. Debts are in general bound in a commission, bind the lands from the time of like manner as goods and chattels, from the their becoming of record, on the return of the teste of the extent. 7 Vin. Abr. 104. inquisition. Wightw. 44.

with respect to personal property, at the extent, is an once of matting, not of ingormoods and chattels of the crown debtor may be seized, except things necessary for the support of himself and family. 2 Rol. Ab. 160.

1. 5. And also except beasts of the plough, if the other chattels are sufficient. Ibid. Under an extent against several, the separate deliver them to the solicitor for the crown. goods of each may be taken, as appears by the West. 74. West. 117, 169. And upon form of the writ.

An extent for the king's debt binds the pro-For the recovery of a simple contract debt, perty of his debtor's goods, into whose hands

The property of goods, though bound, not The writ of extent in chief issues out of the being altered by a distress for rent, an extent against the king's debtor, tested after a distress for rent, with notice to the tenant and appraisement of the goods, but before sale, shall prevail against the distress. Bunb. 42. process at the suit of the crown, a non omittas 269: Parker, 112. 114. And the crown is exempted from the operation of the clause in the purpose of executing it. He may also, if 8 Anne, c. 14. by an express provision which the doors be not open, break the party's house has been held to apply to extents in aid. So either to arrest him, or to take his goods; but the crown is not bound by the bankrupt laws, and an extent will bind the property of a bankrupt from the teste of the writ, until an actual assignment by the commissioners. 2 Show. 481: 2 Str. 978. But where goods seized under a distress for rent are sold, or the goods of a bankrupt assigned by the commissioners (2 Show. 481,) before the teste of an extent, an insolvent act, is not entitled to his dis- they cannot be taken under it, for the propercharge out of custody under an extent (1 Atk. ty is absolutely transferred to third persons; and a provisional assignment is sufficient to pl. 279.

The next step by the sheriff, or the first By § 71. of the bankrupt act (6 G. 4. c. 16.) fraudulent extents of a bankrupt's property are declared void.

In the case of an execution when the king and the subject stand in an equal degree, and the property of the debtor remains unaltered,

But where a fieri facias issues, and is delilate. Comb. 123. See also 2 Black. Rep.

Debts owing to the king's debtor may be

The inquisition taken by the sheriff under an With respect to personal property, all the extent, is an office of intituling, not of infor-

It may here he menner to me a the words an extent against one partner, the crown may on the writ of Gieta channel extremum, which is

Vol. I.—94

chief, issuing after the death of the king's of an extent in aid, is a debt due to the crown debtor against his lands and chattels. When- from its debtor, for which an extent in chief ever an extent might have been issued against has issued against him. Previous to the 57 the king's debtor in his life-time a writ of diem G. 3. c. 117. an extent in aid might have been clausit extremum, which is an extent against lobtained by persons indebted to the crown by his lands and chattels, may issue after his death. | simple contract only, as well as for a specialty Bunb. 119. And this writ may issue against debt, or debt of record, and also for debts due the property of a simple contract debtor of the to the crown in bonds given by traders for ducrown on a commission found after his death. Ities, and by sub-distributors of stamps, and Parker, 95. But no diem clausit extremum sureties only who had not been damnified can regularly issue against the estate of a &c. But by that statute an extent in aid canperson who was not debtor to the crown, or not now be had by persons indebted to the found in his life-time to be debtor to the crown by simple contract, unless it be for a

king's debtor. West. 320.

principally in the first degree, being issued bond or specialty of record in the Exchequer for the recovery of debts immediately due to for the same. But an extent in aid may still the crown; but when an inquisition is taken be had for any debt of record, or specialty thereon under which debts are found and seis- debt; except on such bonds as are particued into the king's hands, the crown, if they larly mentioned in the statute. And bankers are not paid, may proceed for the recovery of who have money in their hands, arising from them either by scire facias (which is the or- the land and assessed taxes paid into their dinary mode, or on an affidavit of danger and bank for the purpose of being paid over to the a baron's fiat by immediate extent, which is called an extent in the second degree; and for whom they are given bond to the crown, upon such an affidavit and fiat, an immediate are still entitled to sue out an extent in aid. extent we have seen may issue before the extent under which the debts are found is returnable, though it must be actually returned an extent in aid, he may still issue it for a before the second extent can issue. In like manner when debts are found and seized into ute having introduced no distinction with the king's hands under an extent in the second degree, an immediate extent may issue for the recovery of them, if not paid on an affidavit of danger and a baron's fiat, which is called an extent in the third degree. And it seems that on an extent in chief, the crown may seize debts found to be due to its debtor, &c. in infinitum; Bunh. 303; but on an ex- be discharged. Bunh. 225. tent in aid, debts cannot be seized beyond the third degree. Parker, 259, 260: West. 302, 303. In reckoning the degrees, however, on an extent in aid, the debt due to the debtor of the crown debtor, for which the extent origi- against the debtor to the crown, upon which nally issued, is, according to a late decision, considered as the first degree. In that case A. was the original crown debtor, B. was indebted to A., C. to B., and D. to C., and on an extent against C. which issued after extents immediate extent in aid. Bunb. 24.127. 128. against A. and B., the debt due from D. to C. had been scized: the court held that this was properly done, and that the debt due to the the same as that of an extent in chief of the crown from its debtor was not to be counted in reckoning the degrees. 1 Price, 95. And see 8 Price, 293, 386.

II. Of Extents in Aid.—An extent in aid, which will be now treated of, is a writ issued at the instance, and for the benefit, of the crown debtor, for the recovery of his own debt; Bunb. 24. 127. 134; or it may be had against a principal debtor to the crown at the the passing of the 57 G. 3. c. 117. whereby it instance, and for the benefit of his surety, is enacted, that upon the issuing of any extent w o has paid the crown debt. West, 13, 14, in aid on behalf of any debtor to the crown 307, &c. In these cases the king is only the the amount of the debt due to the crown shall

a special writ of extendi facias, or extent in nominal plaintiff. West. 14. The foundation. debt due from collectors or receivers of the The writs of extent hitherto spoken of are revenue, and one or more of them be bound by Exchequer, on account of a receiver general, 7 Price, 633.

When a party is entitled to the benefit of simple contract debt due to himself, the statrespect to the nature of the debt due to the crown debtor. Man. L. Ex. 577.

The writ, however, can only be had for a debt originally due to the king's debtor or accountant. Therefore if A. be indebted to B., who assigns to C. before the extent issues against C.. an extent obtained against A. shall

An extent in aid is in effect an extent in the second degree, and being issued without any previous suit is always immediate. In order to obtain it an extent pro forma is sued out an inquisition is taken, and if it be found thereby that another person is indebted to him, the court, or a baron, on an affidavit that the debt is in danger, will grant a fiat for an

The form of an extent in aid is precisely second degree; West. 292; and under it the body of the defendant may, in strictness, be taken in execution, and his lands and tenements, goods and chattels, &c., as under the latter extent.

Formerly it was the practice in many cases to issue extents in aid for larger sums than were due to the crown by the debtors in whose behalf such extents were issued, which led to

be specified in the fiat for issuing such extent In an application to set aside an extent for in aid: that where the debt due to the crown irregularity, it must be made before the sale debtor is equal to, or more than the debt due of the goods levied. 2 Price, 278. A sale from him to the crown, the amount specified under an extent is not vitiated by the agent of in the fiat shall be indorsed on the writ as the the crown making a boná fide bidding for sum to be levied; and where the debt due to the crown debtor is less than his debt to the crown, the actual amount of such debt shall be indorsed on the writ and levied according. court will make an order for sale of the debtly; and the money levied under every such or's lands under the 25 G. 3. c. 35. before extent in aid shall be paid over to the use of the crown under the order of the Court of Exchequer. Any overplus produced beyond the sum so indorsed shall be paid to the Court of Exchequer and disposed of by the court on summary application. A proviso is made that such extent in aid shall not prejudice the crown debtor in recovering the remainder of his debt, not levied under such extent. Persons imprisoned under any capias on extent in aid may apply for their discharge to the Court of Exchequer, or in vacation to a judge of the court, who may relieve as to the personal imprisonment.

Another mode of the subject's taking advantage of the crown process for the recovery of his private debts, was by assigning them to ly, by demurrer. the king for debts due to him. 2 Leon. 67. This was allowed at common law, and might have been done even though the amount of the debts assigned was not ascertained; 2 Leon. 55; and after such assignment the king was entitled to have execution against the body, lands, and goods of the debtor. 4 Inst. 115. But this prerogative of the king having been abused by his debtors for their own private benefit, the assignment of debts to the king was greatly restricted by several rules of court, and by the 7 Jac. 1. c. 15; and has debtor's lands, the creditor is to be paid his now become obsolete. West. 255.

Chief, and in Aid, and the subsequent Prodebt, which is termed a liberate. F. N. B. ceedings.—A writ of extent in chief or in aid 131. This is after the extent directed to the is always made returnable on a general return day; and a term must not intervene between the teste and return. West. 58. Before or after the return of the first extent, any number of extents may issue, with the same teste as the first, that is, the day of the fiat. And any number of extents may issue into different counties at the same time. West. 59.

On the return day of the writ, or as soon after as the writ is actually returned, a rule is entered on its back for a writ of venditioni exponas. If no one appear to claim the protime limited by the rule, a venditioni exponas the statute, &c. entered into, or afterwards, The venditioni exponas commands the sheriff to the extent. 2 Inst. 396. Lands in ancient at least at the price at which they were ap- 1 Rol. Ab. 88. Two parts of the entire rent that fact, and then a venditioni exponas issues, Cro. Eliz. 742. But if the common of sta-directing him to sell for the best price, with- tute have a rent-enarge, and before the out reference to the appraisement. West. 220. he purchase parcer or the land, the rent is

which statute the crown could not have sold the lands of its debtor, but the debt must have been levied by levari fucias, under which the sheriff took the rents and growing profits of the lands until it was satisfied. Gilb. Ex.

Having thus shown the different modes of recovery of debts at the instance, and for the benefit, of the crown or its debtor, the means of resisting such proceedings, either by the defendant or a third person, will be shortly These means are, first, by motion, on application to the court to set aside the extent and proceedings under it; secondly, by petition of right; thirdly, by monstrans de droit; fourthly, by traverse of office; and fifth-

IV. Of the Writ of Extent at the suit of a Subject, and other matters relating to Extents. -The writ of extent for a subject is founded on a recognisance at common law, or by statute, or on a judgment in an action of debt against an heir on the obligation of his ancestor. See tit. Recognisance.

If one bound to the king by specialty, or to others by statute, recognisance, &c. hath forfeithed it; so that by the yearly rent of the debt; upon this the creditor may sue a writ to the sheriff out of the Chancery to deliver III. Of the Return of Writs of Extent in him the lands and goods to the value of the sheriff to seize and value the lands, &c. of the debtor, to the utmost extent. 4 Rep.

Lands and goods are to be appraised and extended by the inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt: every extent ought to be by inquisition and verdict, by the stat. Westm. 2. And the sheriff cannot execute the writ without an inquisition. Cro. Jac.

The body of the cognisor, and all lands perty mentioned in the inquisition within the and tenements that were his at the time of issues to sell the goods seized under the extent. into whose hands soever they come, are liable to sell the goods at the best price he can, and demesne, annuities, rents, &c. are extendible. praised. If he cannot do so he should return may be delivered upon an extent by the sheriff.

gone and shall not be held in execution: it is may upon a hab. fuc. possessionem. 1 Vent. otherwise if he purchases after extent of the 41. Where there is an extent upon a statute, may not be extended; but a plaintiff had yet it is good; though regularly, when inquijudgment for his debt and damages de rever- sitions are taken, the writ ought to be returnsione cum acciderit, and a special degit to ex- ed. 4 Rep. 67: 1 Lill. Abr. 592. The sheriff tend the moiety, &c. 373.

An office of trust cannot be extended, because it is not assignable; and nothing shall sion of the whole. 2 Nels. Abr. 774. But it be extended but what may be assigned over. is said, if a person suing out an extent die Dyer, 7. Though an other is extendeble in before the return of a writ, the sheriff may equity. Chanc. Rep. 39. Goods and chattels, proceed in his inquisition, &c. afterwards; as leases for years, cattle, &c. in the cogni- for there must be a prosecution de noco. sor's own hands, and not sold for valuable | After a full and perfect execution had by consideration, are subject to the extent. As extent, returned, and of record, there shall the lands are to be delivered to the party at a never be any re-extent upon an eviction: but reasonable yearly value, so the goods shall be delivered in extent at a price that is reasonable; and on a scire facius ad computand' the cognisee is to account according to the ertended value, not the real value of the land. Hardr. 136. If the extenders appraise and value the lands too high, the cognisee at the return of the writ may pray that they may take and retain the lands at the rate apprais- or assigns, of lands then liable, returnable in ed; and then it is said he may have execution the same court, forty days after the teste; against their lands for the debt; but this may not be on elegit. Cro. Jac. 12. It has been adjudged, that at the return of the writ the court where the scire facias is returned shall cognisee may refuse the lands, &c. extended, make a new writ of the like nature of the if overvalued. Cro. Car. 118.

Where lands are extended at under-value, the debt. Co. Lit. 290. and delivered in execution, the cognisce hath an interest in the land, which cannot be di- a re-extent may be had. See Dyer, 299. If vested by finding of surplusage. Cro. Eliz. 266: Cro. Jac. 85. The cognisor cannot enter upon the cognisce, when satisfaction is received for the debt, but is put to his scire facias on an extent; though on an elegit the defendant may enter, because the land is only awarded, till the debt, which is certain, is satisfied; whereas on extent, the land is to be held until the debt, damages, and costs, &c. are satisfied: and the cognisee, being in by matter of record, shall not be put out but by matter of record, viz. a scire facias brought omitted, the court would not grant a re-extent. against him. 4 Rep. 67: March's Rep. 207, Sid. 356. By stat. 16 and 17 Car. 2. c. 5. 208: sed qu. Where is the difference? Is (made perpetual by stat. 22 and 23 Car. 2. c. not the tenant by elegit in by matter of re-2.) when any judgment, statute, or recognicord?

go to the sheriff, reciting the extendi facius not be avoided or delayed by occasion that and return, and commanding that he deliver the goods and lands to the conusee (under a statute-staple, &c.) si per extentum, et pretium illa habere voluit. F. N. B. 131: Lutw. 432.

land, by the extent, till the delivery upon the liberate: but, notwithstanding, by the very extent they are in custodia legis for his bene- guo.] The extinction or annihilation of a fit. Cro. Car. 106. 148. No actual seisin can right, estate, &c. by means of its being merged be on an extent, and a cognisee of a statute- in, or consolidated with, another, generally a staple, &c. cannot bring ejectment before the greater or more extensive right or estate. liberate; nor can the sheriff upon the liberate Wherever a right, title, or interest, is destroyturn the tertenant out of possession, as he ed, or taken away by the act of God, opera-

Dyer, 206. A reversion of lands, &c. and a liberate thereupon, but not returned. 2 Sid. 86: Dyer, may be charged to make a return of his writ. if he put the cognisee in possession of part only; and so the cognisee may have posses-

by stat. 32 Hen. 8. c. 5. if lands delivered in execution on a judgment, statute, or recognisance, shall be evicted, without fraud, or default of the tenant, who holds them in execution, before the debt and damages are wholly levied, the recoverer or conusee may have a scire facias against the person on whom the execution was first sued, his heirs, executors, and if the defendant makes default, or shows not cause, the chancellor or justices of the tormer execution for levying the residue of

If lands be extended upon a mistake, &c. part of the lands is evicted, the cognisee is to hold over the residue of the land till the debt is satisfied. 4 Rep. 66. When lands are delivered in extent, it is as if the cognisce had taken a lease thereof for years, until the debt is satisfied; and he shall never afterwards take out a new execution: the cognisee having accepted the land upon the liberate, the law presumes the debt to be satisfied. 1 Lutw. 429. An extent was filed, and though it was discovered that lands were sance, shall be extended (within twenty years After an extent returned, a liberate shall after such judgment, &c. had), the same shall any part of the lands extendible are omitted out of such extent; saving to the parties whose lands shall be extended their remedy for contribution against those whose lands are The cognisee hath no absolute property in omitted, except heirs within age. See this Diet. tits. Execution, Receiver.

EXTINGUISHMENT; from Lat. extin-

tion of law, or act of the party, this in many | rent in the residue of the land, this amounts b.: 1 Rol. Ab. 933.

Extinguishment is the annihilation of a collateral thing or subject, in the subject itself out of which it is derived. A rent, a the tenant attorns, the grantor is without recommon, or a seignory, may be extinguished. medy for the rent in arrear before his grant; That the estate in the rent, common, or seignory, ceases is the consequence of the extinguishment of the subject itself. Under the for years of land to another, and afterwards doctrine of merger the subject may continue granted a rent-charge to C. D., who devised after the annihilation of one estate in another : for, notwithstanding the annihilation of the be levied; then to B. G., and died: adjudged estate, the subject continues, and the effect of that by the devise to A. B. the rent was susthe merger is only to involve the time of one pended, and that a personal thing once susestate in the time of another estate, or at the pended by the act of the party is extinguished utmost to accelerate the right of possession for ever. Dyer, 140. under the more remote estate. Thus suspension (which is an extinguishment for a rendering rent, and afterwards the reversion are applicable to the things themselves, rather extinguishment of the term; but it is otherthan to the estates or degrees of interest there- wise if he have the reversion by purchase. 1 3 Preston on Conveyancing, 9.

as applied to various rights; viz. Estates, tinguish the estate for life for a moiety, Commons, Copyholds, Debts, Liberties, Servi. and sever the joint tenure. 2 Rep. 60. ces, and Ways. See more at large under Lands are given to two men, and the heirs of

neral information on the subject. wards purchases the lands whereout it ariseth, made to two for their lives, and after the lesso that he hath as good an estate in the land sor grants the reversion to them and their as in the rent; now both the property and rent heirs, &c.; here the life estate will be extinare consolidated or united in one possessor; guished. Co. Lit. 182. and therefore the rent is said to be extin-guished. Also where a person has a lease for the curtesy, make a feoffment in fee upon con-Ley.

Extinguishment of a rent is a destroying not be extinct. Co. Lit. 147. If a person hath terest is extinguished; yet that shall not dearent-charge to him and his heirs issuing feat the reversionary interest. 10 Rep. 52: out of the lands, and he purchaseth any part 2 Nels. Abr. 820. of the land to him and his heirs; as the rent that it shall only extinguish the rent for the the term. Moor, 286. land purchased. Lit. 222: Co. Lit. 143. And if the grantee of a rent-charge purchases lessee against his consent, the rent is extinparcel of the lands, and the grantor by his guished. 2 Lev. 143. But it has been ad-

books is called an extinguishment. Co. 147. to a new grant. Co. Lit. 147. See tits. Grant, Estate.

If a man be seized of a rent-charge in fee, and grants it to another and his heirs, and and such arrears become as it were extinct. Vaug. 40: 1 Lil. Abr. 594. A. B. made a lease the said rent to the said A. B. till 100l. should

If tenant for life makes a lease for years. time) and extinguishment, correctly taken, descends to the tenant for life; this is not an Co. Rep. 96. A joint-tenant for life pur-This extinguishment is of various natures, chases the land in reversion; it will exthose titles: what follows will give some ge- their bodies; though they have an estate for life jointly, and several inheritances, yet the EXTINGUISHMENT OF ESTATES. If a man estate for life is not extinct: contra, if it be hath a yearly rent out of lands, and after- by several conveyances; as where a lease is

years, and afterwards buys the property; this dition, and enter for the condition broken, the is a consolidation of the property and fruits, estate is extinct, so that if his wife die, he shall and an extinguishment of the lease. But if not be tenant by the courtesy. 1 Rep. 18. a man have an estate in the land but for life Where a man hath an estate for his own life, or years, and hath a higher estate, as a fee- and for another's life at once; the estate pour simple, in the rent, the rent is not extin- auter vie will be extinguished in the estate guished, but in suspense for a time; for after for his own life, which is greater in law than the term the rent shall revive. Terms de the other. 11 Rep. 87; Dyer, 11. See Bro. 409: Moor, 94: 2. Nels. Abr. 821.

When the freehold cometh to the term, the of the rent by purchase of the land; for no estate for years is extinct. 2 Nels. Abr. 820. one can have a rent going out of his own land, though a person must have as high an to another, if the party in possession purchase estate in the land, as in the rent, or the rent will the fee-simple, though by this means his in-

A fine, &c. of lands will extinguish a term : is entire and issuing out of every part of the and by purchase of an estate in fee-simple, an land, the whole rent-charge is extinguished; estate-tail in the land is extinct. 9 Rep. 139. though it is not so where one hath a rent-ser- But if a fee-simple and fee-tail meet together vice, and purchaseth part of the land out of by descent, the estate tail will not be extinwhich it issues; rent-service being apportion- guished. 3 Rep. 61. Descent of lands to the able according to the value of the land, so same person who has a term will extinguish

When a lessor enters tortiously upon the deed granteth that he may distrain for the judged, that rent is not extinct by the entry of the lessor, but only suspended; and revives by and in the same right, the copyhold interest the lessee's re-entry. Duer, 361. An infant becomes extinguished; but if they are vested has a rent, and purchases the land out of in the same person in different rights the latwhich it is issuing; by this the rent will be suspended, but not extinct. Bro. Extinguish. A man lessee for years takes a wife, or woman lessee a husband, that hath the reversion after the lease; here the term is not extinguished. 12 Rep. 81. See tit. Baron and Feme.

owner of the fee is, as between the parties, an extinguishment of the estate surrendered; yet such estate may have continuence to uphold a prior interest derived under it. Therefore, on an ejectment, where J. B. C. having a lease for three lives of a manor (where by the custom the copyholds were demisable by copy), made a lease for years, by indenture of copyhold tenement to the father of the defendant, and afterwards the estate of J. B. C. was surrendered to the lord of the fee, who made a lease of the manor to the lessor of the plaintiff; the Court of K. B. held that, inasmuch as the lease to the defendant's father, though not warranted by the custom, and though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of the plaintiff should not avoid it, during the continuance of one of the three lives in the lease to J. B. C. nothwithstanding the surrender of that estate. Doe, d. Beadon v. Pyke, 5 Maule & Selwyn, 146. See 1 Inst. 338. b: 8 Rep. 144. b.

Where the equitable interest and the legal estate meet in the same individual, the equita- ject, who after becomes king, the copyhold is ble interest will be extinguished in the legal extinct; for it is below the majesty of a king estate, and the descent will be governed by the legal ownership. Doug. 722: 3 Ves. 339. 2

B. & A. 84.

Extinguishment of Common. By purchasing lands wherein a person hath common appendant, the common is extinguished. Cro. Eliz. 594. A commoner releases his common in one acre; it is an extinguishment of the whole common. Show. Rep. 350. And where a person hath common of vicinage, if he incloses any part of the land, all the common is extinct. 1 Brownl. 174.

But if one hath common appendant in a great waste, belonging to his tenant, and the lord improve part of the waste leaving sufficient; if he after make a feoffment to the commoner of the land improved, this will be no extinguishment. Dyer, 339: Hob. 172. A commoner aliens part of his land, to which the common doth belong; the common is not extinct, but shall be divided. 2 Shep. Abr. 152.

See tit. Common.

EXTINGUISHMENT OF COPYHOLD. It is laid down as a general rule, that any act of the copyholder's which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold. Hutt. 81: Cro. Eliz. 21: 1 Jon. tor's accepting a higher security than he had

the same premises unite in the same person, obligation, this extinguishes the simple con-

ter is suspended only.

As if a copyholder in fee accepts a lease for years of the same land from the lord, this determines his copyhold estate; or if the lord leases the copyhold to another, and the copy. holder accepts an assignment from the lessee, Although a surrender of a life-estate to the his copyhold is extinct. Moor, 184. 2 Co. 16. b. Godb. 11. 101.

So if a copyholder bargains and sells his copyhold to the lessee for years of the maner, his copyhold is thereby extinguished; or if he joins with his lord in a feoffment of the manor, his copyhold is thereby extinct; for these are acts which denote his intention to hold no longer by copy. Hutt. 65: 1 Jon. 41. S. C .:

So if a copyholder accepts to hold of his lord by bill under the lord's hand, this determines his copyhold: so if he accepts an estate for life by parole, if with livery, this is an extinguishment; otherwise not; for without livery nothing but an estate at will passes, which cannot merge or extinguish an estate

at will. 1 And. 199: Latch. 213.

If one seized of a manor in right of his wife lets lands by indenture for years, this doth not destroy the custom as to the wife; for after the death of her husband she may demise

it again by copy. Cro. Eliz. 459. So if a copyhold is in the hands of a subto perform such servile services: yet after his deccase the next that hath right shall be admitted and the tenure revived. 2 Sid. 82: 4 Co. 24: Cro Eliz. 252. See 2 Leon. 208: 4 Co. 26. b: Cro. Eliz. 103. And a copyhold estate is extinct whenever it becomes not demisable by copy. Coke's Copyholder, 62. See further,

tit. Copyhold. EXTINGUISHMENT OF DEBT. If feme sole debtee take the debtor to husband; or there be two joint obligors in a bond, and the obligee marries one of them; or in case a person is bound to a feme sole and another, and she takes the obligor to husband; in these cases, the debt will be extinguished. 8 Rep. 136. And if a debtor makes the debtee his executor, or him and another executors, and they take the executorship upon them; or if the debtee makes his debtor executor, &c. it is an extinguishment of the debt, and it shall never revive. Plowd 184: 1 Salk. 304. But where a debtee or debtor executor legally refuseth; or he and others being made executors, they all refuse, then the debt is revived again. Plowd. 185. See tits. Baron and Feme, Ext. cutor.

It is agreed as a general rule, that a credibefore, is an extinguishment of the first debt; When a freehold and copyhold interest in as if a creditor by simple contract accepts an tract debt. Co. 41.

cannot after sue for his legacy in the Spiritual tinct: but if the service be pro bono publico, Court; for by the deed the legacy is extinct, then no part of it shall be extinguished; and and it becomes a mere debt at common law. homage and fealty are not subject to extin-Yelv. 38.

him, he cannot afterwards bring an action on lands, whereout he is to have services, they the bond; for the debt is drowned in the judg- are extinct: also, by severance of the services, than the bond. 6 Co. 44 b.

But these cases must be understood where the debtor himself enters into these securities; a highway as appendant, and after purchases and therefore if a stranger give bond for a the land wherein this way is, the way is exsimple contract due by another, this does not tinct. Terms de Ley. Though a way of neextinguish the simple contract debt; but if cessity to market or church, or to arable land. upon making the contract, a stranger gives &c., is not extinguished by purchase of ground, bond for it, or being present promises to give bond for it, and after does so, the debt by simple contract is extinguished, the obligation heing made upon, or pursuant to the contract. 2 Leon. 110.

But the accepting a security of an inferior nature is by no means an extinguishment of the first debt; as if a bond be given in satisfaction of a judgment. Cro. Jac. 579: 2 Brownl. 29: Cro. Jac. 649, 650.

Also the accepting a security of equal degree is no extinguishment of the first debt: as where an obligee has a second bond given wrest away.] In a large sense, any oppression to him; for one deed cannot determine the under colour of right. 2 Rol. 263: 1 Ld. duty upon another. Cro. Eliz. 304. 716. 727: 1 Brownl. 74: Lit. Rep. 58: Cro. Car.

Though a bond is taken for a simple con-Stran. 1042.

By a release of part of a debt due on bond, 368: 10 Rep. 102. See tit. Bribery, Fees. the whole is gone, and the obligation extin-guished. Bro. Contract, 80: 1 And. 235: See tion seems to be this. The former offence confurther, tits. Acceptance, Bond.

EXTINGUISHMENT OF LIBERTIES. and franchises granted by the king may sometimes be extinguished, and sometimes not. Moor, 474. When the king grants any privileges, liberties, or franchises, which were in tion for any minister of the king, whose office his own hands, as parcel of the flowers of the did any way concern the administration and crown, such as bona felonum, fugitivorum et execution of justice, or the common good of utlagatorum, waifs, strays, deodands, wreck the subject, to take any reward for doing his on the sea, &c., if they come to the crown office, except what he received from the king : again, they are drowned and extinct in the though reasonable fees for the labour and atcrown, and the king is seised of them jure tendance of officers of the courts of justice are coronæ: but if liberties of fairs, markets, or not restrained by statute, which are stated other franchises, and jurisdictions, be crected and settled by the respective courts; and it and created by the king, they will not be ex- has been thought expedient to allow these oftinguished, nor their appendages severed from ficers to take certain immediate fees in many the possessions. 9 Rep. 25. A man has liber- cases. 2 Inst. 249: 3 Inst. 149: 1 Hawk, P. ties by prescription; if he takes letters patent C. c. 65. of them, the prescription will be gone and extinct; for things of a higher determine implies the act to be lawful; but to take any those of a lower nature. 2 H. 7.5. See tit. money by celeur of an office implies an King.

Extinguishment of Services. The lord tion of busine....

1 Rot. Ab. 470, 471. 604: 6 purchases or accepts parcel of the tenancy, out of which an entire service is to be paid or So if a man-accepts a bond for a legacy, he done; by this the whole service will be exelv. 38.

guishment, by the lord's purchasing part of So if a bond creditor obtains judgment on the lands. 6 Rep. 1. 105: Co. Lit. 149. If the bond, or has judgment acknowledged to the lord and another person do purchase the ment, which is a security of a higher nature a manor may be extinguished. Co. Lit. 147: 1 And. 257. See tit. Tenure.

> EXTINGUISHMENT OF WAYS. If a man bath or unity of possession. 11 H. 7.25: Co. Lit. 155. See tit. Way

> EXTIRPATIONE. A judicial writ, either before or after judgment, that lies against a person who, when a verdict is found against him for land, &c., doth maliciously overthrow any house, or extirpate any trees upon it. Reg. Jud. 13. 56.

> EXTOCARE. To grub up lands, and reduce them to arable or meadow. Mon. Angl.

EXTORTION, extortio, from extorqueo, to Raym. 149: 4 Mod. 101: 8 Mod. 189: 1 Stra. 73, 74. It is usually applied to that abuse of public justice which consists in the unlawful taking by an officer, &c., by colour of his office, tract debt, yet if it is after an act of bankrupt- of any money, or valuable thing, from a percy, the simple contract is not extinguished. son where none at all is due, or not so much is due, or before it is due. Co. Lit.

> sists in the offering at present, or receiving one Liberties if offered; the latter, in demanding a fee or

present by colour of office.

At the common law, which was affirmed by the statute of Westm. 1. c. 26. it was extor-

The taking of money by virtue of an office ill action; and the taking heing to

office, and unlawful. 2 Inst. 206: Co. Lit.

ficer, who takes a reward which is voluntarily is equally guilty, for there are no accessaries given to him, and which has been usual in in extortion. Str. 73. certain cases, for the more diligent or expeditious performance of his duty, cannot be said courts at Westminster a sheriff's officer exto be guilty of extortion; for without such a tort a promissory note from a suitor, and depremium it would be impossible in many cases to have the laws executed with vigour minster, the latter court cannot interfere and success. 2 Inst. 210: 3 Inst. 149: Co. 1 Lit. 368.

But it has been always held, that a promise to pay an officer money for the doing of a thing, which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. 1 Rol. Ab. 16: 1 Rol. Rep. 313: Noy, 76: 1 Jon. 65: Cro. Eliz. 654: Moor, extortion was committed should be set down

468: Cro. Jac. 103.

It is an extortion to oblige an executor to prove a will in the bishop's court, and to take fees thereon, knowing the same to have been proved in the Prerogative Court. Str. 73. Or in a sheriff's officer to admit a prisoner to generally. bail, upon an agreement to receive a certain sum when the prisoner should pay to a third person another sum of money. 2 Burr. 924. To arrest a man in order to obtain a release from him. 8 Mod. 189. In a gaoler to obtain money from his prisoner by any colourable means. 8 Mod. 226: Stra. 575. Or in a churchwarden colore officii. 1 Sid. 307. In a miller, if he takes more toll than is due by custom. Ld. Raym. 159. Or a commissary for absolution. 3 Leon. 268. Or a ferryman for his ferry. 4 Mod. 101. Or to seize upon the place where a fair is held, and by building stalls to force an exorbitant price for them. Ld. Raym. 150. Or in an under-sheriff to refuse to execute process till his fees are paid. Salk. 330. Or to take a bond for his fee before execution is sued out. Hutt. 53. Or for a coroner to refuse his view until his fees be paid. 3 Inst. 149.

Extortion, by the common law is severely punished, on an indictment, by fine and imprisonment, and removal of officers from the office wherein committed. 1 Hawk, P. C.

c. 68.

By the 3 Ed. 1. c. 26. sheriffs or other of the king's officers taking reward to do their offices shall yield twice as much; and by 3 $Ed.\ 1.\ c.\ 27.$ clerks of justices, escheators, or inquirers, and by $3\ Ed.\ 1.\ c.\ 40.$ of ficers of justices in eyre, thrice as much as

they receive.

There are various other statutes forbidding and punishing extortion by under-sheriffs, bailiffs, gaolers, clerks of the assize, and of the peace, attorneys, solicitors, &c. See 23 H. 6. c. 7. 9: 33 H. 8. c. 24: 29 Eliz. c. 4: 1 Jac. 1. c. 10: 9 and 10 W. 3. c. 41: 10 and 11 W. 3. c. 23: 3 G. 1. c. 15: 17 G. 3. c. 26. § 6: 32 G.2. c. 28. § 11. &c. and tits. Sheriffs, Gaolers, Debtor, Fees.

Officers may be jointly indicted for extertion, as they may be jointly guilty of the of-Yet according to some it seems that an of- fence. 1 Salk. 382. And he also who assists

> If by abuse of the process of one of the clare upon it in another of the courts at Westsummarily to punish the officer. 2 Bos. &

> Against attorneys for extortion action may be brought, and the party grieved shall have treble damages and costs; but information will not lie on the stat. 3 Jac. 1. cap. 7. Sid. 434: Nels. 822.

> The time and place when and where the in the declaration. See Pt. C.c. 200: 1 Str. 73: 3 Leon 263: 4 Mod. 101. 103. The sum certain extorted must be particularly set forth, and he cannot say that the defendant did extort divers sums from divers men Godb. 438. pl. 583: Mich. 4 Car.

> The indictment (which may be brought at the sessions, Str. 73.) or information must state the fact particularly. 3 Leon. 268: 25 Ed. 3. st. 3. c. 9: 11 Mod. 80. There must be a positive allegation that the person charged took so much extorsive or colore officii; which words are as essential as proditorie or filonice for treason or felony. 2 Silk. 680. But although it be omitted to be stated for what the thing extorted was taken, it is good after verdict. Sid. 91. And in general the Court of K. B. will oblige the party to demur to a defective indictment for extortion. 4 Mod. 13. But where an indictment was against a ferryman for extortion in taking four-pence a score for sheep carried over, when he should have taken but two-pence a score, it was quashed, because it did not show for how many score he had taken four-pence. Show.

> The indictment must state a specific sum which the defendant received, but it is not necessary to prove the exact sum, for if there is proof only of a shilling taken, the defendant is guilty. Ld. Raym. 149.

It is said that an indictment for this offence may be laid in any county, by stat 31 Eliz. c. 5. § 4. Hawk. P. C. c. 68. § 6. note (3): 2 Burn. 344. Extortion; Stark. Crim. Pleading, 585. note (k): but this position has been questioned: 2 Hawk. P. C. c. 26. § 50: 2 Chitt. C. L. 294. n.

EXTRACTA CURIÆ. The issue or profits of holding a court arising from the customary fees. &c. Paroch. Antiq. 572.

EXTRACTS of writings or records being

notes thereof. See tit. Estreats.

In the Scotch law the extract is the certified copy by a clerk of the court, of the proceedings in an action carried on before that court, and of the judgment pronounced; and ly denomined fuctors. Others are engaged

ings thereupon.

had in a cause not depending in that court where given, or wherein the judge has not jurisdiction. The term is used in contradistinction to a regular act done in judgment, or in the regular proceedings of a court.

EXTRAPAROCHIAL. Out of any parish; any thing privileged and exempt from the duties of a parish. See this Dict. tit. Poor.

EXTRAVAGANTS. Certain constitutions of the popes so called, because extra corpus canonicum Gratiana, sive extra decretorum libros vagantur. Du Cange.

EXTUMÆ. Reliques in churches and

tombs. Cartular. Abbat Glaston. MS.

EXUPERARE. To overcome; sometimes it signifies to apprehend or take, as, exuperare

vivum vel mortuum. Leg. Edm. c. 2. EY, insula, an island.] Where the names of places end in ey, it denotes them an island. As Ramsey is the island of rams; Sheppey the island of sheep; Hersey, the island of harts, &c.

EYREY of hawks. See tit. Aerie. EYRE. Vide Eire, and Justices in Eyre.

F.

F. the letter wherewith felons, &c. were branded and marked with a hot iron, on their being admitted to the benefit of clergy. See

this Dict. tit. Clergy.

FABRICK LANDS, are lands given towards the rebuilding or repairing of cathedral and other churches; for in ancient times almost every person gave by his will more or less to the fabrick of the cathedral or parishchurch where he lived; and lands thus given were called fabrick lands, being ad fabricam reparandum: these lands are mentioned in the stat. 12 Car. 2. c. 8.

FACILITY of disposition, whereby one is easily imposed upon and induced to do deeds to his own prejudice, when combined with any fraud or circumvention on the part of another, is a ground for the interference of equity.

FACTA ARMORUM. Feats of arms, jousts, tournaments, &c. His. Job. Brompton,

in R. 1. p. 1261.

FACTO. In fact; as where any thing is

actually done, &c. See De Facto.

FACTOR. The agent of a merchant abroad, residing in this country: or e contra. A factor is authorised by a letter of attorney, with a salary or allowance for his care. He if he make any composition with creditors must pursue his commission strictly; and the without orders, he shall answer it to his prinsame person may be factor for many different cipal. Lex Mercatoria. merchants. Mal. 81.

it contains an order for execution or proceed-merely in the negociation of contracts relating to property with the custody of which they EXTRAJUDICIAL is when judgment is have no concern. See B. & A. 137. Brokers are principally of the latter description. Paley's Principal and Agent, 13.

A factor is a species of mandatory, whose powers depend on the nature and terms of the mandate, commission, or authority, under

which he acts.

Goods remitted to a factor ought to be carefully preserved; and he is accountable for all lawful goods which shall come to his hands; yet if the factor buy goods for his principal, and they receive damage after in his possession, though no negligence of his, the principal shall bear the loss; and if a factor be robbed, he shall be discharged in account brought against him by his principal. 4 Rep. 83. See tit. Bailment.

A factor is not answerable against all events for the safety of goods which he has in charge; but it is sufficient if he do all that by his industry he may for their preservation. 1 Vent. 121. Co. Lit. 89. He is not liable in cases of robbery, fine, or any other accidental damage happening without his default. 2 Mod. 100.

If the principal give the factor a general commission to act for the best, he may do for him as he thinks fit; but otherwise he may Though in commissions at this time, it is common to give the factor power in express words to dispose of the merchandize, and deal therein as if it were his own; by which the factor's actions will be excused, though they occasion loss to his principal. Lex Mercat: Mal. 81 : Str. 1178.

If the factor has orders from his principal not to sell any goods but in such a manner, and breaks those orders, he is liable to the loss or damage that shall be received thereby: and where any goods are brought or exchanged without orders, it is at the merchant's courtesy whether he will accept of them, or turn them on his factor's hands. When a factor has bought or sold goods pursuant to orders, he is immediately to give advice of it to his principal, lest the former orders should be contradicted before the time of his giving notice, whereby his reputation might possibly suffer: and where a factor has made a considerable profit for his principal. He must take due care in the disposition of the same; for without commission or particular orders he is answerable. A factor shall suffer for not observing orders; and no factor acting for another man's account in merchandize, can justify receding from the orders of his principal, though there may be a probability of advantage by it:

Factors ought to observe the contents of all Of mercantile agents, some are entrusted letters from their principals, or written to them with the possession, as well as the disposal and by their order. A merchant is answerable management of the property: these are usualin action upon the case for the deceits of his

Vol. .I-95

factor, in selling goods abroad: and as some-jagent, and pay him for the same, although he body must be a loser by such deceit, it is knows him to be such, if the contract be made more reasonable that he who employs, and in the usual course of business, and the purputs confidence in the deceiver, should lose, chaser has not notice that the agent is not than a stranger. 1 Salk. 289.

A bare commission to a factor to sell and dispose of merchandize, is not sufficient power for the factor to entrust any person, or to give a further day of payment than the day of the sale of the goods; for in this case, on the delivery of the one he ought to receive the other: and by the general power of doing as if it were his own, he may not trust an unreasonable time, viz. beyond one or three months, &c. the usual time allowed for the commodities disposed of; if he doth, he shall be answerable to his principal out of his own estate. 1 Bulst. 102. But in 2 C. C. 57, it is said that by his of lading, certificate, warrant, or order for general commission a factor has authority to delivery of goods, he shall be guilty of a missell upon credit.

And whatever may formerly have been the transportation. law, it is now settled that the usage of trade affords the true rule in this respect. Willes, [principal, where he is used so to do, the con-

407: 3 B. & P. 4-9.

rity; and therefore a factor authorised to sell principal is the proper person to be prosecuted has no right to barter. 3 B. & A. 316. And on non-performance: but if the factor enters previous to the 6 G. 4c.94, though a factor had into a charter-party of affreightment with a power to sell, and thereby bind his principal, master of a ship, the contract obliges him yet he could not bind or affect the property of only; unless he lades aboard generally his the goods by pledging them as a security for principal's goods; then both the principal and his own debt, though there was the formality lading become liable for the freight, and not of a bill of parcels and a receipt. 2 Stran. the factor. Goldsh. 137. 1178: 7 T. R. 606.

pledgee was ignorant of the factor's not being name, makes the buyer debtor to himself, the owner. 5 Ves. 213: 6 East, 17. Neither though he is not answerable to his principal could the factor assign a bill of lading, by for the debt, if the money be not paid; yet way of pledge, so as to exclude the principal's he has a right to receive it if it be paid, and right to stop in transitu. 6 East, 17: 1 M. & his receipt is a discharge to the buyer. The S. 140. Nor could be pledge goods on which factor may compel such payment by action, he had a lien, so as to give the pawnee a title and the buyer cannot defend himself by sayeven to the amount of the lien. 5 T. R. 604: ing that the principal was indebted to him

agent or factor who is the shipper of goods, S. 494: Paley on Principal and Agent, 217: on the belief that he is the owner, has a lien from which it appears that the rights and liagiven to him to the extent of his advances, bilities of the principal are not varied by the which is an alteration of the law as it pre- circumstance of the broker having a del creviously stood.

By § 2. persons may receive a bill of lading, certificate, warrant, or order for the delivery of goods in deposit or pledge, provided they have not notice by the document or otherwise the money, and dies indebted in debts of a

or pledge for a pre-existing debt from the party part of the merchant's estate, and not the facin possession, without notice he is not the tors; but if the factor have the money, it owner, shall acquire the right or interest but shall be looked upon as the factor's estate, no further, of such party.

authorised to sell or receive the price.

By § 5. any person may accept goods, or any such document as aforesaid, on deposit or pledge from any factor or agent, notwithstanding he has notice of his character, but shall acquire no further right or interest thereto than was possessed by such factor or agent.

But to prevent the improper pledging of goods, and documents relating thereto, by factors or agents, it is enacted by the 7 and 8 G. 4. c. 29 6 51. that if any factor or agent shall, for his own benefit, and in violation of good faith, deposit or pledge any goods, bill demeanour, and be liable to fourteen years'

If a factor buys goods on account of his tract of the factor shall oblige the principal An agent must strictly pursue his author to a performance of the bargain; and the

It is a general rule that where a factor, Nor did it make any difference that the who is authorised to sell goods in his own 7 East, 6.

The rules established by these decisions were productive in many cases of great hard.

The rules established by these decisions where goods are sold by a factor at his own risk, for which he has an additional allowship, and led to the passing of the 6 G. 4. ange, the vendee is not answerable to the c. 94. By § 1. a consignee making advances to an [4 M. S. 566: Conway v. Forrester, 1 M. & dere commission. See Del Credere.

It has been held in equity, that if one employs a factor, and entrusts him with the disposal of merchandise, and the factor receives that the person making the deposit is not the higher nature, and it appears by evidence owner of the goods. By § 3. any person taking goods in deposit | remains unpaid, those goods shall be taken as and must first answer the debts of superior By § 4. any person may buy goods of an ereditors, &c., for as money has no ear-mark, equity cannot follow in behalf of him who against such assignee is devested. There is employed the factor. 1 Salk. 160.

who sells them on credit, and before the molar person. 4 Bro. P. C. (8vo. ed.) 57. See ney is paid dies indebted more than his assets 2 T. R. 63: 1 H. Blac. Rep. 357. And furwill pay; this money shall be paid to the ther, as to stopping goods in transitu, 2 T. R. principal merchant, and not to the factor's 674: 3 T. R. 465: and tit. Stoppage in transitu. administrator, but thereout must be deducted situ. what was due for commission; for a factor is in nature only of a trustee for his principal. Court of Session in Scotland, or where the 2 Vern. 638.

Bills remitted to a factor or banker, while a factor to take charge of the rents and preunpaid, are in the nature of goods unsold; serve the property.

and if the factor become bankrupt, must be returned to the principal, subject to such lien further on this subject, Paley's Principal and as the factor may have thereon. 2 Blac. Rep. Agent, by Lloyd.

him, not only for incident charges, but as an parts with his lien. See 1 Burr. 489: 1 Blac. Rep. 104: 2 East, 529: 6 East, 23: 5 B. & A. 27: Willes, 400. But if the factor sell the goods, he has still a lien on the price in the hands of the buyer. See Bac. Abr. Merchant, Principal, and Factor (B.) And see 1 East,

4: 5 B. & A. 27.

A facter has a lien upon each portion of goods in his possession for his general balance, as well as for charges arising on those particular goods. Amb. 252: 6 T. R. 262: 2 East, 529. And the lien attaches not only upon goods in specie, but upon the proceeds (Cowp. 251. 255: 2 East, 227: 3 B. & P. 489); and securities received in the course of his business. Willes, 400.

A dyer, merely as a manufacturer, has not a general lien; but a packer, being in the nature of a factor, has. 4 Burr. 2214.

A factor has no lien on goods for a general balance, unless they come into his actual possession; and if, in consideration of goods being consigned to him, he accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his actual possession, the consignor may stop them in transitu. 1 Term Rep. 119. If a factor accept bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, and both of them become bankrupts before a cargo consigned come into possession of the factor, the factor's assignees have no property in such cargo, and cannot recover the produce of it against the assignees of the principal, if the latter have sold it, and received the purchase money. 1 Term Rep. 783. See 4 Bro. P. C. 47. (8vo. ed.)

The consignor may stop goods in transitubefore they get into the hands of the consignee, in case of the insolvency of the consignee; but if the consignee assign the bills secretary of state. of lading to a third person for a valuable consideration, the right of the consignor as fringement of

no distinction between a bill of lading indors-If a person employ a factor to sell goods, ed in blank, and an indorsement to a particu-

property of it is in dispute, that court appoints

FACTORAGE, is the wages or allowance A factor has a lien on goods consigned to paid and made to a factor by the merchant. The gain of factorage is certain, however the item of mutual account, for the general ba- success proves to the merchant; but the comlance due to him, so long as he retains the missioners and allowances vary according to possession; if he parts with the possession, he the customs and distance of the country, in the several places where factors are resident. Lex Mercat. See tit. Factor.

FACTORIES. The employment of young persons and children in mills and factories is now regulated by the 3 and 4 W. 4. c. 103 (explained by 4 W. 4. c. 1.); the leading provisions of which may be thus shortly stated.

The employment of children under nine years of age, after the 1st of January, 1834, is prohibited, except in silk mills. No child is to be employed more than 48 hours in one week, or more than nine hours in one day, who, six calendar months after the passing of act, has not attained 11, 18 months after, 12, or 30 months after, 13 years of age, except in silk mills, where children under 13 may work 10 hours every working day. No person under 18 is to work in the night between halfpast 8 in the evening and half-past 5 in the morning; or more than 12 hours a day, or more than 69 hours a week, except in certain cases mentioned in the act; and every such person is to have one hour and a half for meals.

No child under 13 is to be employed without a certificate from a surgeon as to its strength and appearance, countersigned by an inspector or justice; and no person above that age, ander 18, is to work more than 9 hours a day, or between 9 in the evening and 5 in the morning, without a certificate of age.

Children in factories are to attend schools for two hours at least for six days in the week to be witnessed by the school-master's vouch-

Four inspectors are to be appointed of places where children are employed in factories to enforce the provisions of the act, who are to have access at all times to the factories, and to possess the same powers over constables as justices, and to make reports twice a year to a

Certain penames are imposed for a in-

working; and the forging of any certificate is ! made a misdemeanor, punishable with two 1. c. 88. months' imprisonment. All proceedings and convictions may take place before one inspec- tion is brought against a man, who alleges in tor or magistrate, from whose decision there his plea matter of record in bar of the action, is no appeal, except in cases of forgery of certificates.

The act extends to all factories in the United Kingdom where machinery is used for dressing or weaving cotton wool, worsted, hemp, flax, tow, or silk, with the exception of mills used solely for the manufacture of lace.

FACTUM. A man's own act and deed; fact or feat; particularly used in the civil law, for any thing stated and made certain. See

Fait.

FACULTY, facultas.] As restrained from the original and active sense, to a particular understanding in law, is used for a privilege, or special dispensation, granted to a man by favour and indulgence, to do that which by law he ought not to do. And for the granting of these there is an especial court under the Archbishop of Canterbury, called the Court of the Faculties; and the chief officer thereof the master of the Faculties; who has power by the stat. 25 H. 8. c. 21. to grant dispensations; as to marry persons without the banns first asked (and every diocesan may make the like grants), to ordain a deacon under age, for a son to succeed the father in his benefice, one to have two or more benefices incompatible, and for other purposes. And in this court are registered the certificates of bishops and noblemen granted to their chaplains, to qualify them for pluralities and non-residence. 4 Inst. 337. See tit. Chaplain. In the Scotch law faculty is synonymous with power: thus a faculty to burden is the power or right of charging an estate with a sum of money. See tit. Pews.
FASTING-MEN. In Mon. Angl. tom. 1

pag. 100. are rendered to signify vassals: but Cowel thinks they rather mean pledges or bondsmen; which, by the custom of the Saxons, were fast bound to answer for one another's peaceable behaviour. See Festing-Men.

FAG. A knot or excrescency in cloth; and in this sense it was used in the statute 4 Ed. 4. c. 1. (which is now repealed by 3 G, 4. c. 41. §. 1.) The fag-end signifies that end of a piece of cloth or linen where the weaver ends his piece, and works up the worst part of his materials.

FAGGOT. A badge wore in the times of popery, by persons who had recanted and abjured what was then adjudged to be heresy: those were condemned not only to the penance of carrying a faggot, as an emblem of what they had merited, to such an appointed place of solemnity; but for a more durable mark of that no person can claim a fair or market, uninfamy, they were to have the sign of a faggot embroidered on the sleeve of their upper garment: and if this badge or faggot was at any time left off, it was often alleged as the sign of apostacy.

FAIDA. Malice or deadly feud. Leg. H.

FAILURE OF RECORD, is when an acand avers to prove it by the record; but the plaintiff saith, Nul tiel record, viz. denies there is any such record: upon which, the defendant hath day given him by the Court to bring it in; and if he fails to do it, then he is said to fail of his record, and the plaintiff shall have judgment to recover. Terms de Ley. See further tits. Amendment, Jeofails, Record.

FAINT ACTION. Fr. feinte.] A feigned action; such that although the words of the writ are true, yet for certain causes the plaintiff hath no title to recover thereby; but a false action is properly where the words of the writ

are fulse. Co. Lit. 361.

FAINT PLEADER. A fraudulent, false, or collusory manner of pleading to the deceit of a third person; against which, among other things, was made the stat. 3 Ed. 1. c. 19.

FAIR-PLEADER. See tit. Beau-Pleader. FAIR. Fr. feire, Lat. feriæ, nundinæ.] A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious providing of such things as the subject needeth; and the utterance of what commodities we abound in above our own uses and occasions: and both our English and the French word seems to come from feriæ [festivals]; because it is incident to a fair that persons shall be privileged from being molested or arrested in it, for any other debt or contract than what was contracted in the same, or at least was promised to be paid there. See stat. 17 Ed. 4. c. 2. made perpetual by 1 Ric. 3. c. 6. and this Dict. tit. Courts of Pie-powders. See also stats. 2 Ed. 3.c. 15: 5 Ed. 3 c. 5: 27 H. 6. c. 5: 1 and 2 P. & M. c. 7: 18 Eliz. c.

I. The Right to a Eair, and the Manner of holding it.

II. The Duty, Power, and Interest of the Owners of Fairs .- How far a Sale in a Fair changes the Property of a thing therein sold, see this Dict. tit. Market.

I. The first institution of fairs and markets seems plainly to have been for the better regulation of trade and commerce, and that merchants and traders might be furnished with such commodities as they wanted, at a particular mart, without that trouble and loss of time, which must necessarily attend travelling about from place to place; and therefore, as this is a matter of universal concern to the commonwealth, so it hath always been held, less it be by grant from the king, or by prescription, which supposes such a grant. 2 Inst. 220; 3 Mod. 123.

And therefore, if any person sets up any such fair or market, without the King's authority, a quo warranto lies against him; said, that if he grants a market to be kept in and the persons who frequent such fair, &c. such a place, which happens not to be convemay be punished by fine to the king. 3 Mod. nient for the country, yet the subjects can go

tent for holding a fair or market, without a the suit of the grantee of the market. 3 Mod. writ of ad quod damnum executed and returned, that the same may be repealed by scire fa- fair by the king's grant, the grantees may cias; for though such fairs and markets are a keep it where they please, or rather where benefit to the commonwealth, yet too great a they can most conveniently: and if it be so number of them may become nuisances to the limited, they may keep it in what part of such public, as well as a detriment to those who place they will. 3 Mod. 108. have more ancient grants. 3 Lev. 222.

the year; and it has been observed, that fairs 7. and this Dict. tit. Holidays. were first occasioned by the resort of people to the Feast of Dedication, and therefore in most places the fairs, by old custom, are on take care that every thing be sold according the same day with the wake or festival of that saint to whom the church was dedicated: and purposes they may appoint a clerk of the fair for the same reason they were kept in the or market, who is to mark and allow all such church-yard, till restrained by stat. of Winton, weights, and for his duty herein can only church-yard, till restrained by stat. of Winton, weights, and for his duty herein can only 13 Ed. 1. st. 2. c. 6: 2 Inst. 221. Blount. take his reasonable and just fees. See 4 Inst. The Court of Pie-powder is incident to every By stat. 2 Ed. 3. c. 15. fairs are not to be kept longer than they ought by the may be forfeited; as if the owners of them By stat. 5 Ed. 3. c. 5. no merchant shall sell justly due. 2 Inst. 220: Finch. 164: 3 Mod. any goods or merchandize at a fair after the 108. time of the fair is ended, under the penalty of forfeiting double the value of the goods sold, tolls. one-fourth part thereof to the prosecutor, and the rest to the king. By stat. 27 H. 6. c. 5. fairs are not to be kept on Sundays. Any citizen of London may carry his goods or merchandize to any fair or market in England at, his pleasure. See stat. 3 H. 7. c. 9. and this Dict. tit. London.

It seems clearly agreed, that if a person hath a right to a fair or market, and another erects a fair or market so near his, that it becomes a nuisance to his fair, &c., that for this owner of the fair or market, and not incident detriment and injury done to him, an action to them; therefore if the king grants a fair or on the case lies; for it is implied in the king's grant, that it should be no prejudice to another. have none, and such fair or market is account-2 Rol. Ab. 140.

Also, although the new market be held on 2 Lutw. 1326. S. P. a different day, yet an action on the case lies; for this, by forestalling the ancient market, may be a greater injury to the owner, than if outrageous and excessive, the grant of the toll

ger disturbs those who are coming to buy or sell there, by which he loses his toll, or re- must be in consideration of some benefit ceives some prejudice in the profits arising accruing from it to those who trade and from his fair, &c., an action on the case lies. I merchandise in such fair or market. 2 Inst. Rol. Ab. 106: 2 Vent. 26. 28. So if upon a 221. sale in a fair a stranger disturbs the lord in taking the toll, an action upon the case lies for this. 1 Rol. Ab. 106.

to no other; and if they do, the owner of the Also it seems, that if the king grants a pa- soil where they meet is liable to an action at 123. But if no place be limited for keeping a

At what time fairs are to be held, see stat. Fairs are generally kept once or twice in 27 H. 6. c. 5. and 1 Car. 1 c. 1: 29 Car. 2. c.

II. Owners and governors of fairs are to to just weight and measure; for that and other 274: Moor. 523: 1 Salk. 327.

Fairs and markets are such franchises as lords thereof, on pain of their being seized hold them contrary to their charter, as by coninto the king's hands, until such lords have tinuing them a longer time than the charter paid a fine for the offence; and proclamation admits, by disuser, and by extorting fees and is to be made how long fairs are to continue, duties where none are due, or more than are

> As to their interest it arises chiefly from Toll payable at a fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, pickage, or the like. 2 Inst. 222: 2 Jon. 207.

> But this is not incident to a fair or market without special grant; for where it is not granted, such a fair or market is accounted a free fair or market. 2 Inst. 220: Cro. Eliz.

> Toll is a matter of private benefit to the market, and grants no toll, the patentee can ed free. Cro. Eliz. 558: 2 Inst. 220. S. P .:

Also if the king, at the time he grants a fair or market, grants a toll, and the same is held on the same day with his. 2 Saund. 172: is void, and the same becomes free. 2 Inst. 1 Mod. 69. See tit. Market. 220: 2 Lutw. 1336. But the king, after he 220: 2 Lutw. 1336. But the king, after he If a man hath a fair or market, and a stran-, grants a fair or market, may grant that the patentee may have a reasonable toll; but this

No toll shall be paid for any thing brought to the fair or market before the same is sold, unless it be by custom time out of mind, and The king is the sole judge where fairs and upon such sale the toll is to be paid by the markets ought to be kept; and therefore it is buyer; and therefore my Lord Coke says, that a fair or market by prescription is better than bonds.

one by grant. 2 Inst. 221.

And by stat. Westm. 1. c. 31. " touching them that take outrageous toll, contrary to the common custom of the realm in market towns, it is provided, that if any do so in the king's town, which is let in fee-farm, the king shall seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the king shall do in like manner; and if it be done coner; falco gentilis, a jer-falcon; falco spuaby a baliff, or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more, for the outrageous H. 3. taking, as he had of him, if he carried away his toll, and shall have forty day's imprisonment."

But where by custom a toll is due upon the sale of any goods in a fair or market, and he who ought to pay it refuses, an action on the case lies against him. 1 Rol. Ab. 103. 104. 106.

Some persons, however, are exempt from payment of toll; and if the king or any of his progenitors have granted to any to be discharged of toll, either generally or specially, this grant is good to discharge him of all tolls to the king's own fairs or markets, and of the tolls, which, together with any fair or market, have been granted after such grant of discharge: but cannot discharge tolls formerly due to subjects either by grant or prescription. 2 Inst. 221.

Also the king himself shall not pay toll for any of his goods; and if any be taken it is furniture of a cart or wain. Mon. Angl. tom. punishable within the statute Westm. 1. c. 31: 2 Inst. 221. So the tenants in ancient defeater and quit from all manner of the sea-side. Domesd. tolls in fairs and markets, whether such tenants hold in fee, or for life, years, or at will. 2 Inst. 221. 4 Inst. 269: 1 Rol. Ab. 321.

But this privilege does not extend to him who is a merchant, and gets his living by buying and selling, but is annexed to the person in respect of the land, and to those things which grow and are the produce of the land. F. N. B. 228: 2 Leon. 191: Cro. Eliz. 227: folkemote. See tit. Parliament.

2 Inst. 221: 1 Rol. Ab. 321, 2

toll-takers or book-keepers, on pain of 40s., and the suit, the law giveth no remedy in this they shall enter and give account of horses case, because the truth or falsehood of the matsold, &c. Stat. 1 and 2 P. & M. c. 7: 3 Eliz. ter cannot appear before it is tried; and if the c. 12. See further, tits. Toll, Horses, Market. | plaintiff be barred or nonsuited, at common

FAIT, factum.] A deed or writing, lawfully executed to bind the parties thereto. See ment. Jenk. Cent. 161. See Faint Action.

tit. Deed.

FAIT ENROLLE, Fr.] A deed of bargain and sale, &c., and forging the inrollment of it is a great misdemeanor, but not forgery

within the stat. 5 Eliz. 1 Keb. 568.

FAITOURS, Fr.] In the statute 7 Ric. 2 c. 5. is used for evil doers; and may be interpreted idle livers, from faitardise, which signifies a kind of sleepy disease, proceeding every person convicted before two justices of from too much sluggishness; and in the same giving a false character to a servant. statute it seems to be synonymous with vaga-

Termes de Ley. See tits. Poor Vag. rants.

FALANG. A jacket or close coat. Blount. FALCATURA. One day's mowing of grass; a customary service to the lord by his inferior tenants: falcata was the grass fresh mowed and laid in swathes; and falcator the servile tenant performing the labour. Kennet's Gloss.

FALCO. A faulcon. Falconarius, a fal. rius, a sparrow hawk. Cowel. See tit. Hawks.

FALDA. A sheep-fold. Rot. Chart. 6

FALDAGE, faldagium.] A privilege which several lords anciently reserved to themselves. of setting up folds for sheep in any field within their manors for the better manurance of the same; and this was usually done not only with their own but their tenants' sheep, which they call secta faldæ. This faldage is termed in some places a fold course; and in old charters faldsoca, i. e. libertas faldæ, or faldagii.

FALDÆ CURSUS. A sheep walk or feed

for sheep. 2 Vent. 139.

FALDFEY, FALD-FEE. A fee or rent paid by some customary tenants for liberty to fold their sheep upon their own land.

FALDISTOR, Sax.] The highest seat of a bishop inclosed round with a lattice. Cowel. FALDWORTH. A person of age, that he

may be reckoned of some decennary. Du Fresne.

FALERÆ, Lat. phaleræ.] The tackle and

FALK-LAND, or FOLK-LAND. See tit. Copyhold.

FALLOW-LAND. See Warrectum and Terra Warrecta.

FALLUM. An unexplained term for some particular sort of land. De duobus acris et viginti fallis in, &c. Mon. tom. 2. 425.

FALMOTUM, or falkmote; the same with

FALSE ACTION. If brought against one, Owners of fairs and markets are to appoint whereby he is cast into prison, and dies pendlaw, regularly all the punishment is amerce-But if one commence a bailable action against another, and hold him to bail thereon, either without a reasonable cause, or for something considerable, more than what is bona fide due, an action upon the case will lie for the vexa-

tion and injury. See tit. Action, II. FALSE CHARACTERS. A penalty of 201. is inflicted by the 32 G. 3. c. 56. upon

FALSE CLAIM. By the forest laws, is

where a man claims more than is his due, and is amerced and punished for the same. A person had a grant, by charter, of the tenth of all the venison in the forest of Lancaster, viz. in carne tantum sed non in corio; and because he made a false claim, by alleging that he ought to have the tenth of all the venison within the forest, as well in carne as in corio, therefore he was in misericordia de decima venationis suæ in corio non percipiendo. Manwood, c. 25.

FALSE ENTRY. The 56 G. 3. c. 63. for regulating the Penitentiary at Milbank, declares that any officer or servant belonging to that establishment, who shall make any false entry or fraudulent omission in his accounts, shall be liable to be punished by fine and imprisonment.

FALSE FORM. In proceedings at law, is aided by a verdict; though not where there is want of certainty, &c. 1 Keb. 734. 876. See tits. Amendment, Error.

FALSE IMPRISONMENT.

FALSUM IMPRISONAMENTUM.] A trespass committed against a person, by arresting and imprisoning him without just cause, contrary to law; or where a man is unlawfully detained without legal process; it is also used for a writ which is brought for this trespass.

To constitute the injury of false imprisonment two points are necessary; the detention 396. of the person, and the unlawfulness of such detention. Every confinement of the person has been held to lie against a superior officer is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 2 Inst. 589. Unlawful or false imprisonment consists in such confinement or detention without sufficient authority; which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment. 2 Inst. 46. See this Dict. tits. Arrest, Commitment, Constable. Such authority may also arise from some other special cause; warranted, for the necessity of the thing, either by common or statute law; as the arresting of a felon by a private person without warrant; the impressing of mariners for the public service; or the apprehending wagoners, (under stat. 13 G. 3. c. 78,) for misbehaviour in the public highways. False imprisonment may also arise by executing a lawful warrant or process at an unlawful time, as on a Sunday. See tits. Arrest, Sunday.

The means of removing the actual injury of false imprisonment are four-fold; by writs of mainprize; odio et atia; homine replegiando; and habeas corpus. See this Dict. under those titles. The remedy for a satisfaction for the injury is by action either of case or trespass: and therein the party shall recover damages for the injury he has received.

The distinction between the action of case and action of trespass for this injury is thus stated. Where the immediate act of imprisonment proceeds from the defendant, the action can only be trespass; but when the act of imprisonment by one person, is in consequence of information from another, there an action on the case is a proper remedy. Morgan v. Hughes, 2 Term Rep. K. B. 232.

If A. positively state to the commander of a press-gang, that B. is liable to impressment, and he is not so, and in consequence of the statement B. is impressed, A. is liable to an action for false imprisonment at the suit of B. Query, if he had only stated that he believed that B. was liable to impressment. Flewster

v. Royle, 1 Camp. 187.

The most atrocious degree of this offence, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is criminally punished with the pains of præmunire, and incapacity to hold any office, without a possibility of pardon. Stat. 31. C. 2. c. 2. See this Dict. tits. Exile, Habeas Cor-

No action of false imprisonment lies against a judge of a court of record for any act done by him in the execution of his office, nor for any mistake of judgment.

Action on the case for false imprisonment where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty, and was continued beyond necessary bounds. So also where a captain of a man of war imprisoned the defendant three days for a supposed breach of duty, without hearing him, and then released him without bringing him to a court martial. 1 Term Rep. K. B. 536, 537.

If erroneous process issues out of a court that hath jurisdiction of the matter, and the bailiff or officer executes it, whereby the party is imprisoned, the officer shall be excused in action of false imprisonment: but if the court out of which the process issues hath no cognizance of the cause, it is otherwise; for in such case the whole proceedings are coram non judice, and the officer will not be excused. 10 Rep. 75. See tits. Arrest, Constable.

An officer hath a warrant upon a capias ad satisfaciend' against an earl, or countess, &c., who are privileged in their persons, and he arrests them: it is said action of false imprisonment will not lie against the officer, because he is not to examine the judicial act of the court, but to obey. 6 Rep. 56: 10 Rep. 75.

If an arrest is made by one who is no legal officer, it is false imprisonment, for which action lies. Co. Lit. 69. An action of false imprisonment lies avanus a mount for arresting a person without warrant, though he afterwards receives a warrant: and so it is if he person, he must not only make out a reasonaarrests one after the return of the writ is past; ble ground of suspicion, but he must prove for it is then without writ. 2 Inst. 53. If a that a felony has actually been committed: sheriff, or any of his bailiffs, arrests a man whereas a constable, having reasonable ground out of his county, &c. or after the sheriff is to suspect that a felony has been committed. discharged of his office; or a person arrests one on a justice's warrant after his commission is determined, &c., it will be false impri-ties. sonment. Dyer, 41. And if the sheriff, after he hath arrested a man lawfully, when a legal discharge comes to him, as a supersedeas, or the like, do not then discharge the party, he competent jurisdiction, upon which the plainmay be sued in this action. 2 R. 1.12: Fitzh. tiff was arrested and imprisoned, is, till re-253.

In case the plaintiff in a suit brings an unlawful warrant to a sheriff, and shows him the defendant, requiring him to make the arrest; or if he bring a good warrant and direct the sheriff to a wrong man, &c., for this the action of false imprisonment will lie against both. Bro. Tresp. 99. 307: Faux Impr. 19: 1 Brownl. 211. If a warrant be granted to arrest, or apprehend a person where there are several of forth all the circumstances necessary to give the name, and the bailiff or other officer ar- them jurisdiction, and by which it appeared rests a wrong person, he is liable to action of that they had pursued the directions of the act: false imprisonment; and he is to take notice of the right party at his peril. Dyer, 244: to the action. Barton v. Carew, 3 Barn. & C. Moor. 457.

A man arrested on a Sunday may bring & Ald. 369. his action of false imprisonment; but one has been refused to be released in such a case. 5 Mod. 95. See tits. Arrest, Sunday. If a years; which has been construed to be from bailiff demands more than his just fees, when the end of any continued imprisonment Salk. offered him, and keep a person in custody 420. By stat. 24 G. 2. c. 44. actions against thereupon, it is false imprisonment and punjustices of peace, or constables acting under ishable: and if a sheriff, or gaoler, keeps a prisoner in gaol, after his acquittal, for any thing except his fees, it is unlawful imprison-ment. 2 Inst. 482: Wood, 16. If a man falsely imprisons A. B., and the gaoler detains him till he pays so much money, he shall have action of false imprisonment and taking so much money from him against such person. Mod. Cas. 179.

Unlawful or false imprisonment is sometimes called duress of imprisonment, where one is wrongfully imprisoned till he seals a bond, &c. 2 Inst. 482. See tits. Duress.

An imprisonment will be unlawful, and ble, Action. give this action, although the cause be good, when he that makes it doth the same without law to an assault, being a wrong done to the any colour of authority; or if he has a colour, person of a man, for which, besides the priyet if he hath no good authority from the vate satisfaction given to the individual by accourt, &c.; or where a court or officer hath tion, the law demands likewise a punishment power, but do not well make it out; or when for the breach of the king's peace. 1 Hawk. the authority is well made forth, and not c. 60. § 7: 4 Comm. 218. rightly pursued and executed. 4 Rep. 64: 8 Rep. 67: Dyer, 242. If A. having been rob-sonment or wrongful detainer of the person, bed, suspect B. to be guilty, and take and deliver him into the charge of a constable present; B. if innocent, may maintain action of trespass and false imprisonment against A. A writ that lieth where false judgment is 6 Term Rep. K. B. 315.

individual and a constable: in order to justify Error. the former in causing the imprisonment of a

is authorised to detain the party suspected till inquiry can be made by the proper authori-Beckworth v. Philby, 6 Barn. & Cres. 635: and see 3 Campb. 421: 5 Price R. 525: Bac. Abr. Trespass, D.

A conviction of a justice of peace having versed or quashed, conclusive evidence in favour of the justice against whom an action of trespass and false imprisonment is brought.

7 Term Rep. K. B. 633. n.

So where, in an action against two justices for giving the plaintiff's landlord possession of a farm as a deserted farm, they produced in evidence the record of their proceedings under the act 11 Geo. 2. c. 19. § 16. which set it was held that this was a conclusive answer 649: and see 1 Brod. & Bing. 432: 1 Barn.

By the Statute of Limitations, 21 Jac. 1. c. 16. this action must be brought within four their warrants, must be brought within six months; and one month's notice of bringing the action must be given them; and by stat. 21 Jac. 1. c. 12. those officers may plead the general issue, and give the special matter in

In trespass against a justice of the peace for wrongfully committing a party, it appeared that he was discharged from prison on the 14th December, and the writ issued on the 14th June. It was held that the action was commenced in time. Hardy v. Ryle, 9 Barn. & C. 603. See this Dict. tits. Justice, Consta-

An unlawful imprisonment also amounts in

Further as to relief in cases of false imprisee this Dict. tits. Habeas Corpus, Imprison-

ment.

FALSE JUDGMENT, falsum, judicium.] given in the county-court, court-baron, or other There is this distinction between a private courts not of record. F. N. B. 17, 18. See tit.

A judgment may be falsified, reversed, or

avoided, without a writ of error for matters comes without an original; but if the plaintiff foreign to, or dehors the record; that is, not dies, and false judgment is given in the infeapparent upon the face of it, so that they can-rior court, his heir shall have a sei. fac. ad aunot be assigned for error in the superior court, diend' error against him who recovered upon which can only judge from what appears in that record which is removed into C. B.; and the record itself; and therefore if the whole where the plaintiff in a writ of false ju Igment record be not certified, or not timely certified as nonsuit, it was formerly a question, whether by the inferior court, the party injured there- the other party shall sue execution upon by, in both civil and criminal cases, may al-this record, so removed against the plaintiff, lege a diminution of the record, and cause it without suing out a scire facias; but it has to be rectified. See this Diet. trt. Diminution, been adjudged, that he may do it. Hil. 23. Thus if any judgment whatever be given by Hen. 6: New Nat. Br. 33. persons who had no good commission to pro- When a record is removed into C. P. by ceed against the person condemned, it is void; writ of false judgment, if the perty alleges and may be falsified by showing the special variance between the record removed, and matter without writ of error. As where a that on which judgment was given, the trial commission issues to A. and B. and twelve shall be by those who were present in court others, or any two of them, of which A. or B., when the record was made up. 2 Lativ. 957. shall be one, to take and try indictments, and Stat. 1 Ed. 3. c. 4. A man shall not have any of the other twelve proceed without the in- a writ of false judgment but in a court where terposition or presence of either A. or B., in there are suitors; for if there be no suitors, this case all proceedings, trials, convictions, there the record cannot be certified by them. and judgments, are void for want of a proper New Nat. Br. 40. Where false judgment is authority in the commissioners, and may be given on a writ of justicies, directed to the falsified upon bare inspection without the troussheriff, the party grieved shall have a writ of ble of a writ of error; 2 Hawk. P. C. c. 50. § 2; false judgment; although the judgment be for it being a high misdemeanor in the judges so debt, or trespass above the sum of 40s. Ibid. proceeding, and little, if any thing, short of murder in them all, in case the person so ty-court was vicious, and the judgment reattainted be executed and suffer death. Comm. 390.

So likewise if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to forfeiture or escheat: now upon any trial the purchaser is at liberty, without bringing any writ of error, to falsify, not only the time of the felony or treason supposed, of common law. 2 Bing. 344. but the very point of the treason or felony itself; and is not concluded by the confession or outlawry of the vendor; though the vendor himself is concluded, and not suffered then have a writ of false judgment; but a writ of to deny the fact which he had by confession or error thereupon. M. 4: E. 4. For defaults flight acknowledged. But if such attainder of of tenant for life, in writs of right, &c. writ of the vendor was by verdict, on the oath of his peers, the alience cannot be received to falsify or contradict the fact of the crime committed; though he is at liberty to prove a mistake in time; or that the offence was committed after the alienation and not before. 3 Inst. 231: 1 Hal. P. C. 361.

This writ may be brought on a judgment directing law proceedings to be in Engina plea, real or personal: and for errors in lish, if a Latin word was significant, though the proceedings of inferior courts, or where not good Latin, yet an indictment, declarathey proceed without having jurisdiction, writ tion, or fine, should not be made void by of false judgment lieth: though the plaintiff it; but if the word was not Latin, nor allowed assign errors in a writ of false judgment, he by the law, and it were in a material point, shall not say, In hoc erratum est, &c. but un- it made the whole vicious. 5 Rep. 121: 2 Nels. de queritur diversimodo sibi falsum judicium 830. factum fuisse judicium in hoc, &c. Moor, 73: FALSE NEWS. Spreading false news, to 2 Nels. Abr. 829. If a writ of false judg- make discord between the king and nobility, ment abate for any fault in the writ, the plain- or concerning any great man of the realm, is tiff shall not have scire facias ad audiend' er- punished by common law, with fine and im-

Vol. I.—96

Where a record of a judgment in the counversed in C. B. the suitors were ordered to be amerced a mark, and the county clerk fined 51. And if a plaintiff in an inferior court declare for more than 40s. judgment shall be reversed by writ of false judgment: but where damages are laid under that sum, costs may make it amount to more. 1 Mod. 249: 2 Mod. 102. 206.

A writ of false judgment does not lie from the Southwark Court of Requests to a court

Upon false judgment before bailiffs, or others who hold plea by prescription, in every sum in debt by bill before them a party shall not false judgment lies by him in reversion: and this writ may be brought against a stranger to the judgment, if he be tenant of the land. A judgment shall be intended good till reversed by writ of false judgment, &c. See tits. Accedus ad Curiam, Attaint.

FALSE LATIN. Before the statute

rores, upon the record certified, because it prisonment, which is confirmed by statutes

Westm. 1. 3 Ed. 1. c. 31: 2 Rich, 2. st. 1. c. to the like punishment as mentioned in the for-5: 12 Rich. 2. c. 11. See 2 Inst. 226: 3 Inst. mer section. 198.

To circulate false rumours, for the purpose of effecting a fraud upon the public, or to enhance the price of a commodity of general tree frequently arises from the subtle distincconsumption for the sake of private game-is an offence at common law. to be an indictable offence to spread false rumours among the hop-planters in Worcestershire, that the stock of hops was nearly exhausted, and that there would soon be a searcity, with intent to raise their price. 1 East, 143. So where several persons combined to raise the public funds on a particular day, by circulating false rumours, they were held to be indictable for a conspiracy. 3 M. & S. 67. And it is equally an offence where the object of the fals: rumours is to lower the price of the commodity. 3 Inst. 196.

FALSE OATH. See tit. Permey.

FALSE PERSONATION. The offence of personating another for the purpose of fraud is a misdemeanor at common law. R. v. Dupce. 2 Last, P. C. 1010. And if any goods or money be obtained by means of the fraud, the offence will then come within the 7 and 8 G. 4 c. 29, § 53, for obtaining money or, ing the note as a genuine one was tantamount goods by false pretences. See that tit. post. It has been usual, where this offence is ear- 127. So a person presenting a post-office orried on in concert, to indict the parties for a der to the post-master, and writing his real conspiracy. R v. Robinson, 1 Leach, 37: 2 East, P. C. 1010. So where a cheat was effeeted by one person pretending to be a mer- in the order, and to be a false pretence. R. chant, and another pretending to be a broker, judgment was given against the defendants on the ground of conspiracy. R. v. Macarty, count with his bankers, by drawing a bill on 2 Ld. R. 1179.

assume the name or character of any officer, soldier, seaman, marine, or other person entitled or supposed to be entitled to any wages, pay, &c. in order fraudently to receive such wages, &c. is declared to be felony punishable by transportation for life or years, or by imprisonment with or without hard labour.

personating the owner of any share in any stock or public fund, or in the capital stock of any body corporate, company, or society, established by charter or act of parliament, or tences is not changed; 7 Taunt. 59; but unthe owner of any dividend payable in respect | der the old law courts had no authority to orof such share, and thereby endeavouring to der a restitution to the owner in a summary transfer any interest belonging to such own-manner. 2 Leach, 5.5; 5 T. R. 170. They er, and to receive any money due to him, is dearen ow empowered to do so upon the conviction of the offender by the 7 and 8 6.4. c. 29. transportation for life or for seven years, or \$57. with imprisonment not exceeding four, and not less than two years, at the discretion of the court. And by § 11. if any person shall, a mayor, &c. to a mandamus, or by a sheriff, before any court, judge, or other authorised &c to a writ, a special action on the case will person, acknowledge any recognisance or bail, lie. See tit. Action. ine, recovery, cognovit actionem, or judgment, or any deed to be enrolled in the name of any 33 H. S. c. 1, respecting the obtaining money person not privy to the same, every such of or goods by means of false privy tokens, forged fender shall be guilty of felony, and subject letters, or other counterfeit means, is repealed

FALSE PLEA. See tit. Pleading.

FALSE PRETENCES. The stat. 7 & 8 G. 1. c. 29. § 53, recites that a failure of justion between larceny and fraud, and enacts Thus it was held that if any person shall by any false pretence obtain from any person any chattels, money, or valuable security, with intent to cheat or defraud any person of the same, such offender shall be guilty of a misdemeanor, punishable by transportation for seven years, or fine, imprisonment, or hard labour, &c.; and it is provided that if upon the trial of such offender for the misdemeanor, it shall be proved that the property was obtained in such manner as to amount to larceny, yet the offender shall not by reason thereof be entitled to an acquittal of such misdemeanor, but he shall not be liable to be afterwards tried for the larceny.

It is not necessary that the pretence should be in words; there may be a sufficient false pretence by the acts and conduct of the party, as tendering in payment a forged promissory note for 10s, 6d., and receiving the change; in which case the judges held that the utterto a representation that it was so. R. & R. name on it, and receiving the money, was held as representing himself as the person named & R. 81. See tits. Cheats and Frauds.

But where a person obtained credit in acan individual on whom he had no right to By 5 G. 4. c. 107. § 5. to personate or falsely draw, and who he knew would not pay the bill, it was decided to be no offence under the above act, though the bankers advanced money in consequence. 1 R. & M. 224. So where a party obtained goods by delivering a forged letter, "please to let the bearer, A. B., have for C. D. four yards of linen," signed, C. D.; it was held a felony under the forgery By 11 G. 4. and 1 W. 4. c. 66. § 7. falsely act, 1 W. 4. c. 66 § 10; and therefore an indictment for obtaining goods by false pretences could not be supported. 5 C. & P. 553.

The property in goods obtained by false pre-

FALSE PROPHECY. See tit. Prophecy. FAUSE RETURN. On a false return by

FALSE PRIVY TOKENS.

by 7 & 8 G. 4. c. 27; and most of the offences | therein enumerated are now punishable as

false pretences. See that tit.

FALSE VERDICT. A writ of attaint lieth, to inquire whether a jury of twelve men have given a false verdict; that so the judgment following thereupon may be reversed. It is allowed in almost every action except in a writ of right. See tits. Attaint, Jury, Trial.

FALSE WEIGHTS AND MEASURES. A summary jurisdiction is given to magistrates in petty session by the 37 G. 3. c. 143. to punish persons in whose possession false weights and balances shall be found. And the 55 G. 3. c. 43. provides for the punishment of offenders using false and deficient measures.

An uniformity of weights and measures was established throughout the United Kingdom by the 5 G. 4. c. 74., which see under net's Glos. See tit. Fence Month. tit. Weights and Measures.

shall not be required to present false weights land justice ought to be done with all expeand measures at any general gaol delivery or quarter sessions. See further tit. Cheats.
TO FALSIFY. To prove a thing to be

false. Perk. 383.

FALSIFYING A RECORD. A person that puachases land of another, who is afterwards outlawed of felony &c. may falsify the record, not only as to the time wherein the nook, and four nooks a yard land. felony is supposed to have been committed, but also as to the point of the offence: but LAND; quadrantata terræ.] Is the fourth where a man is found guilty by verdict a pur- part of an acre: and besides quadrantata terra, chaser cannot falsify as to the offence; though he may for the time, where the party is found brata terræ, which probably arise in proporguilty generally in the indictment, &c. because tion of quantity from the farding-deal, as an the time is not material upon evidence. And half-penny, penny, shilling, or pound in any judgment given by persons who had no money, rise in value, and then must obolata be good commission to proceed against the person half an acre, denariata an acre, solidata twelve condemned, may be falsified by showing the acres, and librata terræ twelve score acres of special matter, without writ or error. Also land: but some hold obolata to be but half a where a man is attainted of treason or felony, perch, and denariata a perch; and there is if he be afterwards pardoned by parliament, the attainder may be falsified by him or his heir, without plea. 2 Hawk. P. C. See tit. librata terræ is so much as yields 20s. per an-Record.

FALSIFYING RECOVERY. See tits.

any real action, there is a verdict against tenant in tail, the issue can never falsify such verdict in the point directly tried; but only in a special manner, as by saying that some evidence was omitted, &cc. 2 Ld. Raym. 1050. See tits. Trial, New Trial, Jury, Verdict.

FALSING OF DOOMS. In Scotch law, the old term for an appeal: doom is the sentence of a court, and the falsing of dooms is

proving the injustice of that sentence.

FALSONARIUS. A forger. Hoveden, 424. FALSO RETURNO BREVIUM. A writ terers. Sax. that lieth against the sheriff who hath execution of process, for false returning of writs. deal. Rcg. Jud. 43.

FAME, GOOD OR ILL. Persons of good fame charged with a bare suspicion of manslaughter, or other inferior homicide, or with any minor felony, have a right to be bailed on offering sufficient security. 4 Comm. 299. See further tit. Bail, II.

By the 34 E. 3. c. 1. justices are empowered to bind over to the good behaviour towards the king and the people all of them that be not of

good fame, wherever they be found.

FAMILIA. Signifies all the servants belonging to a particular master; but in another sense it is taken for a portion of land sufficient to maintain one family. It is sometimes mentioned by our writers to be a hide of land. which is also called a manse; and sometimes carucata, or a plough land. Blount.

FANATIO, mensis fanationis.] The fawning season or fence-months in forests. Ken-

FARANDMAN, Sax.] A traveller or mer-By stat. 7 and 8 G. 4. c. 38. constables chant stranger, to whom by the laws of Scotdition, that his business or journey be not hin-

dered. Shene, c. 104.
FARDEL OF LAND, fardella terræ.] Is generally accounted the fourth part of a yard land, but according to Noy (in his Compleat Lawyer, p. 57.) it is an eighth part only; for there he says that two fardels of land make a

FARDING-DEAL, or FARUNDEL OF we read of obolata, denariata, solidata, and linum. F. N. B. 87: Spelm. Gloss.

FARE, Sax.] A voyage or passage by water; but more commonly the money paid Fine, Recovery. water; but more commonly the money paid FALSE RUMOURS. See tit. False News. for such passage, in which sense it is now FALSIFYING A VERDICT. Where, in used. See stat. 3 P. & M. c. 16. So for what we pay an hackney or stage coachman for our

FARINAGIUM. Toll of meal or flour.

Ordin. Insul. de Jersey, 17 Ed. 2.

FARLEU. Is money paid by tenants in the West of England in lieu of a heriot: and in some manors in Devonshire farlieu is distinguished to be the best goods; as heriot is the best beast payable at the death of a tenant. Cowel.

FARLINGARII. Whoremongers and adul-

FARUNDEL OF LAND. See Farding.

FARM, or FERM. Lat. firma, from the

Sax, feorme i. c. food; and feorman, to feed or repentance, for the murder of King Charles I. vield victuals.] A large messuage of land, Other days of fasting, which are not fixed, are taken by lease under a certain yearly rent, occasionally appointed by the king's proclapayable by the tenant; and in former days, mation. See Embring Days, Holidays. about the time of William the First, called the Conqueror, these rents were reserved to the lords in victuals and other necessaries arising from the land; but afterwards in the en vessel used by malsters and brewers, for reign of King Hen. I. were altered and con-verted into money. Termes de Ley. A farm eight bushels or a quarter, mentioned in is most properly called the chief messuage in a villago; and it is a collective word, consisting of divers things gathered in one, as a messuage, land, meadow, pasture, wood, common, &c. Locare ad firmam is to let or set county of Worcester. to farm; and the reason of it may be in respect to the firm or sure hold the tenants thereof have above tenants at will. A farm in Lancashire is called Ferm.holt; in the north a Tack; and in Essex a Wike; and ferm is taken in various ways. Ploud. 195.

FARMER. He that holds a farm, or is tenant or lessee thereof. Termes de Ley. And it is said generally every lessee for life or years, although it be but of a small house and land, is called farmer, as he is that occupieth the farm: as this word implies no mystery, except it be that of husbandry, husbandman is the proper addition of a farmer. 2 Hawk. P. C. c. 23. § 115. No person whatsoever shall take above two farms together, and they to be in the same parish, under the penalty of 3s. 4d. a week. Stat. 25 H. 8. c. 13. § 14.

FARRIER. There is in law an implied contract with a common farrier, that he shoes a horse well without laming him; and if he fail, action on the case lies to recover damages for such breach of his general undertaking. 11 Rep. 54: 1 Saund. 312: 3 Comm. all persons that have fee, hold per fidem et 166.

FARTHING. Was the fourth part of a Saxon penny, as it is now of the English

FARTHING OF GOLD, quasi fourth thing.] A coin used in ancient times, containing in value the fourth part of a noble. It is mentioned in the stat. 9 H. 5 c. 7. where it is ordained, that there shall be good and just his fee. weight of the noble, half noble, and farthing of gold, &c.

fer from Farding-deal; for it is a large quantity of land: in a survey-book of the manor of West Slapton in Com. Devon is entered thus: A. B. holds six farthings of land at 126l. per annum.

Mong. Angl. tom. 2. p. 238.
FAST-DAYS. Days of fasting and humiliation, appointed to be kept by public authe do him no injury in his reputation. 4. thority. There are fixed days of fasting entitle, that he do no damage to him in his posjoined by our church, at certain times in the year, mentioned in ancient statutes, particularly the 2 and 3 Ed. 6. c. 19. and 5 Eliz. l. c. 5. And by stat. 12 Car. 2 c. 14. the 30th of January is ordained to be a day of fasting and

FASTERMANS, Sax.] Pledges. Leg. Ed. Confess. c. 38. Vide Fæstingmen.

FAT, VAT, or WATE. Is a large woodthe (repealed) stats. 1 H. 5 c. 10: 11 H. 6. c. 8. It is also a vessel made use of by brewers to run their wort into, and by others for the making of salt at Droitwich, in the

FATHER. See Descent, Executor, Guar-

dian, Marriage.

FATUA MULIER. A whore. Du Fresne. FATUOUS PERSONS. Ideots. See tit. Lunatics.

FAUSETUM. A faucet, musical pipe or

FAUTORS. Favourers or supporters of others; abettors of crimes, &c.

FEAL. The tenants by knight service did swear to their lords to be feal and leal, i. e. to be faithful and loyal. Spelm. de Parliament, See Fealty.

FEAL AND DIVOT. A right in Scotland similar to the right of turbary in England for fuel, &c. See tit. Common of Turbary.

FEALTY, fidelitas, Fr. feaulté, i. e, fides, fidei, obsequii et servitii ligamen, quo particulariter, vassalus domino astringitur. Spelm.] The oath taken at the admittance of every tenant, to be true to the lord of whom he holds his land: and he that holds land by the oath of fealty, has it in the freest manner; because fiduciam, that is, by fealty at least. Smith de Repub. Ang. lib. 3. c. 8. And fealty is incident to all manner of tenures except frankalmoigne and tenancy at will. See tit. Tenures, I. 6. et passim. This fealty, which is used in other nations, as well as England, at the first creation of it bound the tenant to fidelity; the breach whereof was the loss of

It is usually mentioned with homage, but differs from it; being an obligation perma-FARTHING OF LAND. Seems to dif- nent, which binds forever: and these differ in the manner of the solemnity, for the oath of homage is taken by the tenant kneeling; but that of fealty is taken standing, and includes the six following things, viz.

num.

1. Incolume, that he do no bodily injury to the lord. 2. Tutum, that he do no secret damage to him in his house, or any thing which is for his defence. 3. Honestum, that ral and special; general to be performed by simple, is he which has lands or tenements to every subject to his prince, and special, required only of such as in respect of their fee are tied by oaths to their lords. Grand. Custum. Normand.

By stat 17 Ed. 2. st. 2. the form of this oath is appointed, and as now observed it runs as follows, viz. " I, A. B. will be to you my lord C. true and faithful, and bear to you fealty and faith for the lands and tenements which I hold of you: and I will truly do and perform the customs and services that I ought to do to you. So help me God." The oath is administered by the lord or his steward; the tenant holding his right hand upon the book, and repeating after the lord, &c. the words of the oath; and then kissing the book. Termes de

The law with respect to fealty continues the same as when Lord Coke wrote (see 1 Inst. 686. in note); for it does not appear to be varied by stat. 12. C. 2. c. 24. or any other statute made since; but it is no longer the practice to exact the performance of fealty. In the case of copyholders it is become a thing of course on admitting them to enter a respite of fealty; but with respect to such as hold by other tenures it is never thought of. In Wood's Inst. 183. it is said that lessees for life or years ought to do fealty to their lords for the lands they hold. However, it may not be amiss to remember that the title to fealty still remains; that it is due from all tenants except tenants in frankalmoigne, and such as hold at will or by sufferance, and if required must be iterated at every change of the lord; it differing in this respect from homage, which, except in special cases, is only due once; that the receiving of it is at least attended with the advantage of preserving the memory of the tenures, which though perhaps sufficiently done in the case of copyholds by the admittances, and by the payment of fines and quit rents, and continual render of other services, may be very necessary in cases where fealty is the only service due; and lastly, that the law for compelling the performance of fealty has provided the remedy by distress, which is an inseparable incident to all services due by tenure, and in the case of fealty cannot, as it is said, be excessive. See 1 Inst. 68. a. 103. b. 104. a. b. 152. b: 2 Inst. 107: 4 Co. 8. b.

FEAR. See Duress.

FEASTS. Anniversary times of feasting and thanksgiving, as Christmas, Easter, Whitsuntide, &c. The four feasts which our laws especially take notice of, are the feasts of the annunciation of the Blessed Virgin Mary, of Lord Christ), on which quarterly days rent ultimate property resides. on leases is usually reserved to be paid. See stats. 5 and 6 Ed. 6. c. 3: 12 Car. 2. c. 30. of the word fee; but (as Sir Martin Wright

Fealty has likewise been divided into gene- | FEE, and FEE-SIMPLE.-Tenant in fee hold to him and his heirs for ever. Litt. c. 1.

> The word fee is sometimes used for the compass or circuit of a lordship or manor, as we say the lord of the fee, &c., as well as the particular estate of the tenant; and also for a perpetual right incorporeal; as to have the keeping of prisons, &c. in fee. Bract. Lib. 2. c. 5: Old Nat. Br. 41. And when a rent or annuity is granted to one and his heirs, it is a fee personal. Co. Lit. 1, 2.

The true meaning of the word fee (feodum) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to allodium, which latter the writers on this subject define to be every man's own land which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree, and the owner thereof hath absolutum et directum dominum, and therefore is said to be seised thereof absolutely in dominico suo, in his own demesne. But feedum or fee, is that which is held of some superior on condition of rendering him service, in which superior the ultimate property of the land resides; and, therefore, Sir Henry Spelman (of Feuds, c. 1.) defines a feud or fee to be the right which the vassal or tenant hath in lands, to use the same, and take the profits thereof to him and his heirs, rendering to the lord his due service; the mere allodial propriety of the soil always remaining in the lord. This allodial property no subject in England has, it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king, therefore, only hath absolutum et directum dominium, but all subjects' lands are in the nature of feodum or fee, whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feodal clogs which were laid upon the first feudatory when it was originally granted. A subject, therefore, hath only the usufruct and not the absolute property of the soil; or, as Sir Edward Coke expresses it (Co. Lit. 1.), he hath dominium utile, but not dominium directum; and hence it is, that in the most solemn acts of law we express the strongest and highest estate that any subject can have by these words-" he is seised thereof in his demesne as of fee." It is a man's demesne, dominicum, or property, since it belongs to him and his heirs for ever, yet this dominicum, property, or demesne, is strictly not absolute or allodial, but the nativity of St. John the Baptist, of St. qualified or feedal; it is his demesne as of fee, Michael the Archangel, and of St. Thomas the that is, it is not purely and simply his own, Apostle, (or in lieu of the last, the birth of our since it is held of a superior lord, in whom the

This is the primary sense and acceptation

762 FEE

very justly observes) the doctrine "that all copt when limited by act of parliament. 8 lands are holden," having been for so many | Co. 16. ages a fixed and undeniable axiom, our English lawyers do very rarely of late years especially, use the word for in this its primary original sense in contradistinction to alledoum or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A fee, therefore, in general signifies an estate of inheritance, being the highest and most extensive interest that a man can have in a foul, and when the term is used simply, without any other adjunct, or has the ac unct of sample annexed to it (as a fee or a fee smaller, it is used in contradistinction to a ice cone tional at the common law, or as a firstail tv the statute, imparting an absolute mnerdance, clear of any condition, limitation, or restrict tions to particular heirs, but descended to estate, gain a fee. The acquisition of lands their heirs general, whether make or feather, lineal or collateral. And in no other sense class, but it seems more properly referrible than this is the king sand to be seis d in fig. to the same division with descents. See 2 he being the feudatory of no man. Co. Lit. | Comm. 245. 1: 2 Comm. 107.

As to the general nature and origin of estates in fee-simple, and the other estates arising therefrom, see this Diet. 11ts. Estate, Ten. England. ure, III. 5. It is therefore in this place 18: Dyer, 2. pl. 8. See Alien. sufficient to inquire,

I. In what Things one may have a fresimple.

II. By what Means such an Estate may be acquired.

III. By what Words it may be created.

I. A man may have an estate in tee-signple of all lands or tenements or offer thangs real. Co. Lit. 1. b. Of lordships, advowsons, commons, estovers, and all hereditaments. Co. Lit. 4. a. So he may have a fee-simple in things mixed: as in franchises, liberties, &c. Co. Lit. 2. a.

So if a man grants to another and his heir all woods, underwoods, timber-trees, or others in such a part of a forest, saving the soil: the grantee has a fee to take in alieno solo. R. 8 Co. 137. b.

So, in things personal; as in annuity. Lit. 2. a. In a dignity granted to him and his heirs. Co. Lit. 2. a. In a swan-mark. Co. 17. In a part or share of the New River water. Co. Parl. 207.

So, in the patronage of an hospital, or other thing created de novo, in which there was not a precedent estate, a man may have a fee to him and his heirs, qualified in a particular manner: as if a queen consort institutes an hospital, and reserves the patronage sibi et reginis Angliæ succedentibus. Ca. Ch. 214.

ry inheritance it cannot be; as the duchy of nacy, his heirs may avoid it: for they shall Cornwall limited to the prince et filiis regis not be subject to the contracts of a person

II. The modes by which a fee, or any estate in real property may be acquired, are by law reduced to two,-descent and purchase, which word is here used in its legal sense, and not in its common acceptation. Descent is where the title to lands is vested in a manby the single operation of law; purchase, where they are vested by his own act and agreement, 2 Comm. 201. The latter class may be subdivided into rightful and wrongful acts. Rightful acts comprise all the various a surances by which a fee may be transferred; wrongful acts, the different species of cispossession into which an ouster is distributable, and which in every instance, except where a party enters claiming a particular by escheat is generally included in the second

By our law some are incapable of purchasing land.

An alien cannot purchase any lands in Vangh. 227, 291: 7 Co. 16, 17,

All persons attainted of treason or felony are incapable of purchasing. 2 New Abridg. 21): Co. Lit. Sa. See Dig. Feud. lib. 2. tit. 23, 24: Vigellius, 242. 350: Spel Gloss. 214,

If a man be attainted of felony, and after by his prerogative, and not the lord of the fee; because his person being forteited to the king, he cannot purchase but for the king. Co. Lat.

A monster not having human shape cannot purchase or inherit, but an hermaphrodite shall inherit or purchase secundum prævalentiam sexus incalescentis; one born deaf and dumb may inherit; so may one born deaf, dumb, and blind, because it is for their advantage; but they cannot contract, because they cannot understand the signs of contracting; an infant, an idiot, and a person of nonsane memory, may inherit, because the law, in compassion to their natural infirmities, presumes them capable of property; so also an infant or a person of non-sane memory may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right: if at full age, or after recovery of his memory he agrees thereto, he cannot But in estates in esse before such desulto- avoid it; but if he die during minority or lu-Anglia primogenitis, shall not be good, ex- who wanted capacity to contract. So, if afFEE 763

A feme covert is capable of purchasing: out the word heirs. Co. Lit. 19. 9. for such an act does not make the property of And by deed of feoffment a fee-si the husband liable to any disadvantage, nor does it suppose a separate will or power of contracting in the wife; but here the will of and his heirs male, &c. without the word the wife is supposed the mind of the husband body. Hob. 32. A gift to a man and his (he not objecting), since no man is supposed children, and their heirs, is a fee-simple to all not to assent to that which is for his benefit: that are living. Co. Lit. 8: Lit. Rep. 6. but in this case the husband may disagree, and it shall avoid the purchase. Co. Lit. 3. a. ing suis, gives him a fee-simple. Co. Lit. 8. See tits. Baron and Feme.

It may be observed, the law presumes every man to have an estate in fee in lands of which, and their heirs; if he has issue, it gives them a

Cowp. 595.

III. The word "heirs" is necessary in every legal instrument in order to convey a fee, and if it be omitted, the grantee will have to many exceptions, which are hereafter par-

It is the word heirs makes the inheritance: and a man cannot have a greater estate. Lit. To have fee-simple implies, that it is without limitation to what heirs, but to heirs generally, though it may be limited by act of parliament. 4 Inst. 206. If one give or grant almoigne. Co. Lit. 9. b.: 1 Rol. 833. l. 5. land to J. S. and his heirs; and if he die without heirs, that J. D. shall have it to him fed him, he has a fee without the word heirs. and his heirs; by this J. S. hath a fee-simple, Co. Lit. 9. b. This must mean where A. had and J. D. will have no estate. Dyer, 4. 33. an estate in fee of the feofiment of B. 1 Rol. This means by parol, with livery and seisin, 833. l. 12. So a grant to the church of B. or by deed, &c., but not by will.

Where land is given or granted by fine, cessors. 1 Rol. 833. l. 3. deed, or will, in possession, reversion, or remainder, to another and his heirs, it will be a fee-simple. Plowd. 143. And if land be granted to a man and his heirs, habendum to him for life only, and livery of seisin is made

years, and after that the lessee shall have the land to him and his heirs by the rent of 10l. a ner or joint-tenant releases to his companion. year; if the grantor make livery upon it, it is Co. Lit. 9. b. If the lord, &c. releases to the a fee-simple: otherwise but for years. Co. tertenant; which enures by way of extin-Lit. 217. Where lands are granted to A. for guishment. Co. Lit. 9. b. If a man releases life, remainder to B. for life, the remainder to a mere right; as where a disseisee releases to the right heirs of A.; here A. hath a fee- the disseissor all right. Co. Lit. 9. b. simple. 20 Hen. 6. 35: Bro. East, 34, 35. A gift or grant to a man's wife during life, after lowelty (or equality) of partition. Co. Lit. 9. to him in tail, and after to his right heirs; he 10. So if a peer be summoned to parliament will have a fee-simple estate. 2 Rep. 91.

cessors, this creates no fee-simple; but if such forest law, if the king at a justice seat grants a grant be made to a corporation it is a fee- to another an assart in perpetuum, without simple, and in case of a sole corporation, as a more, he has a fee. Co. Lit. 10. a. So, by bishop, parson, &c., a fee-simple is to them custom, a grant of a copyhold, sibi et suis, or and their successors. Co. Lit. 1. b.; Wood, sibi et assignatis, may give the inheritance. 119. An estate granted to a person, to hold to 4 Co. 29 b. him for ever, or to him and his assigns for

ter his memory recovered, the lunatic or per- ever, is only an estate for life; the word heirs son non compos die without agreement to the purchase, his heirs may avoid it. Co. Lit. 2. wills, which are more favoured than grants, 8: 2 Vent. 303. See tit. Estate.

And by deed of feoffment a fee-simple may be created, which would be an estate tail by will; as where lands are given to another,

A feoffment to B. et heredibus, without say-So to a son and the heirs of his father. Semb. Co. Lit. 220. b. So to B. et liberis suis he is in possession until the contrary is shown. joint estate in fee. Co. Lit. 9 a. So to B. heredibus et successoribus suis, gives a fee. Co.

Lit. 9 a.

So a grant to the king in perpetuum gives him a fee, without the words his heirs or successors, for he never dies. Co. Lit. 9. b. So only an estate for life; but the rule is subject a feoffment to a corporation aggregate in perpetuum gives a fee; for it never dies. Lit. 9. b.: 1 Rol. 832. l. 55. And in a conveyance to such corporation aggregate no words of limitation whatever are necessary, because in legal consideration it never dies. 2 Comm.

So to a corporation sole, to be held in frank-So if A. re-enfeoffs B. adeo plene as B. enfeofgives a fee, without the words heirs or suc-

And a limitation to the right heirs of B. gives a fee, without the words and their heirs. I Rol. 133. l. 16. So a fee may be given without the words his heirs, by fine sur conuzance de droit come ceo, &c.; Co. Lit. 9. b.;

it is a fee-simple estate, because a fee is expressed in the grant. 2 Rep. 23.

A lease is granted to one for a term of where a man gives land with his daughter, &c. in frankmarriage. Co. Lit. 9. b. If a parce-

So, if a rent be granted upon partition, for by writ, he has a fee in his dignity, without If lands are granted to a man and his suc- the word heirs. Co. Lit. 9. b. So, by the

A fee-simple determinable upon a contin-

durable as absolute fee. Vaugh. 273. But space of two years, then the feoffor or his

see tit. Executory Devise.

by will, without using the word heirs; for the fee is held to pass in a devise whenever an intention to pass it can be gathered from words or circumstances. See tit. Will.

In pleading estates in fee simple, they may be alleged generally; but the commencement of estates tail, and other particular estates, must regularly be shown. Co. Lit. 303. The fce-simple estate, being the chief and most excellent, he who hath in it lands or tenements may give, grant, or charge, the same by deed or will at his pleasure; or he may make waste or spoil upon it; and if he bind himself and his heirs to warranty, or for money by obligation, or otherwise, and leave such land to the heir, it shall be charged with warranty and debts; also the wife of a man that is seised of such an estate shall be endowed; and the husband of a woman having this estate shall be tenant by the curtesy. Co. Lit. 273: Dyer, 330: Perk.

Though a fee-simple is the most ample estate of inheritance, it is subject to many incumbrances; as judgments, statutes, mortgages, fines, jointures, dower, &c. And there is a fee-simple conditional, where the estate is defeasible by not performing the condition; and a qualified fee-simple, which may be defeated by limitation, &c. This is called a base fee, upon which no reversion or remainder can be expectant. Co. Lit. 18.; 10 Rep. 97.

As to the instances in which the fee is placed in obeyance, see that tit. See further on this subject, tits. Descent, Estate, Executory De-

vise, Tenure, Wills, &c.

FEE-EXPECTANT. Feudum expectati-Where lands are given to a man and his wife in frank marriage, to have and to hold to them and their heirs, in this case they have fee simple; but if they are given to them and the heirs of their body, they have tail and feeexpectant. Kitch. 153. See tit. Tail.

FEE-FARM, feodi firma.] Or fee-farm rent; is when the lord, upon the creation of the tenantcy, reserves to himself and his heirs, either the rent for which it was before let to farm, or was reasonably worth, or at least a fourth part of the value; without homage, fealty, or other services, beyond what are especially comprised in the feoffment. 2 Inst. 44. By Fitzherbert, a third part of the yearly value of the land may be appointed for the rent, where lands are granted in fee-farm, &c. F. N. B. 110. And Lord Coke says, fee-farm rents may be one-half, a third, or fourth part of the value. Co. Lit. 143. See 2 Comm. 43: Doug. 627, in note; and the notes to 1 Inst. 143.

These fee-farm rents seem to be more or less, according to the conditions or consideration of the purchase of the lands out of which they are issuing. It is the nature of fee-farm,

gency, is a fee to all intents; though not so that if the rent be behind and unpaid for the heirs may bring an action to recover the As already stated, a fee-simple may be given lands, &c. Brit. c. 66. num. 4. See tit. Cessavit.

Feodi firma appellatur, cum quis, ex dono vel concessione alterius, prædia tenuerit sibi et hæredibus suis, reddendo vel dimidiam, vel tertiam, vel ad minus quartam partem veri valoris. Tenens hujusmodi ad nulla servitia obligatur, nisi que in ipsâ Chartâ continentur: exceptà fidelitate, que omnibus tenuris incum-

Spelm. Gloss. 221.

FEE-FARM RENTS OF THE CROWN. The fee-farm rents remaining to the kings of England from their ancient demesnes, were many of them alienated from the crown in the reign of King Charles II. By stats. 22 Car. 2. c. 6: 22 and 23 Car. 2. c. 24. (explained by stat. 10 Anne, c. 18.) the king was enabled by letters patent to grant fee-farm rents due in right of his crown, or in right of his duchies of Lancaster and Cornwall, except quit-rents, &c., to trustees to make sale thereof, and the trustees were to convey the same by bargain and sale to purchasers, &c., who may recover the same as the king might. But it has been observed, that men were so very doubtful of the title to alienations of this nature, that while these rents were exposed to sale for ready money, scarce any would deal for them, and they remained unsold; but what made men earnest to buy them was the stop upon some of his Majesty's other payments, which occasioned persons to resort to this as the most eligible in that conjuncture; no te nant in tail of any of the said rents is enabled to bar the remainder. See further, tit. Coun ties Palatine.

FEE.SIMPLE. See Fee. FEE-TAIL. See tit. Tail.

FEES. Certain perquisites allowed to officers in the administration of justice, as a recompense for their labour and trouble; ascertained either by acts of parliament, or by ancient usage, which gives them an equal sanction with an act of parliament. 2 New. Abr. 463.

I. In what Cases Fees are due. II. In what Time they may be demanded.

I. At common law no officer, whose office related to the administration of justice, could take any reward for doing his duty, but what he was to receive from the king. Co. Lit. 368: 2 Inst. 176. 208, 209.

And this fundamental maxim of the common law is confirmed by Westm. 1. c. 26. which enacts, "That no sheriff, or other king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doth shall yield twice as much, and shall be punished at the king's pleasure."

The statute comprehends escheators, coro-

FEES.

ners, bailiffs, gaolers, the king's clerk of the not raise a presumption of immemorial paymarket, aulnager, and other inferior ministers ment, since licenses were not granted till the and officers of the king, whose offices do any reign of Edward VI., and the mayor, as jus-

of justice. 2 Inst. 209.

And so much hath this law been thought to conduce to the honour of the king and wel- the bailiff's fees for arrests in civil cases; nor fare of the subject, that all prescriptions what would the Court of K. B. allow more than the soever, which have been contrary to it have been holden void; as where by prescription had in fact been paid for years under an the clerk of the market claimed certain fees order of such justices. 3 Term. Rep. K. B. 417. for the view and examination of all weights and measures, and it was held merely void. stat. 29 Eliz. c. 4. it is enacted, "That it shall

penny, which was claimed by the coroner of every visne, when he came before the justices in eyre, is not within the meaning of the statute, because it is not demanded by the coroner for doing any thing relating to his office, but claimed as a perquisite of right belonging to him. 2 Inst. 210: Staun. P. C.

Also it is holden by Lord Coke, that within the words of the statute 34 Ed. 1. which are, " No tallage or aid shall be taken or levied by us or our heirs in our realm, without the good will and assent of archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land;" no new offices can be crected with new fees or old offices with new fees; for that is a tallage upon the subject, which cannot be done without common assent by act of parliament. 2 Inst. 533.

Yet it is holden, that an office erected for the public good, though no fee is annexed to it, is a good office; and that the party, for the labour and pains which he takes in executing it, may maintain a quantum meruit, if not as a fee, yet as a competent recompense for

his trouble. Moor, 808.

All fees allowed by acts of parliament beintitled to them may maintain an action of 157. debt for them. 2 Inst. 210. All such fees as have been allowed by the courts of justice to their officers, as a recompense for their labour and attendance, are established fees; and the parties cannot be deprived of them without an act of parliament. Co. Lit. 368: Prec. Chan.

Where a fee is due by custom, such custom, like all others, must be reasonable; and therefore where a person libelled in the Spiritual Court for a burying fee due to him for every one who died in the parish, though buried in another; the court held this unreasonable, and a prohibition was granted. Hob. 175. The plaintiff brought an action on the case for fees due to him as Usher of the Black Rod, and obtained a verdict. Stran. 747.

entitled to a fee of 4s. on the renewal of a pub. the amount in an action by the sheriff against lican's licence, though regularly paid for a pe- him for fees and postage. 2 B. & A. 562. riod of 65 years; for this length of time could

way concern the administration or execution tice of the peace, was not entitled to any fee. Morgan v. Palmer, 2 B. & C.

Justices in sessions have no authority to fix

As to the fees of sheriffs for executions, by A Inst. 274: Moor, 523: 2 Inst. 209: 2 Rol. not be lawful for any sheriff, &c., nor for any Ab. 226. But it hath been holden, that the fee of one to take of any person, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person, more recompense than in this present act appointed, i. e. twelve-pence of and for every twenty shillings where it exceedeth not 100l; and sixpence of and for every twenty shillings over and above the said sum of 100l.; that he or they shall so levy or extend, and deliver in execution, or take the body in execution for; upon pain that the person offending shall forfeit, to the party grieved, his treble damages; and shall forfeit the sum of 401. for every time that he, they, or any of them, shall do the contrary.

In an action on this stat. 29 Eliz. 3. c. 4. the plaintiff is entitled to treble costs as well as treble damages. Deacon v. Morris, Term Rep. K. B. Hill. 59 G. 3. 393.

Nothing but the poundage can be taken by the sheriff under this stat. 29. Eliz. c.4.2 Bing. 255: 3 B. & C. 688. In actions on simple contract, and judgment for a debt certain, as the expenses of levying must be paid by the plaintiff, he is the party grieved by any overcharge of the sheriff; but if the judgment be for a penalty the defendant must pay the expenses, and in such case he is the party grieved by come established fees; and the several officers such overcharge. 2 Term. Rep. K. B. 148.

> See stat. 43 G. c. 46. § 5, as to poundage to sheriffs on executions. Where the sheriff levied under f. fa. and received the money, and afterwards the judgment and execution being set aside for irregularity and the money ordered to be returned, paid it back, with the assent of the plaintiff; it was held that the stat. 43. G. 3. c. 46. did not take away the sheriff's remedy by action of debt against the plain-tiff for his poundage. Rawstone v. Wilkinson, Term. Rep. K. B. Tr. 55. G. 3. 256.

By stat. 23 H. 6. c. 9. (see tit Sheriff, V.) the sheriff is entitled to charge only 4d. on each warrant issued by him; and where a sheriff claimed a larger fee, and the attorney paid it in ignorance of the law, it is held that he might maintain an action for money had The Mayor of Yarmouth was held not to be and received for the excess, or might set off

No fee shall be taken for a report upon a

Vol. I 97

FEES. 766

10. Certain fees of sheriff settled. Stat. 3 G. stamp duties payable to the king, or to any 1. c. 15. See tit. Sheriff. Fees on Nisi Prius recother person, and chargeable on the renewal cords out of the Exchequer to be the same as of appointments, commissions, grants, penon other records. Stat. 23 G. 2. c 26. 5. 10. sions, and patents, consequent on the demise Fees of justices' clerks to be regulated. Stat. of the crown, are abolished. The officers. 26 G, 2 c, 14: 27 G, 2, c, 16.

an officer for taking a larger fee than is al- an adequate remuneration, to be fixed by the lowed by law, the plaintiff must prove the sum. Commissioners of the Treasury, to be paid by allowed by law, the 20 H. 6. c. 9. not being the | those who would have been chargeable with rule. 2 New Rep. 59. If an officer demand and the fees abolished. The act does not extend to receive from an arrested defendant a larger persons who have an estate of freehold in sum for a caption fee and for the bail-bond their offices, and who are still to be entitled to than he is entitled to, the Court of Exchequer | their legal fees.

more for conducting a prisoner from the judge's , ing any office connected with the passing of

Various statutes have been passed of late years, relieving parties from the payment of count of their receipts for the previous ten fees in many cases; fixing the fees to be received by the officers of the different courts; and for making compensation to holders of offices which have been or are to be abolished. the officers are to render an account of their

By 55 (4. 3 c. 50, all fees and gratuities payable by prisoners on their entrance, commitment, or discharge, to or from prison are abolished; and every prisoner charged with felony or misdemeanor, against whom no indictment is found, or who is acquitted on his trial, shall be discharged without payment of any fee whatever. All such fees as were usually paid to the clerk of assize or clerk of the peace, in any of the above cases, are also abolished; these are to be paid in future out of the county rate. Any clerk of assize, clerk of the peace, clerk of the court, or their deputies, or other officers, exacting such fees, are rendered incapable of holding such offices, and are declared to be guilty of a misdemeanor. Any gaoler exacting from any prisoner any fee or gratuity for, or on account of his entrance, commitment, or discharge, or detaining any prisoner in custody, for non-payment of any fee or gratuity, forfeits his office and is declared to be guilty of a misdemeanor, punishable by fine and imprisonment.

The act is not to extend to the prisons of the King's Bench, or the Fleet, or those of 4. c. 56. the Marshalsea and Palace Courts.

By 56 G. 3 c. 116, the above act is declared

to extend to prisoners for debt.

By 3 G. 4. c. 69, the judges of the several courts of law and equity at Westminster are to establish tables of fees to be taken by the officers of their respective courts, and from time to time to appoint reasonable fees in cases where non are specified in the tables. No other fees than those so established are to be 330. taken; extracts of the tables are to be hung up in the different offices. The act does not relate to the fees of attorneys or solicitors.

reference from any court. Stat. 1. Juc. 1. c., By 11 G. 4. and 1 W. 4. c. 43. all fees and however, whose duty it may be to make out In an action on the 32 G. 2. c. 28, against such renewed appointments, &c. are to receive

will order it to be referred to the master to ascertain what he is cuttiled to, and order him to restore the surplus to the detendant, and pay the coasts of the application. 4 Price, 309.

A tipstall is entitled to a fee of 6s. and no the Coart of Chancery, and every person hold. chambers to the King's Bench. 5 B. & A. 266. fines and recoveries, are to render to commissioners to be appointed under the act an acyears; and such commissioners are to ascertain and certify to the Treasury the value of all such offices. After the 24th May, 1830, fees to the Treasury; if such fees exceed or fall short of the certified value of their offices, such excess or deficiency is to be paid into, or made up out of the consolidated fund. The act provides for the payment of compensation in the event of any of the offices being abolished; and the Treasury is empowered to purchase such offices; and all fees due in respect thereof, and not abolished, are to be in future paid into the consolidated fund.

By the 2 W. 4. c. 51. his Majesty is empowered, with the advice of his Privy Council, to make regulations touching the practice of the Vice Admiralty Courts abroad, and to e-tablish tables of fees to be received by the judges, officers, and practitioners therein, which tables are to be hung up in each court.

By the 2 and 3 W. 4. c. 122, provision is made for the lord chancellor in lieu of certain fees theretofore received by him. And by the same act annuities are made payable to certain officers of the Court of Chancery for the loss of fees in consequence of the establishment of the new Bankrupt Court by the 2 W.

II. It is extortion for any officer to take his fee before it is due; and therefore where an under-sheriff refuse to execute a capias ad satisfaciendum till he had his fees, the court held, that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for ex-Co. Lit. 368: 10 Co. 102. a: 1 Salk. tortion.

Officer must obey a writ, though fees unpaid. Stran. 814. Process must be obeyed, though fees are not tendered. Stran. 1262.

If an habeas corpus ad subjiciendum be directive demand the plaintiff makes in Chancery. ed to a gaoler, he must bring up the prisoner, 1 Vern. 203: 2 Chan. Ca. 135. although his fees were not paid him; and he cannot excuse himself of the contempt to the court, by alleging that the prisoner did not cause; and attorneys are not to be dismissed tender him his fees. 1 Keb. 272. pl. 57. So by their clients till their fees are paid. 1 Lil. as to an habeas corpus ad faciendum et recipiendum. March. 89: 2 Keb. 280: 2 Inst. than their just fees; nor to be allowed fees to 178: 1 Keb. 566. cont.

But if the gaoler brings up the prisoner by virtue of such habeas corpus, the court will torney may have an action of debt for his not turn him over till the gaoler be paid all his fees; nor, according to some opinions, till he be paid all that is due to him for the prisoner's diet; for that a gaoler is compellable to find his prisoner sustenance. See 1 Rol. Rep. 338: Co. Lit. 295: 9 Co. 87: Plowd. 68. a: 2 Rol. Ab. 32: 2 Jon. 178. But see now 55 G. 3. c. 50. ante, I.

If a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers, before they allow it. Fitz. Coron. 294: Pulton de Pace, 88: Keling. 25:

2 Jon. 56: 1 Sid. 452.

If an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous. 1 Salk. 332. It seems to be laid down in the old books, as a distinction, that upon an extent of land upon a statute, the sheriff is to have his fees, so much per pound according to the statute immediately; but that upon an elegit he is not to have them till the Liberate. Poph. 156: Winch. 51. S. P.

Fees are now recoverable by an action for money had and received, which has been introduced in lieu of an assise. Money given to A., and claimed by B. as perquisites of office, tion for the 5l.: the defendant allows the cannot be recovered by B. in such action, unless such perquisites be known and accustomed fees, such as the legal officer could have directed out of Chancery to be tried; and thus

considerations allowed them as a recompense If it is a matter of great difficulty and consefor their labour; and in respect to officers, quence, the direction may be for a trial at bar, they are granted over and above their salaries, to excite them to diligence in executing their offices. They differ from wages, which are paid to servants for certain work and labour of the court is a contempt of court; and after done in a certain space; whereas fees are dis- such a trial, they will stay the proceedings. bursed to officers, &c. for the transacting of the client, when his business in court is dispatch. closure act which contains no special direced, refuseth to pay the officer his court fees, the court on motion will grant an attachment statute of Gloster, as in other actions of asagainst him, on which he shall be committed sumpsit. Fitzwilliam, E. v. Maxwell, 7 W. until the fees are paid. 1 Lil. Abr. 598. Ecclesiastical courts have not power to establish fees; but if a person bring a quantum meruit in B. R. &c. for fees, and the jury find for him, then they become established fees. 1 Salk. 333.

bill for his fees for business done in that it is said if a murderer could not be found, court; and so he may where the business is &c., the parents of the person slain should done in another court, if it relates to another have six marks, and the king forty; if he had

counsel without tickets, or the signature of counsel, &c. Stat. 3 Jac. 1. c. 7. An atfees, and also of counsel, and costs of suit. a counsellor is not bound to give counsel till he has his fee, it is said he can have no action

See further, as connected with the subject of fees, this Dict. tits. Bribery, Extortion, and also tits. Attorney, Barrister, Coroner, Extortion, Gaoler, Sheriff, &c.

FEIGNED ACTION. See tit. Faint Ac-

tion.

FEIGNED ISSUE. If, in a suit in equity, any matter of fact is strongly contested, the court usually directs the matter to be tried by a jury; especially such important facts as the validity of a will, or whether A. is the heir at law to B., or the existence of a modus decimandi, or real and immemorial compositions for tithes. But as a jury cannot be summoned to attend a court of equity, the fact is usually directed to be tried in the Court of King's Bench, or at the assizes, upon a feigned issue. For this purpose a feigned action is brought, wherein the pretended plaintiff declares that he laid a wager of 51. with the defendant, that A. was heir at law to B.; then he avers he is so, and brings his acwager, but avers that A. is not the heir to B., and thereupon that issue is joined, which is recovered from A. 6 Term Rep. K. B. 681. 3. the verdict of the jurors at law determines the FEES OF ATTORNEYS AND OFFICERS. Are fact in the court of equity. 3 Comm. 452. with leave of the court. See tits. Chancery, Equity.

Trying a feigned issue without the consent

The costs in a feigned issue, under an intions as to costs, abide the event, by the P. Taunton, 31. See tit. Costs.

The privy council may now direct feigned issues to the courts of law. See Privy Council.

FELAGUS, quasi fide cum coligatus.] A companion, but particularly a friend, who was bound in the decennary for the good be-A solicitor in Chancery may exhibit his haviour of another. In the laws of King Ina no parents then the lord should have it. Et felony; but this is likewise the case with some si dominus non haberet, felagus ejus. LL. other offences, which are not punished with

FELD, is a Saxon word, signifying field; and in its compound it signifies wild; as feldhoney, is wild honey, &c. Blount.

FELE, or FEAL HOMAGERS. Faithful subjects; from the Sax. fai. i. e. fides. See

FELO DE SE. One that commits felony by laying violent hands upon himself, or commits any unlawful malicious act, the consequence of which is his own untimely death,

See tit. Homicide, III. 1. FELONS' GOODS. The statute de prærogativa regis, 17 Ed. 2. c. 1. grants to the king, among other things, the goods of felons and fugitives. If the king grant to a man and his heirs felons' goods, the grantee cannot devise them, &c. on the statute 32 H. 8. c. 1. because they are not of a yearly value; but where a person is seised of a manner to which they are appendant it is otherwise, for they will pass as appurtenant. 3 Rep. 32. See tits. Flight, Forfeiture.

FELONY.

FELONIA.] A term of law including, generally, all capital crimes below treason. Comm. 98. This word is of feudal original; but as to the derivation of which authors dif-Some deduce it, fancifully enough as it seems, from φμλος Gr. an impostor; from fallo, Lat. to deceive; and Coke (1 Inst. 391.) says it is crimen felleo animo perpetratum.-All, however, agree that it is such a crime as occasions a forfeiture of the offender's lands or goods: this, therefore, gives great probability to Spelman's derivation from the Teutonic or German fee, a feud or fief, and lon, price or value. Spelm. in verb. Felon. Felony according to this derivation, is then the same as pretium feudi; the consideration for which a man gives up his fief or estate; as in common speech it is said, such an act is as much as one's life or estate is worth. In this sense it will clearly signify the feodal forfeiture or rather the act by which an estate is forfeit. 556. ed or escheats to the lord. See 4 Comm. 95,

for those felonies which where called clergya-ble, or to which the benefit of clergy extended, were anciently punished with death in lay or unlearned offenders, though afterwards by the statute law that punishment was for the first that day. offence universally remitted. See this Dict. tit. Clergy benefit of. Treason itself (says punishable with death shall be punished as di-Coke 3 Inst. 15.) was anciently comprised under the name of felony. And not only all of offence: and persons convicted of felony for fences now capital are in some degree or other which no punishment is or shall be specially

death; as suicide, where the party is already dead; homicide, by chance medley, or in selfdefence: all which are, strictly speaking, felonies, as they subject the committers of them to forfeitures.

As felony may be without inflicting capital punishment, so it is possible that capital punishment may be inflicted for an offence which is no felony; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods, an inseparable incident to felony. 3 Inst. 43. Of the same nature was the punishment of standing mute, which at common law was capital, but without any forfeiture, and was therefore no felony.

So that upon the whole the only adequate definition of felony seems to be this, viz. " An offence which occasions a total forfeiture, of either lands or goods, or both, at the common law; and to which capital or other punishments may be superadded, according to the degree of guilt." 4 Comm. 94, 95.

However, the idea of felony was so generally connected with that of capital punishment, that it seemed hard to separate them: and to this usuage the interpretations of law conformed. For if a statute made any new offence felony, the law implied that it should be punished with death (viz. by hanging), as well as by forfeiture, unless the offender pray the benefit of clergy. Hawk. P. C. i. c. 41. § 4. ii. c. 48. So where a statute decreed an offence to undergo judgment of life and member, the offence became a felony, though that precise word were omitted; but the words of the statute must not in such case have been the least doubtful or ambiguous. 1 Hawk. P. C. c. 41. § 1, 2.

Also where a statute declared that the offender should, under the particular circumstances, be deemed to have feloniously committed any act, it made the offence a felony, and imposed all the common and ordinary consequences attending a felony. 3 M. & S.

Such was the law previous to the passing of the 7 & 8 G 4. c. 28., which by § 6. abol-Felony, in the general acceptance of law, sished benefit of clergy. The effect of this comprises every species of crime which occasioned, at common law, the forfeiture of lands or goods. This most frequently happens in those crimes for which a capital punish in those crimes for which a capital punish from these following which was considered to the common law in all suffer these following which whose called clergy.

By § 8. persons convicted of felony not

by transportation for seven years, or impris- &c. onment not exceeding two years, and (if a

male) by whipping.

By § 10. of the same act, wherever sentence shall be passed for felony on a person already imprisoned or ordered to be transported under sentence for another crime, the court may award imprisonment or transportation for a subsequent offence, to commence at the expiration of the former sentence.

punishable with death, after a previous conviction for felony, are liable, at the discretion of the court, to be transported for life, or not less than seven years, or imprisoned not exceeding four years, and (if a male) once, or

twice, or thrice whipped.

All capital offences by the common law came generally under the title of felony; and could not be expressed by any word but felonice; which must of necessity be laid in an indictment of felony. Co. Lit. 391. It is always accompanied with an evil intention; and therefore felony cannot be imputed to any other motive. But the bare intention to commit a felony is so very criminal, that at the common law it was punishable as felony, where it missed of its effect through some accident; and now the party may be severely fined for such an intention. 1 Hawk. P. C. c. 23.

Felony, by the common law, is against the life of a man; as murder, manslaughter, felo de se, se defendendo, &c. Against a man's goods, such as larceny, and robbery; against his habitation, as burglary, arson or houseburning; and against public justice, as breach

of prison. 3 Inst. 31.

Under the word felony in commissions, &c. is included petit treason, murder, homicide, burning of houses, burglary, robbery, rape, &c., chance medley, se defendendo, and petit larceny. All felonies, punishable according to the course of the common law are either by the common law, or by statute. Piracy, robbery, and murder, on the sea are punishable by the civil statute law. 1 Inst. 391.

of late years an attempt has been made to consolidate them by repealing various penal enactments scattered throughout the statute- ny is taken for a concealment of felony, or a

character and in a single act.

relative to the benefit of clergy, and to lar- And it is said that silently to observe the comceny and other offences connected therewith, mission of a felony, without using any endeaand to malicious injuries to property, are re-

By the 7 and 8 G. 4. c. 29. the law relative to larceny and other offences connected therewith were consolidated and amended, and the distinction between grand and petit a felony may be proceeded against for a mislarceny abolished. See further, tit. Lar-

The 7 and 8 G. 4. c. 30. consolidates the laws

provided, shall be punishable under the act relative to malicious injuries. See tit. Arson

The 9 G. 4. c. 31. those relative to offences against the person, and abolishes petit treason. See tits. Homicide, Murda, &c.

The 11 G. 4. and 1 W. 4. c. 66. many of

the acts relative to forgery. See that title.

The 2 and 3 W. 4. c. 34. those relative to the coin. See tit. Coin.

For the crimes that are declared felonies by the statute law, and are punishable with death By § 11. offenders convicted of felony not or otherwise, the reader is referred to the various titles in this dictionary.

As to admitting persons accused of felonies

to bail, see tit. Bail. II.

As to the proceedings against, and trial of offenders, see tits. Arrest, Evidence, Mute, Pleading, Trial.

As to conviction, judgment, and its consequences, see tits. Attainder, Corruption of Blood, Escheat, Forfeiture, Execution.

As to pardon, see tit. Pardon.

As to accessaries in cases of felony, see tit. Accessary.

And see as to the expenses of prosecutions for felony, tit. Expenses: and further, tits. Compensation, Compounding Felony.

By 7 and 8 G. 4. c. 83. § 2. persons armed with a gun, pistol, hanger, &c., or other offensive weapon, or having on them any instrument with intent to commit any felonious act, are punished summarily as rogues and

vagabonds.

By the stat. 9 G. 4. c. 32. § 3. offenders convicted of felony not punishable with death having endured the punishment to which they shall have been adjudged, the punishment so endured shall have the like effects and consequences as a pardon under the great seal as to such felony.

FELONY, COMPOUNDING OF. The offence of compounding of felony consists of taking reward for forbearing to prosecute felony; and it is a misdemeanor at common law punishable by fine and imprisonment, at the discre-

tion of the court.

One species of the offence is theft bote, or receiving back stolen goods, or taking other Felonies by statute are very numerous; and amends upon an agreement not to prosecute. 4 Comm. 133.

FELONY, MISPRISON OF. Misprison of felobook, and by embodying offences of the same procuring of the concealment thereof, whether it be felony by the common law or by statute. By the 7 and 8 G. 4. c. 27. various statutes 1 Hawk. P. C. c. 59. § 2: Fost. C. L. 195. vours to apprehend the offender is a misprison. 1 Hale's Hist. 75. 431. 448. 533: 2 Hawk. P. C. c. 12: 3 Inst. 140.

It is also said that a misprison is contained in every felony, and that one who is guilty of prison only if the king please. 1 Hawk. c.

For this offence every common person is

mon law. 3 Inst. 173. And by 3 Ed. 1. c. 9. or extinguished by such disposition. sheriffs, coroners, and bailiffs, guilty of this crime shall be imprisoned for a year, and pay a grievous fine, or otherwise be imprisoned for three years.

FEMALE OFFENDERS. The punishment of whipping them is abolished by stat. I G. 4. c. 57; and in lieu thereof they may be ing the same, or afterwards, be produced and imprisoned to hard labour for a period not exceeding six months, or placed in solitary con- fore a judge of one of the superior courts at finement for a space not exceeding seven days at any one time.

FEMALES, VIOLATION OF. See tits. Girl,

Marriage, Rape

FEME COVERT. A married woman; who is likewise said to be covert baron.

The law with respect to married women has already been treated of under the title of Baron and Feme: but it is necessary to notice disposition, release, surrender or extinguishunder the present head the 3 and 4 W. 4. c. ment shall be made by her under this act, 74. enacted since the former part of this work shall examine her, apart from her husband, was printed off, whereby fines and recoveries touching her knowledge of such deed, and have been abolished, and a new mode of alien- shall ascertain whether she freely and volunation substituted for passing the interests of tarily consents to such deed, and unless she

feme coverts in real estate.

December, 1833, it shall be lawful for every married woman, in every case except that of lates to the execution thereof by such married being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to powered to appoint (removeable at his pleabe invested in the purchase of lands, and also sure), for every county or place for which to dispose of, release, or extinguish any estate there is a clerk of the peace, commissioners which she alone, or she and her husband in her right, may have in lands of any tenure, or in any such money as aforesaid, and also to with whom the certificate of such acknowrelease or extinguish any power which may be vested in or reserved to her in regard to to time, without fee or reward, to transmit to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as effectually as if she were a the peace is also to deliver a copy of the list feme sole: save that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided that this act shall not extend to lands held by copy of the court roll of or to youd seas, or ill-health, or any other sufficient which a married woman, or she and her husband in her right, may be entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the commissioners apthe passing of this act have been effected by her, in concurrence with her husband, by sur-render into the hands of the lord of the manor may issue a commission specially appointing of which the lands may be parcel.

a married woman by this act shall not inter- that every such commission shall be made refere with any power which, independently of turnable within such time as the said court or this act, may be vested in or reserved to her, judge shall think fit. so as to prevent her from exercising such power in any case, except so far as by any ledges a deed, the person taking the acknowdisposition made by her under this act she may be prevented from so doing in conse- thereon, and as well as a certificate of such

punishable by fine and imprisonment at com-quence of such power having been suspended

By § 79. " every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executacknowledged by her as her act and deed be-Westminster, or a master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereafter provided."

By § 80. " such judge, master in Chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any freely and voluntarily consents to such deed By § 77, it is declared that after the 31st shall not permit her to acknowledge the same; and in such case such deed shall, so far as re-

woman, be void."

By 6 81. the chief justice of the C.P. is emfor taking such acknowledgments, a list of whom is to be made out and kept by the officer ledgments are lodged; and who is from time the clerk of the peace for each county, a copy of the list for such county, and deliver a copy thereof to any person applying: each clerk of last transmitted to him to any one applying for the same.

By § 82. a commissioner may take the acknowledgment of a married woman wherever she may reside, or the lands or money may be.

By § 83. where, by reason of residence because, any married woman shall be prevented pointed as aforesaid, the Court of Common any persons therein named to be commission-By § 78, the powers of disposition given to ers to take her acknowledgment; provided

By § 84. when a married woman acknowledgment is to sign a memorandum endorsed acknowledgment to the effect therein men-ried woman who by the custom of London davit verifying the same, and the signature thereto, is to be lodged with some officer of the

By § 87 and 88, the officer with whom the certificates are lodged, is to make an index of them, and to deliver a copy, signed by him, of every certificate filed to any person applying, which shall be received as evidence of the acknowledgment of the deed to which it refers.

By § 89. the Court of Common Pleas is authorised to make regulations from time to time touching the mode of examination to be pursued by the commissioners under the act, and the matters to be mentioned in the certificates, &c., and for the other proceedings required by the act.

By § 90. every married woman is to be separately examined on the surrender of an equitable estate in copyhold, in the same manner as if such estate were legal; and all previous surrenders so made are declared valid.

By § 91. if a husband shall, in consequence of being a lunatic, idiot, or unsound mind, and whether found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or living apart from his wife, either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, the Court of Common Pleas at Westminster may, by an order made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, dispense with the concurrence of the husband in any case in which his concurrence is required by this actor otherwise; provided, that this clause shall not extend to the case of a married woman, where under this act the Lord High Chancellor, or other the person or persons intrusted with the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband.

In pursuance of § 89, various rules and regulations were made by the Court of C. P. in M. T. 1833 and H. T. 1834, with respect to the examination of married women, and the other proceedings under this act, but which cannot be more particularly referred to in the present

For the clauses of the act enabling a married women to dispose of an estate tail, either held in her own right, or ex provisione viri, see tit. Tail; and for the other provisions of the act, see tits. Fine, Involment, Recovery.

is, unmarried. Feme Sole Merchant; a mar. p. 5. See tit. Fish.

tioned; which certificate (§ 85.) with an affi-trades on her own account, independent. See tits. Baron and Feme, London.

FENCE. A hedge, ditch, or other inclo-C. P., who is to file them of record in the court. sure of land for the better manurance and im-By § 86. on filing the certificate the deed is to take effect by relation, from the time of its and ditch join together, in whose ground or acknowledgment. belongs the keeping of the same hedge or fence, and the ditch adjoining to it on the other side, in repair and scoured. Par. Offic. 188. An action on the case or trespass lies, for not repairing of fences, whereby cattle come into the ground of another, and do damage. 1 Salk. 335. Also it is presentable in the court-baron, &c.

> No man making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and often if he likes it he plants a hedge on the top of it; therefore if he afterwards cut beyond the edge of the ditch which is the extremity of his land, he cuts into his neighbour's land and is a tresspasser. Vowles v. Miller, 3 W.P. Taunton, 137.

By 7 and 8 G. 4. c. 29. § 40. persons stealing or throwing down with such intent any live or dead fence, post, rail, pale, stile, or gate, &c. are punished summarily before one magistrate by a fine not exceeding 51., besides the value

of the thing stolen, or injury done. By 7 and 8 G. 4. c. 30. § 23. unlawfully and maliciously to cut, break, throw down, or destroy, any fence, wall, stile, or gate, or any part thereof, is punishable also summarily, in like

By 7 and 8 G. 4. c. 29. § 44. stealing or ripping, cutting, &c., with such intent, any lead, iron, copper, brass, or other metal, fixed for a fence to any dwelling-house, garden, river or in any public street, square, &c., is a felony punishable as simple larceny.

By § 28. of the same act, the wilfully destroy. ing any part of the fence of any land where any deer shall be kept, is punishable summarily, before one justice, by fine not exceeding 201. See further, this Dict. tits. Common In-

FENCE MONTH, mensis fanationis (or feonacionis,) mensis prohibitionis, or mensis vetitus.] Is a month wherein female deer in forests, &c. do fawn, and therefore it is unlawful to hunt in forests during that time; which begins fifteen days before Old Midsummer, and ends fifteen days after it, being in all thirty days. Manw. part. 2. c. 13: stat. 20 Car. 2. c. Some ancient foresters call this month the defence month, because then the deer are to be defended from being disturbed, and the interruptions of fear and danger. Serjeant Fleetwood saith, that the fence month hath been always kept with watch and ward, in every bailiwick throughout the whole forest, since FEME SOLE, Fr.] A woman alone, that the time of Canutus. Fleetwood's Forest Laws,

this kingdom several statutes have been from and de novo feoffamento; the first whereof time to time enacted, which are chiefly local, and by the provision of which the destroying of King Henry I. And the others, such as were works for the drainage or fences for the securing them, are punishable in some cases as the beginning of the reign of Henry II. At felonies, and by other penalties. See tit. Rivers, common law the usual conveyance was by Sea Banks, Poudike.

FEOD, or FEUD. The right which the vassal had in land, or some immoveable thing of sion being thereby given to the feoffee; but his lord's, to use the same and take the profits thereof, rendering unto his lord such feodal reason there was a tenant in possession, the duties and services as belonged to military reversion was granted, and the particular tentenure; the mere property of the soil always ant attornied. Co. Lit. 9. 49. A feoffment remaining in the lord. See Spelman of Feuds is said, in some respects, to excel the convey-

FEODAL, feodalis, vel. feudalis.] Of or belonging to the feud or fee. Stat. 12 Car. 2. c.

FEODALITY. Fealty. See tit. Fealty,

Tenures. I. 6.

FEODARY, or FEUDARY, feudatarius.] An officer of the Court of Wards, appointed by the master of that court by virtue of the statute 32 H. 8. c. 26. whose business it was to be present with the escheator in every county at the finding of offices of lands, and to give in evidence for the king as well concerning the value as the tenure; and his office was also to survey the lands of the ward, after the office found, and to rate it. He did likewise assign the king's widows their dowers; and receive all the rents of wards' lands within his circuit, which he answered to the receiver of the court. This office was wholly taken away by the operation of stat. 12 Car. 2. c. 24. abolishing ten-

FEODATARY, or FEUDATARY. The tenant who held his estate by feodol service; and grantees, to whom lands in feud or fee were granted by a superior lord, were sometimes called homagers; and in some writings are termed vassals, feuds, and feodataries. See

tit. Tenures, I.

FEODUM. See Fcod.

FEODUM MILITIS. A knight's fee: feodum laicum, a lay-fee, or land held in tee of a lay-lord. Kennet's Gloss. See tit. Tenures.

FEOFFMENT, feoffamentum, from the verb feoffare; donatio feudi.] A gist or grant of any manors, messuages, lands or tenements, feoffed. to another in fee, to him and his heirs, for ever, by the delivery of seisin and possession of the a man has no fixed estate; as, if he has thing given or granted. In every feoffment, the giver or grantor is called the feoffer, and he that receives by virtue thereof is the feoffee. Littleton says, the proper difference between a feoffor and a donor is that the one gives in fee-simple, the other in fee-tail. Litt. the north in such a moor, which contains 100 lib. 1. cap. 6.

Blackstone (2 Comm. 399.) defines feoffment to be the gift of any corporeal heredita-

FENGELD, Sax.] A tax or imposition, ex- ment to another. The deed of feofiment is acted for the repelling of enomies. MS. Antiq. our most ancient conveyance of lands; and FENS, paludes.] Low marshy grounds, or lakes for water; for the draining whereof in under the phrases of de veteri feoffamento, were such lands as were given or granted by granted after the death of the said king, since feoffment, to which delivery (shortly called livery) and seisin were necessary, the possesif livery and seisin could not be made, by and Tenures, cap. 1. and this Dict. tit. Tenures, ance by fine and recovery; it clearing all disseisins, abatements, intrusions, and other wrongful estates, which no other conveyance doth: and for that it is so solemnly and publicly made it has been of all other conveyances the most observed. West. Symb. 235: Ploud. 554. See this Dict. tits. Conveyance, Deed; and 2 Comm. c. 20: Shep. Touchst. c. 9. and the notes to the 8vo. edition, 1791.

This conveyance is now but very little used; except where no consideration passes, as is the case of trustees of lands for a corporation, &c. See this Dict. tit. Lease and Release, as to conveyance by bodies corporate. It is still, however, a formal, valid, and effectua! mode of conveyance : but has been of late years almost entirely superseded by the conveyance by lease and release. See this Dict. under that title; as also tits. Bargain and

Sale, Conveyance, Deed.

It will be found useful to consider the learning relating to feoffments according to the following division:

- I. Of what Things a Feoffment may be made.
- II. Who may make a Feoffment, and how it is to be made.
- III. Of the different Kinds of Livery; with their Effects and Operations.

I. A fcoffment may be of a messuage, land, meadow, pasture, or other corporeal hereditament, and of a moiety or fourth part of it; that lies in livery. The deed must contain the words, have granted, bargained, and en-

A feoffment may be made of lands in which twelve acres to be annually assigned in such a meadow; and livery in any acre, which he has at the time of the feoffment, is sufficient. Co. Lit. 4. a. 48. b: 2 Rol. 10. l. 40. 50.

So, if a feoffment be of fifty acres towards acres, livery in any of them is sufficient. 2 Rol. 11. l.5: Dyer, 372. b.

So, if two manors be divided alternis vici-

bus between parceners, either may make a | Co. 45: Co. Lit. 247. a.: 4 Co. 125. a.: 2 feoffment of her manor; and the deed ought | Rol. Ab. 2: Show. Par. Cases, 153. to comprehend both; and she shall make Tenant in tail makes a feoffment in fee; livery in one secundum formam chartæ this the inheritance of the tail is not given to the year, and in the other the next year. Co. Lit. feoffee by the feoffment, nor is he thereby 48. b.

But a fcoffment cannot be made of a thing of which livery cannot be given; as, of incorporeal inheritances, rent, advowson, com-immediate estate the fcoffer had. Plowd. mon, &c. 2 Rol. 1. b. 20. Though it be an 562: Hob. 335. If lessee for life and the readvowson, &c. in gross. Cont. 11 H. 6. 4:
Acc. 2 Rol. 1. l. 21.

till a future act, is void: for livery does not 6 Rep. 15: Lil. Abr. 609. A feofiment was operate in future: as, if A. agrees by inden- made habendum to the feoffee and his heirs, ture to convey 201. per annum in land to such after the death of the feoffor, and livery was an use, and 20s. per annum to such an use, made: yet it was held to be a void fcoffment, and makes a feoffment of all his lands to the for an estate of freehold in lands cannot beuses in the indenture; it will be void for all but that where livery was made, it not being ascertained which shall be to one use, and which to the other. R. 1 Rol. 187.

See further of what things a feoffment may be made. Com. Dig. Feoffment (A. 2.): Vin.

Ab. Feoffment (C.)

good feoffor, that is, one able to grant the thing conveyed by the deed; a feoffee capable to take it; and a thing grantable, and granted wife : also so it is, if one joint tenant make a in the manner the law requireth. Co. Lit. deed of feofiment of the whole land, his com-42. 49. 190.

If a person non compos makes a feoffment, and gives livery himself, that is allowed on all hands to be good to bind himself, so that he can by no process or plea avoid the feoff-ment, and restore himself to the possession; the same law of an idiot; and the reason is, because the investiture being made before the pares curiæ, their solemn attestation could not be defeated by the person himself, because it is presumed they are competent judges of the ability of the feoffor to make such feoffment. 2 Rol. Ab. 2: Co. Lit. 247: 4 Co. 125. a: Show. Parl. Cases, 153: and see tit. Idiots and Lunatics; and post, II.

But if an infant makes a feoffment, and makes livery himself, this shall not bind him, but he himself may avoid it by writ of dum fuit infra ætatem; yet the feoffment of the infant is not void in itself, as well because he is allowed to contract for his benefit, as that there ought to be some act of notoriety to restore the possession to him equal to that which transferred it from him. 4 Co. 125: 2 Rol. Ab. 2: 8 Co. 42, 43. Whittingham's

Yet if an infant makes a feoffment, and a letter of attorney to make a livery, that is void; so if a person non-compos makes a sur- declaring any use, it should have been to the

tenant in tail; for none shall be tenant in tail but he only who is comprehended in the gift made by the donor. But it gives away all the versioner in fee make a feoffment in fee by deed, each gives his estate; the lessee his by So a feoffment of lands, which are uncertain livery, and the fee from him in remainder. gin at a day to come: but where a lessor made a lease for lives, and granted the reversion to another for life, whose estate for life was to begin after the death of the survivor of the other lessees for life, this was adjudged a good estate in reversion for life. Hob. 171: 1 Nels. Abr. 846.

If the husband alone make a feoffment of II. In a deed of feoffment, there must be a his wife's land, or of both their lands, his wife being on the land and disagreeing to it; this will be good against all persons but the panion being then upon it; or if a man disseise me of my lands, and then enfeofi another thereof, whilst I am upon the land, &c. Perk. § 219, 220.

Every gift or feoffment of lands made by fraud or maintainance, shall be void; and tho disseisce, notwithstanding such alienation, shall recover against the first disseisor his land and double damages; provided he commence his suit in a year after the disseissin, and that the feoffer be pernor of the profits. Stat. 1

R. 2. c. 9: see stat. 11 H. 6. c. 3.

A feofiment being a common-law conveyance, and executed by livery, makes a transmutation of estate; but a conveyance on the statute of uses, as a covenant to stand seized &c. makes only a transmutation of posession, and not of estate. 2 Lev. 77: Vent. 378. A feoffment to the use of A. for life, the remainder to B.; if A. refuses to take the estate. B. shall take presently, because the whole of the estate is out of the feoffer by livery; but if it had been by covenant to stand seised, he should not have taken till after the death of A., but it would rest in the covenantor, who shall have the use in the mean time. 2 Lev. 77: 2 Leon. Ca. 279. Before the stat. Westm. 1. if a man had made a feofiment in fee, without render or release, this is void in law; so if he use of the feoffee; though now by that statmakes a letter of attorney to give livery: but the heir at law after the death of the person of non-same memory, or idiot, may avoid his self. 2 Leon. 15, 16. If I convey lands by feoffment; and so may the king upon an efforment; and so may the king upon an office found of his lunary during his life.

Vol. I.—98

shall return again to me and my lairs on the livery was executed by actual entry; part of the mother; yet if I declare the use to it was adjudged the livery might be executed me and any heirs, or upon each teoffment re-latter marriage, the feoffee having not only an serve a rent in like manner, a shall go to my lauthority to enter, but an interest passed by heirs at the common-law, it being a new thing the livery in view, and the woman did all on divided from the land. Hob. 31: Co. Lat. 13. her part to be done. 1 Vent. 186. 231: 1 Rep. 100: Dyer, 134. Where a man | No posession short of twenty years, under makes a feoffment, without any consideration; by that the estate and possession passes, but and an indorsement on a feofiment in the not the use, which shall descend to his heir. 1 Leon. 182.

A fcoffment in fee is made to the use of livery. 9 B. & C. 864. such persons, and for such estates, as the feoffer shall appoint by his will, or to the issue and to whom, 4 Co. 125: 5 Co. 42. b.: Bac. of his last will; by operation of law the use Abr. Feoffment (D.): Vin. Abr. Feoffment (E.) vests in the feoffer, and he is seised of a qualified fee, riz. until he makes his will, and declares the uses; and after the will is made, it which latter is also called livery within view. is only directory, for nothing passe by it but all by the Coffment. 6 Reg. 18: Moor, 567, the land, and is made either by the delivery of A feoffment in fee, upon condition, we, was a branch of a tree or a turf of the land, or inrolled, but no livery and decome it was advocate thing, in the name of all the lands judged no good it thinest, but in incollerent and tenements contained in the deed; and it shall conclude the percenter of the viller it was not his deed. Peph. 6. 2 A. le. Abr. +44. 1. a bargain and sale of lands be not inrolled, upon the land, or at the door of the house, says and the bargainer deliver livery and seisin of to the feoffee, "I am content that you should the lands secundum formam charte, it has enjoy this land according to the deed; or enbeen held a good feoffment. 1 And. 68.

not to alien, the condition is void, because it is repugnant to the estate; but if livery is had, the feoffment will be good against the feoffer: of the estate, and then the words spoken by and a bond with condition that the feotier the icoffer on the land are a sufficient indicium shall not alien, is said to be good. Co. Lit. 206: the people present, to determine in whom the Cro. Jac. 596. If a man makes a feoffment freehold resides during the extent of the limiof lands on condition that the fcoffee shall give the lands to the feoffer, and his wife in special tail, remainder to the heirs of the feorer, and he dies before such gift is made, the feoffee ought to make it as near the intent of the con. Rol. Ab. 7: Cro. Jac. 80. contra. dition as may be, viz. to the wife without impeachment of waste, remainder to the heirs of the body of her husband, on her body begotten, and remainder to the husband's right heirs. In case the feoffer and his wife both die, the feoffee then should make the estate to the issue, and heirs of the body of his father and mother begotten, remainder to the right heirs of the husband or father. Co. Lit. 219,

There must be livery of seisin in all feoffments, and gifts, &c. where a corporeal inheritance or freehold doth pass; and without livery the deed is no feoffment, gift or demise Lit. 59: 8 Rep. 82. But a freehold may pass without livery, by the statute 27 H. S. c. 10. By force of which statute, a fcoffment to the use of the feoffer, feoffee, &c. supplies the place of livery and seisin. Wood's Inst. 239.

But no deed of feoffment is good to pass an estate without livery of seisin; and if either of the parties die before livery, the feoffment is void. Ploud. 214, 219. Though where a effectually done by deputy or attorney as by the feme feoffor made a feoffment of lands with principals themselves in person), come to the

eration; the use will be void, and the land livery in view, and then married the feeffee

a feortinent, is presumptive evidence of livery; hand-writing of an attorney empowered to deliver seisin, was held not to be evidence of

See more fully who may make a fcoffment,

III. Livery may be by deed; or in law;

The livery in deed is the actual tradition of may be made by words only without the deinvery of any thing; as if the feoffor being ter into this house or land, and enjoy it ac-A feofliment in fee made upon condition cording to the deed;" this is a good livery to pass the freehold, because in all these cases the charter of feotiment makes the limitation tation; besides, the words, being relative to the charter of feoffment, plainly denote an intention to enfeoff. Co. Lit. 48. a.: 9 Co. 137. b. Thorourgood's case: 6 Co. 26. Sharp's case: 2

But if a man without any charter, being in his house, says, "I here demise you this house, as long as I live, paying 201 per annum," this passes no freehold, but only an estate at will; because the word demise denotes only the extent of the limitation of the estate intended to be conveyed: but bare words of limitation, without some acts or words to discover the intention of the feoffor to deliver over the posession, are not sufficient to convey the freehold; for if a charter of feoffment be made to a man and his heirs, this, without some other act or word to give the possession, only passes an estate at will, because the act of delivery is requisite to the perfection of the charter; but besides the charter of feoffment, there must be some act or words to deliver over the possession, before the feoffee can enjoy it pursuant to the charter. 6 Co. 26: 2 Rol. Ab. 7: Co. Lit. 48: Cro. Eliz. 482: 9 Co. 138; Moor, pl. 632.

Livery in deed is thus performed.—The feoffer, lessor, or his attorney (for this may be as

of witnesses declare the contents of the feoff- at the courts baron, which were anciently held ment or lease on which livery is to be made; sub dio (in the open air), in some open part of and then the feoffor, if it be of land, doth de- the manor, from whence a general survey or liver to the feoffee, all other persons being out view might have been taken of the whole of the ground, a clod or turf, or a twig or manor, and the pares curia easily distinguishbough there growing, with words to this ed that part which was then to be transferred. effect, "I deliver these to you in the name Pollex. 47. This livery in law cannot be given of seisin of all the lands and tenements con- or received by attorney, but only by the partained in this deed." But if it be of a ties themselves. 1 Inst. 48. house, the feoffer must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the fcoffee must enter alone and shut the door, and then open it and let in the others. 1 Inst. 48: West. Symb. 251.

lands, lying scattered in one and the same the feoffee, the livery within the view becomes county, then in the feoffer's possession, livery ineffectual and void; for if the feoffer dies beof seisin of any parcel, in the name of the fore entry, the feoffee cannot afterwards enter, rest, sufficeth for all; but if they be in several because then the land immediately descends counties there must be as many liveries as upon his heir, and consequently no person can there are counties. Lit. § 414. Also if the take possession of his land without an authority. lands be out on lease, though all be in the rity delegated from him who is the proprietor; same county, there must be as many liveries nor can the heir of the feoffec enter, because as there are tenants; because no livery can be he is not the person to whom the feoffer intendmade in this case but by the consent of the ed to convey his land, nor had he an authority particular tenant; and the consent of one will from the feoffer to take possession; besides, if not bind the rest. Dy. 18.

indorse the livery of seisin on the back of the come in as purchaser, whereas he was mendeed; specifying the manner, place, and time, tioned in the fcoffment to take as the repreof making it, together with the names of the sentative of his ancestor, which he cannot do, witnesses. Co. Lit. 48.

deed by letter of attorney; for since a con- Moor, 85: Pollex. 48. tract is no more than the consent of a man's The livery within view may be made of mind to a thing, where that consent or con- lands in another county than where the lands

receive livery, must be by deed, that it may for, notwithstanding that, they might have appear to the court that the attorney had a been part of the same manor for which the commission to represent the parties that are court was held. Co. Lit. 48. b. to give or take the livery, and whether the authority was pursued. Co. Lit. 48. b. pares of the county might, upon any dispute

feoffment, and a letter of attorney to enter enabled to determine in whom the right was. and take possession of the land, and after- Hence, therefore, it is, that if a man makes a wards to make livery, according to the form feoffment or lease for life, to commence in of the charter, it will be a good feoffment, future, and makes livery immediately, the though he was out of possession at the time of livery is void, and only an estate at will passes the deed made: for the feoffment takes effect to the feoffee, for the design of the institution by the livery, and not by the deed. Co. Lit. would fail, if such livery were effectual to pass 48. 52.

land, or to the house, and there in the presence livery seems to have been made at first only

This latter sort of livery also is not perfect to carry the freehold, till an actual entry made by the feoffee, because the possession is not actually delivered to him, but only a license or power given him by the feoffer to take possession of it; and therefore, if either the feoffer If the conveyance of feoffment be of divers or feoffee die before livery, and entry made by the heir of the fcoffee were admitted to take In all these cases it is prudent and usual to possession after his father's death, he would since the estate never vested in his ancestor. A man may either give or receive livery in Co. Lit. 48 b.: 2 Rol. Ab. 3.7: 1 Vent. 186:

The livery within view may be made of currence appears, it were unreasonable to lie, because the translation of the feud was oblige each person to be present at the execu-often made at the court-baron, in the presence tion of the contract, since it may as well be of pares curiæ; and these courts being held performed by any other person delegated for sub dio, the pares could have a distinct view that purpose by the parties to the contract, of every part of the manor; and therefore Co. Lit. 52: 2 Rol. Ab. 8. But such delegation, or authority to give or though the lands were in a different county,

This ceremony was first instituted, that the relating to the freehold, determine in whom If a man be disseised, and makes a deed of it was lodged; and from thence be the better the freehold; for it would be no evidence, or The livery within view, or the livery in law, notoricty of the change of the freehold, if after is when the feoffer is not actually on the land, the livery made, the freehold still remained in or in the house, but being in sight of it, says the feoffer; the use of the investiture would to the feoffee, "I give you yonder house, or rather create then prevent the uncertainty of land; go and enter into the same, and take the freehold, and in many cases would put possession of it accordingly:" this sort of men to fruitless trouble and expense in pursuit of their right; for by that means, after a! man has brought his pracipe against a per- he that infcoffs or makes a feoffment to anoson, whom he supposed to be tenant to the ther of lands or tenements in fee-simple. freehold, and had proceeded in it a considera- Feoffee is he who is enfeoffed or to whom ble time, the writ might abate by the freehold's vesting in another, by virtue of a livery made before the purchase of the writ. Another reason why such future interests cannot be allowed to pass by any act of livery was because no man would be safe in his purchase, if the operation of livery might create an estate, to commence many years after the livery was made; and though they have allowed a Property. future interest, to commence by way of lease, yet that had no such ill effect in making pur- del-land. Query a yard-land: but see Virchases uncertain, because anciently they were gata terra. under the power of the freeholder, who by recovery might destroy them; and now, unless iter.] Significat quietantiam eundi in exercisuch leases are made upon good considera- tum. tions, they are fraudulent against a purchaser; and it is not to be presumed that leases at poena.] Was used for being quit of mangreat distances should be purchased for value. slaughter, committed in the army. Fleta, lib. Cro. Eliz. 451: 2 Vent. 204: Co. Lit. 217: 1. It is rather a fine imposed on persons 5 Co. 94. b.

freehold in reversion or remainder cannot be in necessity obliged; and a neglect or omisgranted in future, though there no livery is sion of this common service to the public was necessary to pass it; as where A. is tenant punished with a pecuniary mulct called the for life, remainder to B. in fee; A. makes a ferdwite. lease for years to C., and afterwards grants the land to D. habend' from Michaelmas next cording to the Latin dictionary are holy days; ensuing, for life; this grant to D. was adjudg- but in the stat. 27 H 6. c. 5. ferial days are ed void, though C. attorned to it after Mi- taken for working days; all the days of the chaelmas, because such future grants create week, except Sunday. an uncertainty of the freehold; and the tenant of the freehold being the person who is to answer the stranger's pracipe, and who was answerable to the lord for their services, it were unreasonable to permit him by any act of his own to prevent or delay the prosecution of their right. Cro. Eliz. 451: 2 Vent. 204: Co. Lit. 217: 5 Co. 94 b.: 2 Co. 55. Buck. Is an hospital; and we read of friars of the ler's case: 2 And. 29: Moor, 423: Cro. Eliz. firmary. 450, 585: Hob. 170, 171; 5 Co. 94: 1 Rol. Rep. 261.

A fcoffment always operates to pass an estate either by right or by wrong. By right, if the feoffer be lawfully seised of the land for the estate which he conveys. By wrong, if he be only tenant for life, or years, and con-declared guilty of felony, and may be transvey the whole fee-simple to the prejudice of ported for seven years, or imprisoned and him who has the reversion or remainder, which is thereby divested and turned to a right. But a feoffment by the owner of a particular estate, or of a term, is a forfeiture of his interest, and in reversion or remainder may immediately enter for a breach of the condition, which the law annexes to an estate for life or for years. 1 Inst. 215: and see tit. Forfeiture.

In what cases livery may be made within larly applied to horses, which we at this time the view, see Vin. Abr. Feoffment (M.) And further, as to the different kinds of livery, Buc. Abr. Feoffment (A.): Com. Dig. Feoff. from Africa, and sold in this country. Ferment (B.): Vin. Abr. Feoffment (E.F.): and this dict. tit. Livery of Seisin.

FEOFFOR AND FEOFFEE. Feoffor Is the fcoffment is so made. See tit. Proff. ment.

FERÆ NATURÆ. Beasts and birds that are wild, in opposition to the tame, such as hares, foxes, wild geese, and the like, wherein no man may claim a property, unless under particular circumstances, as where they are confined, or made tame, &c. See tits. Game,

FERDELLA Terræ. Ten acres, a far-

FERDFARE, from the Sax. fyrd, and fare,

Fleta lib. 1 c. 47.

FERDWIT, Sax. ferd, exercitus and wite, for not going forth in a military expedition; to Hence, by the way, we may account why at which duty all persons, who held land, were Cowel

FERIAL DAYS, dies feriales, feria, Ac-

FERLINGATA (FERLINGUS and FERDLINGUS) TERRÆ. A quarter or fourth part of a yard-land. See tits. Fardel of Land, and Fardingdeal.

FERM, firma.] A house and land let by lease, &c. See tit. Farm.

FERMARY, from the Sax. feorme, victus.]

FERMISONA. The winter season of killing deer; as tempus pinguedinis is the sum-

mer season.

FERN. By stat. 7 and 8 G. 4. c. 30. § 17. persons maliciously setting fire to any fern, heath, gorze, or furze, wherever growing, are whipped.

FÉRNIGO. A piece of waste ground where fern grows. Cartular. Abbat. Glaston.

FERRAMENTUM, ferramenta.] The iron tools or instruments of a mill. Et reparare ferramenta ad tres carucas, i. e. the iron work

of three ploughs. Lib. Nig. Heref. FERRANDUS. An iron colour particu-

call an iron grey.

FERRET. An animal originally brought base a nature as to be incapable of becoming the subject of larceny. See C. C. R. 350: agreement, as that of the inhabitants of the

any beast or bird usually kept in state of confinement, and not the subject of larceny at tants to pay none. Show. 257. common law, subjects the offender, on a summary conviction before a magistrate to a penalty of 20l. over and above the value of the beast, free. An inhabitant of A. may bring an acor bird stolen; for a second conviction twelve month's imprisonment may be awarded; and

month's interisonment may be awarded; and if it take place before two magistrates, they may order such offender to be whipped.

FERRY. A liberty by prescription, or the king's grant, to have a boat for passage upon a river, for carriage of horses and men for reasonable toll: it is usually to cross a large river. Terms de Ley. A ferry is no more than a common highway; and no action will lie for one's being disturbed in his passage, unless he allege some particular damage &c.

A ferry is in respect of the landing-place, lently, and as a pretence for avoiding the regu-and not of the water; the water may be to lar ferry. 4 Term. Rep. 666. one, and the ferry to another; as it is of ferries on the Thames, where the ferry in some places belongs to the archbishop of Canterbury, while the mayor of London has the interest of the water; and in every ferry, the land on both sides of the water ought to belong to the owner of the ferry, or otherwise he cannot land on the other part. Savil, 11. And every ferry ought to have expert and able ferry-men, and to have present passage and reasonable payment for the passage. And it is requisite to have one who has property in the ferry, and not to allow every fisherman to carry and to re-carry at their pleasure, for divers inconveniences; and especially when a place is between the divisions of the two counties, any felon may be conveyed from one county to another, secretly, without any notice. the Sax. festnian, to fasten, or confirm.

Sav. 14.

FESTUM. A feast. Festum S. Michaelis,

If a ferry is erected on a river, so near the feast of St. Michael, &c.

another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the use of all the king's subjects; otherwise he may be grievously amerced. 2 Rol. Ab. 140. It would be extremely hard if a new ferry were suffered to share his profits, which does not also share his burthen. 3 Comm. 219.

Owner of a ferry cannot suppress that, and put up a bridge in its place without license, and writ of ad quod damnum; per Holt, Ch. J. Show. 243. 257: Cart. 193: 1 Salk. 12.

If a ferry be granted at this day, he that accepts such grant is bound to keep a boat for the public good; per Holt, Ch. J. Show,

town might be at the charge of procuring the Now by the 7 and G. 4. c. 29. § 31. stealing grant, and in consideration thereof one man to find the boat, and take toll; and the inhabi-

A common ferry was for all passengers paying toll, but the inhabitants of A. were toll tion for taking toll, but not for neglecting to keep up the ferry; because the former is a private right, but the latter a public. But he cannot maintain an action for not passing, for so, any other subject might bring an action, which would be endless; but the taking toll was a special damage, and without special damage he can only indict, or bring information. 1 Salk. 12.

And exclusive right to a ferry from A. to lie for one's being disturbed in his passage, unless he allege some particular damage, &c. 3 Mod. Rep. 294.

B. does not prevent persons going by any other boat from A. directly to C., though it lie near to B., provided this be not done fraudu-

The not keeping up a ferry has been held to be indictable. See tit. Bridge.

FERSPEKEN. To speak suddenly. Leg. H. 1. c. 61.

FESTA IN CAPPIS. Were some grand holy days, on which the whole choirs and cathedrals wore caps. Vita Abbat. St. Alban. p.

FESTINGMEN. The Sax. festinman signifies a surety or pledge; and to be free of festingmen, was probably to be free of frankpledge, and not bound for any man's forthcoming who should transgress the law. Mon.

Ang. tom. 1. p. 123. FESTING-PENNY. Earnest given to servants when hired or retained in service, so called in some northern parts of England, from

FESTUM STULTORUM. The feast of

fools. See Caput anni.
FETTERS. When a prisoner for felony is unruly, or makes any attempt to escape, it is lawful for the gaoler to hamper him with irons in order to restrain his violence, or prevent him from escaping; but a gaoler ought not to do this unless he has just reason to fear that the prisoner will escape, or unless he apprehends any danger from the violence of his A ferryman, if it be on salt water, ought to conduct; for, notwithstanding the common be privileged from being pressed as a soldier, practice of gaolers to put fetters on a prisoner or otherwise. Savil, 11. 14. committed for felony, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbid to put their prisoners to any pain or torment. See Co. P. C. 34. Custodes gaolarum pænam sibi commissio non augeant, nec eos torqueant vel redimant sed anni sævir the public good; per Holt, Ch. J. Show, tiá remotá pietateque adhibitá judicia debite exequantur. Flet. lib. 1. c. 26. So the Mirror Custom for the inhabitants to be discharged of Justices, c. 5. 81. n. 54. says—"It is an of toll, may have a reasonable beginning by abuse that prisoners should be charged with

tainted of felony." Lord Coke also, in his common to be sold at the fiar prices: and also all cases ment on the statute of Westminster, 2 C. 11. where no price has been stipulated. Beli's is express, that by the common law it might not be done. 2 Inst. 381: 1 Hale, 601. note

And it is laid down in our ancient books, cesses, &c. that the prisoner, though under an indictment of the highest nature, must be brought to the king, for his warrant to bring a writ of error bar to be arraigned without irons, or any manin parliament, he writes on the top of the pener of shackles or bonds, unless there be evi-tition fiat justitia, and then the writ of error dent danger of an escape, and then he may be is made out, &c. And when the king is pesecured with irons; but yet in Layer's case, titioned to redress a wrong, he endorses upon A. D. 1722, a difference was taken between the petition, "Let right be done the party." the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar 110 TION OF LAW, fictio juris.] A supin chains during the time of his arraignment, position of law, that a thing is true, without State Trials, VI. 230: 4 Comm. 323. The inquiring whether it be so or not, that it may distinction there taken was adopted in Waite's have the effect of truth so far as is consistent case, 1 Leach, Cr. C. 36.

prisoner is not to be handcuffed, unless he has of law; not what is imaginable in the concep-

vent his escaping. 6 D. & R. 623.

By the 4 G. 4, c. 64. § 10. rule 12. no prisoner shall be put in irons by the keeper of any prison except in case of urgent and absolute necessity, and then not for longer than four days, without an order in writing from a visiting justice.

FEU, or FEW. A free and gratuitous right to lands, made to one for service to be performed by him, according to the proper nature thereof. Scotch Dict.

FEU, or FEW-HOLDING. Is whereby the vassal is obliged to pay to the superior a | 42

sum of moncy yearly. Scotch Dict.

So the proceedings in Ejectment are functional to the Latin word feudum was used upon a series of fictions. See that tit. to denote the feudal holding where the service was purely military, the term feu is used in Scotland in contradistinction to ward-holding, the military tenure of that country, and ton, in the county of Middlesex, &c. in order means that holding where the vassal, in place to try the same here; without which such of military services, makes a return in grain or in money. Bell's Scotch Law Dict.

FEU, or FEW ANNUALS. The rent which is due by the reddendo of the property of the ground, before the house was built with-

FEUD (Deadly.) Sec Deadly Feud. FEUDAL and FEUDARY. See tits. Feo-

dal and Feodary.

FEUDBOTE. A recompense for engaging invented, but for every other purpose they a feud, and the damages consequent; it may be contradicted. Cowp. 177. in a feud, and the damages consequent; it having been the custom in ancient times for

FEUDS. See tit. Tenures, I.

FIAR. In Scotch law, in opposition to life renter; the person in whom the property of an doth not keep that fealty which he hath sworn estate is vested, subject to the life renter's es- to the lord. Leg. H. 1. c. 53.

February, with the assistance of juries: and Dict. tit. Fee, Tenure.

irons, or put to any pain, before they be at-these regulate the prices of all grain stipulated

FIAT. A short order or warrant of some judge for making out and allowing certain pro-

FIAT JUSTITIA. On a petition to the

with equity. It is allowed of in several cases: When an arrest is made on suspicion, the but it must be framed according to the rules attempted to escape, or it is necessary to pre- tion of man; and there ought to be equity and possibility in every legal fiction. There are many of these fictions in civil law; and by some civilians it is said to be an assumption of law upon an untruth, for a truth in something possible to be done, but not done. Godolphin and Bartol. The seisin of the conusee in a fine was but a fiction in our law, it being an invented form of conveyance only. 1 Lil. Abr. 610. And a common recovery was fictio juris, a formal act or devise by consent, where a man was desirous to cut. off an estate-tail, remainders, &c. 10 Rep.

So the proceedings in Ejectment are founded

By fiction of law a bond made beyond sca made beyond sea may be pleaded to be made in the place where not made, to wit, in Islingtrial cannot he had. Co. Lit. 261. And so it is in some other cases: but the law ought not to be satisfied with fictions, where it may be otherwise really satisfied: and fictions in law shall not not be carried farther than the reasons which introduce them necessarily require. 1 Lit. Abr. 610: 2 Hawk. 320.

Fictions of law shall never be contradicted so as to defeat the end for which they were

And the court will notice legal fictions to all the kindred to engage in their kinsman's avoid their working injustice by affording quarrel. Sax. Dict. having no real foundation. 10 Price, 154.
FIDEM MENTIRI. Is when a tenant

tate. Bell's Scotch Law Dict.

FIEF, which we call fee, is in other counFIARS PRICES. The prices of grain in tries the contrary to chattels: in Germany,
the different counties of Scotland, fixed yearly certain districts or territories are called fiels,
by the respective sheriffs in the month of where there are fiels of the empire. See this

FIERI FACIAS. A judicial writ of exe-, first writ, by reciting that all the money was cution, that lies where judgment is had for debt or damages recovered in the king's courts; by which writ the sheriff is commanded to levy the debt and damages of the goods and chattels of the defendant, &c. Old Nat. Br. 152. See this Dict. tit. Execu-

This writ and a levari capias were the only writs of execution at common law; except in actions of trespass, in which a capias ad satisfaciendum was allowed. It is called a fieri facias, because the words of the writ, directed to the sheriff, are quod fieri facias de bonis et catallis, &c., and from these words the writ takes it denomination. Co. Lit. 290. b.

This writ is to be sued out within a year and a day after judgment; or the judgment must be revived by scire facias: but if a fieri facias sued in time be not executed, a second fieri facias or elegit may be sued out; and it is said some years after, without a scire facias, provided continuances are entered from the first fi. fa., which it is also held may be entered after the second fi. fa. taken out, unless a rule is made that proceedings shall stay, &c. Sid. 59: 2 Nels. Abr. 776.

A fieri facias should regularly in the first instance issue and be directed to the sheriff of the county in which the venue in the action is laid; and after being returned by that sheriff, a testatum writ may then be sued out, direct-

ed to the sheriff of another county.

As a fieri facias is a judicial writ, it must (except when issued on judgments obtained in writs of inquiry under 1 W. 4. sess. 2 c. 7. § 1. or for costs under the interpleader act, 1 and 2 W. 4. c. 58. § 7.) bear teste in term time; and the practice has hitherto been when sued out in term, to teste it on the first day of the term: if sued out in vacation, on the last day of the preceding term. A mistake in the teste may be amended. 2 Burr. 1188

If a man recover a debt against A. B., and levy part of it by fieri facias, and this writ is returned, yet he may take the body in execution by capias for the rest of the debt. Rol. Ab. 904. The sheriff on a fieri facias is to do his best endeavours to levy the money upon the goods and chattels of the defendant; and for that purpose to inquire after his goods, &c. And the plaintiff may ingire and search if he can find any, and give notice thereof to the sheriff, who ex officio is to take and sell them if he can, or if not, by a writ of venditioni exponas. 2 Shep. Abr. 111.

There may be a testatum fieri facias into another county, if the defendant hath not goods enough in the county where the action is laid to satisfy the execution; and the fieri facias for the ground of the testatum may be returned of course by the attorneys, as originals are. 2 Salk. 589. If all the money is not levied on a fieri facias, the writ must be returned before a second execution can be the expressing numbers by figures in all writs,

not levied. 1 Salk. 318.

If an execution is sued on a ft. fa. and the defendant dies before it is executed, it may be served on the defendant's goods in the hands of his executor or administrator. Cro. Eliz.

So if a party die within the year and day after judgment obtained against him, a fi. fa. tested before the death (6 T. R. 368: 1 B. & P. 571.) may be sued out against his goods in

Ld. Raym. 849.

The sale or assignment by the sheriff of goods or chattels of the defendant taken in a fi. fa. conveys an indefeasible title to a bona fide vendee: so much so, that if the writ be afterwards vacated, the defendant shall not be restored to his goods. 1 M. & S. 425: 6 M. & S. 110. But if the writ were void, as issuing from a court not baving jurisdiction, or if the goods belong to a stranger, and not to the defendant, the sale would convey no property.

The defendant, instead of allowing the writ to be executed on his goods, may pay the debt and costs to the officer, which will be held a good payment to the plaintiff. 2 Lev. 203: Cro. El. 504. And the sheriff's duty on a fi. fa. differs from his duty on a ca. sa., for if he seise and sell the goods under the former after a tender of the debt and costs, he would, it

seems, be a trespasser. 1 Keb. 655. See further this Dict. tits. Sheriff, Extent,

Execution.

FIFTEENTHS. A tribute or imposition of money, anciently laid generally upon cities, boroughs, &c. through the whole realm; so called, because it amounted to a fifteenth part of that which each city or town was valued at, or a fifteenth of every man's personal estate according to a reasonable valuation. every town knew what was a fifteenth part, which was always the same; whereas a subsidy raised on every particular man's lands or goods, was adjudged uncertain; and in that regard the fifteenth seems to have been a rate formerly laid upon every town, according to the land or circuit belonging to it. Cambd. Brit. 171.

There are certain rates mentioned in Domesday, for levying this tribute yearly; but levied but by parliament. See Cowell: 1 Com.

FIGHTING AND QUARRELLING. Is prohibited by statute, in a church or churchyard, &c. on pain of excommunication, and other corporal punishment. Stat. 5 and 6 Ed. 6. c. 4. See tit. Church.

FIGHTWITE, Sax.] A match for fighting, or making a quarrel to the disturbance of the prace.

FIGURES. The stat. 6 G. 2. c. 14. allows issued; because it is to be grounded on the &c. pleadings, rules, orders, and indictments,

ly used in the said courts, notwithstanding any of summons and distringas returnable in the thing in the stat. 4 G. 2. c. 26. See tits. Exchequer, the chief baron shall appoint from

Amendment, Error, Pleading.

FILACER, FILAZER, or FILIZER, filizarius, from Lat. filum, Fr. file, filace, a thread.] An officer of the Court of Common By the 2 and 3 W. 4. c. 110. § 2. the filacer is Pleas, so called, as he files those writs whereon he makes out process. There are fourteen of those filacers in their several divisions and counties, and they make forth all writs and processes upon original writs, issuing out of Chancery, as well real as personal and mixed, returnable in that court; and in actions merely personal, where the defendants are returned summoned, they make out pones or attach-lof process of a court makes it a record of it. 1 ments; which being returned and executed, if Lil. 112. An original writ may be filed after the defendant appears not, they make forth a distringas, and so ad infinitum, or until he doth appear; if he be returned nihil, then process fidavits must be filed, some before read in of capias infinite, &c. They enter all appearances and special bails, upon any process made by them: and makes the first scire facias on special bails, writs of habeas corpus, distringas nuper vicecomitem vel ballivum, and all supersedeus's upon special bail: in real actions, writs of view, of grand and petit cape of withernam, &c. also writs of adjournment of a term, &c. cannot be amended after filed. See this in case of public disturbance, &c.

And until an order of court, 14 Jac. 1. they entered declarations, imparlances, and pleas, and made out writs of execution, and divers other judicial writs, after appearance: but that order limited their proceedings to all matters before appearance, and the prothonotaries to all 4 Inst. 307. after. The filacers of the Common Pleas have been officers of that court before the stat. 10 H. 6. c. 4. wherein they are mentioned: and in son. the King's Bench, of later times there have been filacers who make out process upon original writs returnable in that court, on actions

in general.

Since the abolition of original writs and processes thereon by the 2 W. 4. c. 39. the only writs and process signed by the filacer of the which divides counties, townships, parishes, K. B., who is also the exigenter and clerk of the outlawries, are those issued for the purpose of removing the proceedings in replevin, or other suits, from inferior courts, and in ejectment when that action is commenced by original, which actions are not affected by the without paying custom. See tit Customs. statute. He has also the signing of writs of exigent, of proclamation, and capias utlagatum

gas, capias, and detainer, allowed by the above act, are issued by the filacer, and in the Ex- fines levied previous to that statute. It has, chequer by the clerk of the pleas, or his deputy, during the life of the present holder of that a great measure the information which was

In the Exchequer there was formerly no filacer, and as a plaintiff could not proceed in tensive, was also closely implicated with that that court by original writ, a defendant could of Recoveries. A definition of both terms is not be outlawed; but it is provided by the 2 therefore here given, with some idea of the dis-W. 4. c. 39. § 4 that for the purpose of pro- tinct nature of those assurances. See further

&c. in courts of justice, as have been common-|ceeding to outlawry and detainer upon writs time to time a fit person holding some other office in the court to execute the duties of a filacer, exigenter, and clerk of the outlawries. declared to be one of the five principal officers of the plea side of the court, exclusive of the clerk of the pleas.

FILE, Filacium.] A thread, string, or wire, upon which writs, and other exhibits in courts and offices are fastened or filed, for the more safe keeping and ready turning to the same.

A file is a record of the court; and the filing judgment given in the cause, if sued forth before; declarations, &c. are to be filed; and afcourt, and some presently when read in court. Ibid. 113. Before filing a record removed by certiorari, the justices of B. R. may refuse to receive it, if it appears to be for delay, &c. and remand it back for the expedition of justice; but if the certiorari be once filed, the proceedings below cannot be revived. An indictment, Dict. tits. Certiorari, Amendment. FIELD ALE, or FILKDALE. A kind of

drinking in the field, by bailiffs of hundreds; for which they gathered money of the inhabitants of the hundred to which they belonged: but it has been long since prohibited. Bract.

FILICETUM. A ferny ground. Co. Lit 4. FILIOLUS. Is properly a little son; a god-

Dugd. Warwicksh. 697.

FILUM AQUÆ. The thread or middle of the stream where a river parts two lordships. Et habeant istas buttas usque ad filum aque prædictæ. Mon. Angl. tom. 1. f. 390. File du mer, the high tide of the sea. Rot. Parl. 11. H. 4. It is also the middle of any river or stream manors, liberties, &c.

FINDERS. Mentioned in several ancient statutes, seem to be the same with those which we now call searches, who are employed for the discovery of goods imported, or exported,

FINE OF LANDS.

in proceedings to outlawry.

In the C. P. the writs of summons, distrinof the law by the 3 and 4. W. 4. c. 74 questions may still arise upon the validity and effect of therefore, been thought advisable to retain in office, after whose death it is to be abolished. communicated under the present title in the 2 and 3 W. 4. c. 110. § 8.

The law on this subject, of itself very ex-

this Dict. tit. Recovery, for what relates ex- date the origin and frequent use of fines as clusively thereto.

A FINE, Finis, or Finalis Concordia: from the words with which it began, and also from its effect in putting a final end to all suits and contentions. A solemn amicable agreement or composition of a suit (whether that suit were real or fictitious), made between the demandant and tenant, with the consent of the judges; and enrolled among the records of the court where the suit was commenced; by which agreement freehold property might be transferred, settled, and limited. See Cruise on Fines, 1st ed. 4. 89. 92.

Shepherd says, sometimes it is taken for a "final agreement or conveyance upon record for the settling and securing of lands and tenements;" and so it is designated by some to be, "an acknowledgment, in the king's court, of the land or other things to be his right that doth complain:" and by others "a covenant made between parties and recorded by the justices:" and by others "a friendly, real, and final agreement amongst parties, concerning any land, or rent, or other thing whereof any suit or writ is hanging between them in any court:" and by others more fully " an instrument of record of an agreement concerning lands, tenements, or hereditaments; duly made by the king's license, and acknowledged by the parties to the same, upon a writ of covenant, writ of right, or such like, before the justices of the Common Pleas or others thereunto authorised, and engrossed of record in the same court; to end all controversies thereof, both between themselves which be parties and privies to the same, and all strangers not suing or claiming in due time." Shep. Touchst. c. 3. and the authorities there

The most distinguishable properties of a fine were, 1. The extinguishing dormant titles by barring strangers; unless they claimed within five years. 2. Barring the issue in tail immediately. [But not barring the remainders or reversions, which depend on the estate tail barred; except where the tenant in tail had the immediate reversion in fee in himself. See Cruise on Fines, 2d edit. 176: 1 Show. 370: 1 Salk. 338: 4 Mod. 1.] 3. Binding femes covert, see post. IV .- These constituted the peculiar qualities on account of which a fine was most usually, if not always resorted to, as one of the most valuable of the common assurances of the realm; being in fact a fictitious proceeding to transfer or secure real property by a mode more efficacious than ordinary conveyances. 1 Inst. 121. a. note

Fines being agreements solemnly made in the king's courts were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them operation of each was not seldom necessary in to have the same quality of barring all who aid of the other. A fine was therefore often should not claim within a year and a day, levied for the purpose of eresting a good ten-See Plowd. 357. Hence we may probably ant to the præcipe, on which the Focovery was

feigned proceedings. But this puissance of a fine was taken away by the 34 Ed. 3. c. 16. and this statute continued in force till the 1 Ric. 3. c. 7. and 4 H. 7. c. 24. which revived the ancient law, though with some change; proclamations being required to make fines more notorious, and the time for claiming being enlarged, from a year and a day to five years. See post, I. The force of fines on the rights of strangers being thus regulated, it became a common practice to levy them merely for better guarding a title against claims, which, under the common statutes of limitation, might subsist with a right of entry for 20 years and with a right of action for a much longer time. 1 Inst. ubi supra, and see post.

A RECOVERY-in its most extensive sense was a restitution to a former right by the solemn judgment of a court of justice. its general acception a common recovery was a judgment in a fictitious suit, brought against the tenant of the freehold, obtained in consequence of a default made by the person who was last vouched to warranty in such fictitious suit. Cruise on Recoveries, 1, 120. 121. 137.

The common recovery used for assurance of land was nothing else but fictio juris, or a certain form or course set down by law to be observed for the better assuring of lands and tenements to men, wherein there was a demandant who was called the recoverer, and a tenant who was called the recoveree; and one that was called (or vouched) to warrant upon a supposed warranty, who was called the vouchee. Shep. Touchst. c. 3. and the authorities there cited.

Considered as a legal assurance or conveyance, it was a fiction of law, adopted for the purpose of destroying that species of perpetuity which was created by the statute de donis (13 Ed. 1. st. 1. c. 1.); and whereby all tenants in tail were ennbled, by pursuing the proper form, to bar their estates-tail. 10 Rep. 37. And not only this, but it was also a bar to ALL remainders and reversions depending on such estates-tail so barred; and to all charges and incumbrances created by the persons in remainder and reversion. 1 Rep. 62. But a common recovery did not bar an executory devise unless the executory devisee came in as a vouchee. Fearne, 306: Pigot, 134: Cro. Jac. 590: Palm. 131.—And by stat. 12 H. 8. c. 15. no estate held by statute-merchant, staple, or elegit, should be avoided by means of a feigned recovery.—And see also this stat. and stat. of Gloucester, 1 Ed. 1. c. 11 as to termours

Distinctions. Though a recovery generally speaking, was a more extensive species of conveyance than a fine, to guard an estate against all claims and incumbrances; yet the

Vol. I.—99

suffered in order to operate as a discontinu- only declared and regulated the manner in ance of an estate-tail, for the purpose of barring remainders or reversions depending on And that was as follows:such estates-tail; and thus a conveyance by fine and recovery, if unreversed, barred all be conveyed or assured commenced an action the world.

A fine was technically said to be levieda recovery to be suffered. Good writers, however, have but too frequently confounded the rantia charta, or de consuetudinibus et serviterms. See 2 Comm. 357. n.

I. Generally, of the Nature, several Kinds, Effect, and Operation, of a clare the Uses of a Fine.

levied.

III. By whom, and to whom, it might have been levied, and see post, IV.

IV. Before whom, and in what Manner, it might have been levied.

V. Who were barred by a Fine, and who

VI. Of reversing and amending Fines.

VII. The provisions of the 3 and 4 W. 4. c. 74. relating to Fines.

I. Under this head it will be necessary to explain, 1. The nature of a fine. 2. Its several kinds. 3. Its force and effect.

1. A fine was sometimes said to be a feoffment of record; Co. Lit. 50; though it might with more accuracy have been called an acknowledgment of a feoffment on record. By which is to be understood, that it had at least the same force and effect with a feoffment, in the conveying and assuring of lands; though it was one of those methods of transferring estates of freehold by the common law, in which livery of seisin was not necessary to be actually given, the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to have been an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question became, or were acknowledged to be, the right of one of the parties. Co. Lit. 120. In its original it was founded on an actual suit commenced at law for recovery of posession of the land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were commenced, for the sake of obtaining the same security.

Fines were of equal antiquity with the first rudiments of the law itself; being spoken of by Glanvil. l. 8. c. 1. and Bracton, l. 5. tr. 5. c. 28. in the reigns of Henry II. and Henry III. as things then well known and long established: and instances have been produced of them even prior to the Norman invasion. Plowd. 369. So that the stat. 18 Ed. 1. called modus

which they should be levied, and carried on.

First, The party to whom the land was to or suit at law against the other, generally an action of covenant (though a fine might also have been levied on a writ of mesne, of wartiis; Finch L. 278.); by suing out a writ of præcipe, called a writ of covenant: the foundation of which was a supposed agreement or covenant, that the one should convey the lands Fine: and of Deeds to lead or de- to the other; on the breach of which agreement the action was brought. On this writ II. Of what Things a Fine might have been there was due to the king by ancient prerogative a primer fine, or a noble for every five marks of land sued for; that was, one-tenth of the annual value. 2 Inst. 511. The suit being thus commenced, then followed-

Secondly. The licentia concordandi, or leave to agree the suit: for, as soon as the action was brought, the defendant, knowing himself to be in the wrong, was supposed to make overtures of peace and accommodation to the plaintiff, who accepted them; but having, upon suing out the writ, given pledges to prosecute his suit, which he endangered if he deserted it without license, therefore applied to the court for leave to make the matter up. This leave was readily granted; but for it there was also another fine due to the king by his prerogative, which was an ancient revenue of the crown, and was called the king's silver, or sometimes the post fine, with respect to the primer fine before-mentioned. And it was as much as the primer fine, and half as much more, or ten shillings for every five marks of land; that is, three-twentieths of the supposed annual value. 5 Rep. 39: 2 Inst. 511: stat. 32 G. 2. c. 14.

Thirdly, came the concord, or agreement itself, after leave obtained from the court. This was usually an acknowledgment from the deforciants (or those who kept the other out of possession) that the lands in question were the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine was called the cognizor, and he to whom it was levied the cognizee. This acknowledgment must have been made either openly in the Court of Common Pleas, or before the lord chief justice of that court, or else before one of the judges of that court; or two or more commissioners in the country, empowered by a special authority called a writ of dedimus potestatem; which judges and commissioners were bound by stat. 18. Ed. 1. st. 4. to take care that the cognizors were of full age, sound memory, and out of prison. If there were any feme covert among the cognizors, she was privately examined whether she did it willingly and freely, or by compulsion of her husband.

The concord being the complete fine, it was levandi fines, did not give them original, but adjudged a fine of that term in which the concord was made, and the writ of covenant re- | term, write out a table of the fines levied in turnable. 1 Salk. 341. A concord would not be of any thing but what was contained in the writ of covenant: and the note of the fine

principale recordum. 3 Leon. 234.

Though one concord would serve for lands that lay in divers counties, yet there must have been several writs of covenant. 3 Inst. 21: Dyer, 227. A concord of fine might have had an exception of part of the things mentioned therein: and if more acres were named than a man had in the place, or were intended to be passed, no more should pass by the fine than were agreed upon. 1 Leon. 81: 3 Bulst. 317, 318.

By these acts all the essential parts of a fine were completed: and if the cognizor died the next moment after the fine was acknowledged, provided it were subsequent to the day on which the writ was made returnable, still the fine should be carried on in all its remaining parts. Comb. 71. Of which the next was-

The note of the fine; which was only an abstract of the writ of covenant, and the concord, naming the parties, the parcels of land, and the agreement: this must have been enrolled of record in the proper office, by direction of

stat. 5 H. 4. c. 14.

The fifth part was the foot of the fine, or conclusion of it; which included the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there were indentures made or engrossed at the chirographer's office, and delivered to the cognizor and cognizee, usually beginning thus, "Hac est finalis concordia; This is the final agreement;" and then reciting the whole proceeding at length. thus the fine was completely levied at common law.

By several statutes, still more solemnities were superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And first, by stat. 27 Ed. 1. c. 1. the note of the fine was to be openly read in the Court of Common Pleas, at two several days in one week, and during such reading all pleas were to cease. By stat. 5 H. 4. c. 14: 23 Eliz. c. 3. all the proceedings on fines, either at the time of acknowledgment, or previous, or subsequent thereto, were to be enrolled of record in the Court of Common Pleas. By stat. 1 Ric. 3. c. 7. confirmed and enforced with some alterations by stat. H. 7. c. 24. (the latter act superseding the former), the fine, after engrossment, was to be openly read and proclaimed in court (during which all pleas should cease) sixteen times: viz. four times in the term in which it was made, and four times in each of the three succeeding terms; which was reduced to one in each term by stat. 31 Eliz. c. 2. and these proclamations were endorsed on the back of the record. It was also enacted by stat. 23 Eliz. c.

each county in that term, and affix them in some open part of the Court of Common Pleas all the next term, and also deliver the contents remaining with the chirographer, it was held, of such table to the sheriff of every county, who should at the next assizes fix the same in some open place in the court, for the more

public notoriety of the fine.

2. Fines thus levied were of four kinds:-First. What, in law French was called a fine " sur cognizance de droit, come ceo que il ad de son done ;" or, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This was the best and surest kind of fine, for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledged in court a former feoffment or gift in possession, to have been made by him to the plaintiff. This fine was therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery; so that this assurance was rather a confession of a former conveyance, than a conveyance thus originally made; for the deforciant, or cognizor, acknowledged the right to be in the plaintiff, or cognizee, as that which he had de son done of the proper gift of himself, the cog-

Secondly. A fine "sur cognizance de droit tantum," or, upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This was commonly used to pass a reversionary interest, which was in the cognizor. For of such reversions there could be of feoffment, or donation with livery supposed; as the possession during the particular estate belonged to a third person. Moor, 629. It was worded in this manner, "that the cognizor acknowledges the right to be in the cognizee; and grants for himself and his heirs that the reversion, after the particular estate determines, shall go to the cognizee." West. Symb. p. 2. § 95.

Thirdly. A fine "sur concessit," was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate de novo, usually for life or years, by way of supposed composition. And this might be done reserving a rent, or the like; for it operated as

a new grant. West. p. 2. § 66.

This species of fine might have been levied where the intent was to pass several mesne particular estates, and a reversion in fee (2 W. P. Taunt. 84;) but not of a doubtful estate under the description of "all and whatsoever the said ---- hath in the premises:" nor could two operations, as that of a fine sur concessit and one sur conusance de droit, be combined in the same fine. 2 W. P. Taunt. 198.

Fourthly. A fine, " sur done grant et ren-3. that the chirographer of fines should, every | der," was a double fine, comprehending the fine sur cognizance de droit come ceo, &c., and | were expressly declared not to be by the statthe fine sur concessit, and might have been ute de donis, the stat. 32 H. S. c. 36. was thereused to create particular limitations of estate: and this to persons who were strangers, or not declaring that a fine levied by any person of named in the writ of covenant; whereas the fine sur cognizance de droit come ceo, &c. conveyed nothing but an absolute estate, either of inheritance or at least of freehold. Salk. 340. In this last species of fine, the cognizee, after the right was acknowledged to be in him, granted back again or rendered to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine, sur cognizance de droit come ceo, &c. was the most used; as it conveyed a clear and absolute freehold, and gave the cognizee a seisin in law, without any actual livery; and was therefore called a fine executed: whereas the others were but executory. See

post, II. 3. The force and effect of a fine principally depended on the common law and the two statutes, 4 H. 7. c. 24. and 32 H. 8. c. 36. The cluded by the fine, and barred of any latent ancient common-law, with respect to this right they might have, even though under the point, was very forcibly declared by the stat. legal impediment of coverture. And indeed, 18 Ed. 1 st. 4. in these words, "And the reason why such solemnity is required in passing covert, or married woman, is permitted by law a fine is this, because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those moved the general suspicion of compulsion by which are parties and privies to the fine, and her husband,) it was therefore the usual and their heirs, but all other persons in the world, almost the only safe method, whereby she who are of full age, out of prison, of sound could join in the sale, settlement, or incummemory, and within the four seas, the day of brance, of any estate. See post, IV. the fine levied: unless they put in their claim on the foot of the fine within a year and a day." But this doctrine of barring the right by nonclaim was abolished for a time by 34 Ed. 3. c. 16., which admitted persons to claim, and fal. sify a fine, at any indefinite distance, (Litt. \ dower (see Cruise, Piggot); yet if a jointress 441.;) whereby, as Sir Edward Coke observes (2 Inst. 581.,) great contention arose, and few men were sure of their possessions, till the parliament held in 4 H. 7. reformed that mischief, and excellently moderated between the latitude given by the statute, and the rigour of the common law. For the statute then made (stat. 4 H. 7. c. 241.) restored the doctrine of non-claim, but extended the time of claim. By that statute the right of all strangers whatsoever was barred, unless they made claim, by way of action or lawful entry, not within one year and a day, as by the common law, but within five years after proclamations made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as were not of whole mind: who had five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

covertly, by this statute, extended fines to have they interposed their claim; provided they

upon made; which removed all difficulties, by full age, to whom, or to whose ancestors, lands have been entailed, should be a perpetual bar to them and their heirs claiming by force of such entail: unless the fine were levied by a woman after the death of her husband, of lands which were, by the gift of him, or his ancestors, assigned to her in tail for her jointure; or of lands entailed by act of parliament or letters patent, and whereof the reversion belonged to the crown. See stat. 11 H. 7. c. 20.

From this view of the common law, regulated by these statutes, it appears that a fine was a solemn conveyance on record from the cognizor to the cognizee; and that the persons bound by a fine were Parties, Privies, and

Strangers.

The parties were either the cognizors, or cognizees: and these were immediately conas this was almost the only act that a feme to do (and that because she was privately examined as to her voluntary consent, which re-

Though a wife might thus join her husband in either a fine or recovery to convey her own estate and inheritance, or an estate settled upon her by her husband as her jointure, or to convey the husband's estates discharged of after her husband's death levied a fine or suffers a recovery without the consent of the heir, or the next person entitled to an estate of inheritance, the fine or recovery was void, and also a forfeiture of her estate, by stat. 11.

H. 7. c. 20. See post, III.

Privies to a fine were such as are any way related to the parties who levied the fine, and claimed under them by any right of blood, or other right of representation. Such were the heirs general of the cognizor; the issue in tail since the statute of H. 8; the vendee; the devisee; and all others who must have made title by the persons who levied the fine. For the act of the ancestor bound the heir, and the act of the principal his substitute, or such as claimed under any conveyance made by him subsequent to the fine so levied. 3 Rep. 87.

Strangers to a fine were all other persons in the world, except only parties and privies. And these were also bound by a fine, unless It seems to have been the intention, to have within five years after proclamation made been a bar of estates-tail. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, which they ture, infancy, imprisonment, insanity, and without proclamations; one waste processing. absence beyond sea; and persons who were tions was termed a fine according to the thus incapacitated to prosecute their rights, statutes 1 R. 3. c. 7: 4 H. 7. c. 24. And such had five years allowed them to put in their a fine, every fine that was pleaded was intendclaims after such impediments were removed. ed [supposed] to be, if it were not shown what Persons also that had not a present, but a future interest only, as in remainder or reversion, had five years allowed them to claim in, from the time that such right accrued. Co. Lit. 372. And if within that time they neglected to claim, or (by the stat. 4 Anne, c. 16.) if they did not bring an action to try the right, within one year after making such claim, and prosecuted the same with effect, all persons whatsoever were barred of whatever right they might have had by force of the statute of non-claim. See this Dict. tit.

But, in order to make a fine of any avail at all, it was necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers by a mere confederacy might defraud the owners by levying fines of their lands; for if the attempt were discovered, they could be no sufferers, as to the estate in question, but remained in statu quo; whereas if a tenant for life levied a fine, it was an absolute forfeiture of his estate to the remainderman or reversioner, if claimed in proper time. Co. Lit. 251. It is not therefore to be supposed that such tenants would frequently run so great a hazard; but if they did, and the sion of the lands; for, if he were in possession claim was not duly made within five years at the time of levying the fine, there need not after their respective terms expired, the estate have been any such writ, or any execution of was for ever barred by it. 2 Lev. 52. Yet where a stranger, whose presumption could not thus be punished, officiously interfered in an estate which in nowise belonged to him, his fine was of no effect: and might at any time have been set aside (unless by such as were parties or privies thereunto) by pleading that "partes finis nihil habuerunt." And even if a tenant for years, who had only a chattel interest and no freehold in the land, levied a fine, it operated nothing, but was liable to be defeated by the same plea. 5 Rep. 123: Hard. 401. See post, VII. Therefore, when a lessee for years was disposed to levy a fine, it was usual for him to make a feoffment first, to displace the estate of the reversioner, and create a new freehold by disseisin. Hardr. 402: 2 Lev. 52. See this Dict. tit.

put the estate of another to the hazard, as far as in them lay, the 21 Jac. 1. c. 26. made it felony without the benefit of clergy to acknowledge, or procure to be acknowledged, any fine, recovery, judgment, &c., in the name of any person not privy or consenting to the same. And although that statute was repealed by the 1 W. 4. c. 66. the offence was by the latter act declared to be still a felony, and punishable by transportation, &c.

Fines were also divided into those with and \ 21.30. A

fine it was. 3 Rep. 86.

If tenant in tail levied a fine, and died before all the proclamations were made, though the right of the estate-tail descended upon the issue, immediately on the death of the ancestor, yet if proclamations were made afterwards, such right was barred by the fine, by the statutes 4 H. 7. c. 24: 3 H. 8. c. 36: 3 Rep. 84.

The fine without proclamations was called a fine at the common law, being levied in such manner as was used before the stat. 4 H. 7. c. 24. and was still of the like force by the common law, to discontinue the estate of the cognizor, if the fine were executed.

A fine also with or without proclamations was either executed or executory: a fine executed was such a fine as of its own force gave present possession to the cognisee, without any writ of seisin to enter on the lands, &c., as a fine sur cognizance de droit come ceo; and in some respects a fine sur release, &c. was said to be executed. A fine executory did not execute the possession in the cognisee, without entry or action, but required a writ of seisin; as the fine sur conuzance de droit tantum, &c. unless the party were in possesthe fine; and then the fine would enure by way of extinguishment of right, not altering the estate or possession of the cognisee, however it might better it. West. § 20.

Subsequent to the statute of uses (27 H. 8.) writs of possession were never sued out where fines were levied to uses; for the statute executing the possession to the use, the cognisee was immediately in possession without attornment. Booth, 250: Pig. 49: Cruise, 59.

Where husband and wife granted to trustees an estate, of which the wife's father was seised in fee-simple, and afterwards in the life of the father they levied a fine of the lands to the uses of the settlement, and the father afterwards died, leaving the wife one of his coheiresses, her moiety of the estate became subject to the uses of the settlement, by reason of the fine as an estoppel against the husband In order to punish criminally such as thus and wife and all persons claiming title under them. 2 B. & A. 240.

Fines were likewise single or double: single, where an estate was granted by the cognisor to the cognisee, and nothing was thereby rendered back again from the cognisee to the cognisor. The double fine was that which contained a grant or render back again from the cognisee, of the land itself; or of some rent, common, or other thing out of it, and by which remainders were limited, &c. West. ___etimes called a

double fine, when the lands lay in several | but he might grant and release to him by fine.

might puss by one fine, and then the writ of other use but to him to whom it was levied. covenant must have been brought by all the 3 Leon. 61. vendees against all the vendors, and they must every one of them have warranted for estates for life or years, was also executory, so himself and his heirs; and such a fine was that the cognisees must have entered, or had good. Shep. Touchst. c. 2. p. 19. And such a writ of hab. fac. seisinam to obtain posses. joint fines seemed reasonable, when the several purchases were of small value, though they were ex gratia. See Wils. on Fines, 47. Where an order of the chancellor is inserted, authorizing the cursitor to stay the writ when ly executed and partly executory; and as to there was more than one demandant and one the first part of it, was altogether of the same deforciant, except co-parceners, joint-tenants, and tenants in common. It afterwards became the practice to permit two separate pur- a grant and render back, it was taken in law chases to be comprised in one fine, on an affidavit that the value of them together did not between party and party, and not as a writ of exceed 2001.

droit come ceo, &c. was a single fine levied of a particular estate, without remainder or with proclamations, according to the stat. 4 remainders over; or of the reversion; and H. 7. c. 24. It was, as has been already said, the principal and surest kind of fine: and clause of distress, and grant thereof over by this because it was said to be executed, as it the same fine. 5 Rep. 38. gave present possession (at least in law) to the cognisec, so that he needed no writ of hab. the cognisee by the same fine rendered back fac. seisinam, or other means for execution the land to A. B. in tail, reserving a rent to thereof; for it admitted the possession of the himself, &c.; the rent and reversion passed, lands, of which the fine was levied, to pass by though in one fine: and it enured as several the fine, so that the cognisee might enter, fines. Cro. Eliz. 727. and the estate was thereby in him, to such uses as were declared in the deed to lead the uses thereof; but if it was not declared by was no party to the writ; but mediately, or deed to what use the fine was levied, such in secundo gradu, it might. 3 Rep. 514: Bro. fine enured to the use of the cognisor that 108. The fine with grant and render differed levied the same. 2 Inst. 513.

could not be levied to any person but one that in the original; but the grant and render was party to the writ of covenant; though a might be of another thing than was expressed vouchee, after he had entered into the war- in the original: though to make a good grant ranty to the demandant, it is said, might con- and render, the land rendered must have passfess the action or levy a fine to the demand- ed so the cognisee by the fine; for he could ant, for he was then supposed to be tenant of not render what he had not. 3 Rep. 98. 510. the land, though not a party to the writ; and vet a fine levied by the vouchee to a stranger himself a less estate by way of remainder was void. No single fine could be with a re- than the fee: and the render of a rent (if any) mainder over to another person not contained must have been to one of the parties to the in it; but if A. levied a fine to B. sur conuzance de droit come ceo, and B. by the same concord granted back the land again to A. for life, remainder to E., the wife of A., for her life, remainder to A. and his heirs: this was a good fine. Plowd. 248, 249.

sit; though most commonly made use of to then, to bind him, he and the lessee acknowpass a reversion, it was also sometimes used ledged the tenements the right of A. B., who by tenant for life, to make a release (in nate of a surrender, to him in reversion, but the remainder to the lessor and his heirs, &c. not by the word surrender; for it was said a 44 Ed. 3. c. 45: 2 Leon. 206.

Plowd. 268: Dyer, 216. A fine upon a re-Lands that were brought of divers persons lease, &c. should not be intended to be to any

The fine sur concessit, used to grant away sion; if the parties to whom the estate was limited, at the time of levying such fine, were not in possession of the thing granted.

The fine sur done grant et render was partnature with a fine sur conuzance de droit come ceo; but as to the second part containing to be rather a private conveyance or charter judgment upon record; and this render was The first kind of fine sur conuzance de sometimes of the whole estate, and sometimes sometimes with reservations of rent and

A. B. and C. D. levied a fine of lands, and

A grant and render of land could not be immediately in primo gradu to a person who from the fine sur conuzance de droit come ceo, A fine sur conuzance de droit come ceo, &c. | &c., as that must have been levied of the land

A man might not by this fine reserve to fine, and not to a stranger. Dyer, 33. 69: 2 Rep. 39. To make a lease for years, &c. by fine with a render, the lessee must have acknowledged the land to be the right of the lessor that was seised thereof: and then such lessor granted and rendered the same back The second sort of fine sur conuzance de droit tantum was said to be a fine executory, and much of the nature of a fine sur concession good fine: but if the lessor were tenant in tail,

particular tenant, as for life, &c. could not A fine and render was a conveyance at surrender his term to him in reversion by fine; common law, and made the cognisor, on the

render back, a new prchaser; by which lands nants, in common, concurred in levying a fine, arising on the part of the mother might go to neither of them singly could declare the uses the heirs on the part of the father, &c. 1 Salk. of more than his share. So when a tenant for

a confirmation of a former estate, which was defeasible before. 1 Sand. 261. So a fine might enure by way of extinguishment; therefore if tenant in tail made a lease, or other estate to A., and afterwards levied a fine to B., the lease, or other estate, should be indefeasible; for his right during such former estate was extinct by the fine. R. Jon. 60: Cro. Jac. 689. See this Dict. tit. Estates.

When a fine was levied by a person who had no estate or seisin, it might have operated as on estoppel, and excluded him from asserting any right subsequently acquired. a fine levied by a person who afterwards became heir, estopped him from claiming as heir, although a release by deed, while he had merely a hope or chance of succession, would not have barred his title. Hob. 45: 1 Rol. Ab. 482. (S.) pl. 2: 3 T. R. 365. So a fine levied himself, during the coverture. If husband by a person who had a contingent interest, and wife levied a fine of the lands of the wife,

Pollexf. 54.

Of deeds to lead or declare the uses of fines! (and recoveries) .- If a fine or recovery were levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enured only to the use to the contrary, such fine by construction of of him who levied or suffered them. And if law should be to the uses declared in the a consideration appeared, yet as the most deed, and which was evidence thereof; and usual fine sur conuzance de droit come ceo, &c. where a fine varied from a former description, conveyed an absolute estate without any limi- it has been held that a new deed made after tations to the cognisee, and as common recoveries did the same to the recoverer, these assurances could not be made to answer the purpose of family settlements, unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses could be more particularly expressed. If the deeds were made previous to the fine or recovery, they were called deeds to lead the uses; if subsequent deeds to declare them; and the fine or recovery enured to the uses specified in such deeds, and to no other. Doug. 45:2 Wils. 220. If a fine or recovery were had without any previous settlement, and a deed be afterwards made between the parties declaring the uses to which the same should be applied, this was equally good as if it had been expressly levied or recovered in consequence of a deed directing its operation to these particular uses; for by stat. 4 and 5 Anne, c. 16. indentures to declare the uses of fines and recoveries had and suffered, should be good and effectual in law, and the fine and recovery should enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds, 29 Car. 2. c. 3. to the contrary.

One person could not declare the uses of a fine beyond the extent of his own interest. such share was necessary, in regard the New

life and a remainder-man in fee joined in a All sorts of fine in general might enure as fine, a declaration of use by one of them would not supply the want of a similar declaration by the other; Doug. 24; and the estate of which no uses had been declared resulted to

> The wife alone could not declare the uses of her fine. 2 Co. 57. Neither could the husband against her consent, appearing by deed, or by any act in pais; but they might

jointly declare the uses.

If a feme covert alone declared the uses of a fine intended to be levied by husband and wife of her land, and the husband alone declared other uses; it was held that both declarations of uses were void, and the use should follow the ownership of the lands; but in another case it was determined that the uses declared by the wife were void; and the uses declared by the husband good only against would in some cases bar, in others bind, that and he alone declared the uses, this should bind the wife if her dissent did not appear; because otherwise, it should be intended that she did consent. 2 Rep. 56. 59. Though there was a variance between a deed declaring uses, and the fine levied; yet if nothing appeared would declare the uses of the fine. It was not absolutely necessary to insert the word use in the declaration of uses of fines; for any words which showed the intent of the parties were sufficient. 1 Ld. Raym. 289, 290.

> II. A fine might have been levied of every species of real property, as of a house, or messuage, manor, castle, office, rent, &c.; and of every thing whereof a precipe quod reddat lay, &c.; or of any thing whereof a precipe quod faciat lay, as customs, services, &c.; or whereof a præcipe quod permittat, or præcipe quod teneat, might be brought. 2 Inst. 513.

> So, since the stat. 32 H. 8. c. 7. (see tit. Tithes,) they might have been levied of rectories, vicarages, tithes, pensions, oblations, and all ecclesiastical inheritances made temporal. Of a chantry. So of a seignory. Of all services; as homage, fealty, &c. West. Of common of pasture. Of a corody. Of an office, as of the custody of a forest. Of a boilary. Of two pools and a fishery in the water of D. Of an annuity. See West. Symb. 6.7: Shep. Touchst. c. 2.

So also of a share in the New River water, by the description of so much land covered, by water; and when a fine and recovery of Thus if two joint tenants, copartners, or te-River runs through the several counties of have been three several fines and recoveries.

2 P. Wms. 128.

Where money was agreed to be laid out in lands to be settled in tail, a fine could not be levied of the money, but a decree of a court of there went a writ to the justices of C. B. equity bound it, as much as a fine alone could have bound the land, if it had been bought and settled. 1 P. Wms. 130: 2 Atk. 453: 3 Atk. 447: 1 Vez. 146: and see 1 P. Wms. 471. 485: 1 Bro. C. R. 223.

Fines might have been levied of all things in esse, tempore finis, which are inheritable; but not of things uncertain; or of lands held in tail by the king's letters patent; of land restrained from sale by act of parliament, or of lands in wright of a man's wife, without the wife, &c. 5 Rep. 225: West. § 25. Or of common without number. Cruise, 121.

A fine might have been levied of a rentcharge, or of a chief rent; and if a person who had a rent-charge levied a fine of the land, out of which the rent-charge issued, it would bar the rent-charge though the fine were levied of the land, and not of the rent-charge. Cruise,

c. 7. and the authorities there cited.

A fine might have been levied of an undivided moiety, or fourth part of a manor, as well as of the whole. 3 Rep. 88. But where a fine was levied of a manor, nothing but a real manor would pass, and not a manor by reputation only. Cruise c. 7.

But a fine could not be levied of common in gross sans nombre; an annuity. Touchst. pl. 11. Or an office of dignity.

The word tenement was not a sufficient description of any thing whereof a fine was to be levied; for a tenement might consist of an advowson, a house or land of any kind; and therefore a fine levied of a tenement was void,

or at least voidable by writ of error.

And almost any kind of contract might have been made and expressed by fine, as by a decd, and therefore it might have been so made that one of the parties should have the land, and the other a rent out of it; and that one should have it for a time, and another for another time; also a lease for years, or a jointure for a wife, might have been made; and a gift in tail, and a remainder over, might have been limited and created thereby. 1 Rep. 76.

As fines might have been levied of things in possession, so they might be levied of a remainder, or reversioner, or of a right in future.

3 Rep. 90.

III. All persons who may lawfully grant by deed, might have levied a fine. 7 Rep. 32. A corporation-sole might have levied a fine of femes covert merely by reason of the secret exland which he had in his corporate capacity; amination of the wife by the judges, was inbut bishops, deans, and chapters, parsons, &c. correct. If the secret examination by itself were restrained from levying of fines to bind had been so operative, the law would have their successors. But a fine could not be levied provided the means of effectually adding that by a corporation aggregate; for it could not form to ordinary conveyances, and so have act but by attorney, and it could not make co- made them conclusive to femes covert equally nusance by attorney. All persons that may with a fine. But it was clearly otherwise;

Hertford, Middlesex, and London, there must | be grantees, or that may take by contract. might have taken by fine; though in cases of infants, feme coverts, persons attainted, aliens, &c., who, it is said might have taken by fine, before the ingrossing of the fine, quod permittant finem levari. Lit. 660. Tenant in fee-simple, fee-tail general, or special tenant in remainder or reversion, might have levied a fine of their estates; so might have a tenant for life, to hold to the cognisee for life of tenant for life; but a person who was tenant, or had an interest only for years, could not levy a fine of his term to another. 3 Rep. 77: 5 Rep. 124.

It was not necessary to be in possession of the freehold in order to levy a fine; but if any one entitled to the inheritance, or to a remainder in tail, levied a fine, it bared his issue, and all heirs who derived their title through

him. Hob. 333.

A fine by a man non compos, though it ought not to have been levied, bound for ever when it was levied. So a fine by a man attainted for treason, or felony, bound all but the king, or the lord of the fee. West. Symb. 3. a. See 2 Wils. 220. So a fine by an infant, or feme covert without her husband, bound till it was avoided. Vide Com. Dig. tit. Baron and Feme, (P.1.) Enfant, (B.2.)—See 2 Black Rep. 1205. a fine acknowledged de bene esse by a feme covert, whose husband was abroad, before the lord chief justice then in court.

Where the estate of a married woman had been regularly sold, with the consent of her husband, the conveyance executed by him, and the purchase money paid, the Court of C. P. allowed the wife to levy a fine, although her husband had in the interim become non

compos. New Rep. C. P. 312.

But the court refused to interfere to authenticate a fine levied by a married woman in the absence of her husband, though he had become a bankrupt, and omitted to surrender himself, and was gone beyond the seas. 1 W.

P. Taunton, 37.

A fine of the husband alone of the lands of the wife might have been avoided by her or her heirs; but if she joined with him it bound her and them. If a married woman alone without her husband levied a fine, the husband might avoid it by entry; but if he did not, it was good to bar her and her heirs, except she was an infant at the time of the fine

levied. 12 Rep. 122. In 1 Inst. 121. a. arguments are brought to prove (apparently with great force and justice) that the common notion that a fine bound

and except in the case of conveyance by cus-, for though the judge ought not to have adtom, there must have been a suit depending for mitted of a fine from a man under that disament of the court in real action, appears to have in the law, presumed the conusor, at that arisen from admitting them and their husbands time, capable of contracting; and therefore jointly to defend actions brought against the the credit of it was not to be contested, nor feme for her estate, the adverse judgment on the record avoided by any averment against which was final against the feme. When the the truth of it. 4 Co. 124: 12 Co. 124: 2 transition was made to the case of friendly Inst. 483: Bro. tit. Fines, 75: Co. Lit. 247. suits, the form of secret examination was intro- | See this Dict. tits. Idiots and Lunatics. duced to avoid any undue influence of the hus-

band, or his ancestors, could not be conveyed away from her by fine, &c. without her act; but it a woman and her husband levied a fine posed its authority in cases of this kind, and of her jointure, she was barred of the same; though if the jointure was made after cover. fine levied by an idiot to bar his heirs; as no ture, when the wife had an election to have species of fraud could be more evident, than her jointure or dower on the husband's death, that of obtaining a conveyance from a person it is said that this is no bar of her dower in of this description. 2 Vern. 678: 2 Atk. the residue of the land of the husband. Dyer, 281: and see post, VI. and tit. Recovery. 358: Leon. 185. See tits. Dower, Jointure.

cepted by a fine, and by the same fine render- ing chattel interests (3 Co. 77.), as tenants for ed back the land for 100 years, &c.; this was

7. c. 20. See ante, I.

If tenant for life granted a greater estate by fine than for his own life, it was a forfeiture; and if there were tenant for life and remainder for life, and the tenant for life levied a fine to him in remainder and his heirs, both their estates were forfeited; the tenant for life by levying the fine and the remainder-man for life by accepting it. 2 Lev. 209. Though if such a tenant for life levied a fine sur grant et release to the cognisee for the life of tenant for life; or by a fine granted a rent out of the land for a longer time, the fine was good, and there was no forfeiture of the estate of tenant for life; so likewise if a fine were levied of lands by tenant for life; to a stranger, who thereby acknowledged all his right to be in the tenant for life, and released to him and his heirs. 27 Ed. 1. 1: 44 Ed. 3. 36.

If an infant levied a fine which was no more than his own agreement recorded as the judgment of the court, he might have reversed it by writ of error; this must have been brought during his minority, that the Court of B. R. might by inspection determine the age of the infant; but the judges might in such cases have informed themselves by witnesses, church-books, &c. 2 New Abr. 526: Co. Lit.

With regard to idiots and lunatics, neither of fines in any place out of the court, and certhey nor their heirs could vacate any act of tified the same without any writ of dedimus the former done in a court of record; and potestatem. But the chief justice of England therefore if a person non compos acknowledged could not, or any other of the justices, except a fine, it was good against him and his heirs; the chief justice of C. P., who had this special

the freehold, and inheritance; or the exami- bility, yet when it was once received, it could nation being extra-judicial, was ineffectual. not be reversed, because the record and judg-This mode of binding femes covert by the judg- ment of the court, being the highest evidence

Thus stood the common law on this point; band. See this Dict. tit. Baron and Feme, VIII. but as the Court of Chancery had in many Lands assured for dower, or term of life, instances compelled persons who had obor in tail, to any woman by means of her hus- tained estates under a fine in a fraudulent manner to reconvey them to those who were really entitled thereto; so that court interwould not suffer the declaration of uses of a

The persons disqualified in point of estate If a widow having an estate in dower ac- from levying a fine were, first, persons havyears; tenants for uncertain interests, as till a forfeiture of her estate within the stat. 11 H. debts are paid; tenants by statute merchant, statute staple, elegit, and at will; secondly, copyholders. The fines of all these persons, however, were good as against themselves by way of estoppel, not operating as a conveyance, but an extinguishment, of their estates.

All persons who might be grantees in a deed might have been conusees in a fine.

The king, although he could not have levied a fine, by reason that no writ of covenant could be brought against him, might have been a conusee. So also infants, feme coverts, persons attainted (West. Symb. 815.), and a corporation sole, or aggregate.

IV. Fines were ordained to be levied in the Court of Common Pleas at Westminster. on account of the solemnity thereof, by the 18 Ed. 1. st. 4. and 27 Ed. 1. st. 1. c. 1. before which statutes they were sometimes levied in the Exchequer in the County Courts, Courts Baron, &c. They might have been acknowledged before the lord chief justice of the Common Pleas, as well in, as out of court, and two of the justices of the same court had power to take them in open court; also justices of assize might have done it by the general words of their patent or commission; but they did not usually certify them without a special writ 380. b: Moor, 76: 2 Rol. Ab. 15: Bro. tit. of dedimus potestatem. 2 Inst. 512: Dyer, Error: Bro. tit. Fines, 74.79: 2 Inst. 482: 2 224. The chief justice of C. P. might, by the Bulst. 320: 12 Co 122. See this Dict. tit. Infant. prerogative of his place, have taken cognizance

Vol. I.-100

9 Co. Read.

country, empowered by dedimus potestatem: their dower: if they did not make their claim the writ of dedimus surmised that the parties in that time by action or entry, they were who were to acknowledge the fine were not barred by statute. Dyer, 72: 2 Rep. 93. able to travel to Westminster for the doing thereof: these commissions, general and spelage, although he was in his mother's womb at cial, issued out of the Chancery. By the the time of the fine levied. Plwd. 359. And common law all fines were levied in court; an infant was allowed time during his minoribut the stat. of Carlisle, 15 Ed. 2. allowed the ty, to reverse his own fine and prevent the dedimus potestatem to commissioners, who bar, which if not reversed during that time might be punished for abuses, and the fines was good. Aff. pl. 53. taken before them set aside; and it is said an information might have been brought by him in reversion against commissioners, who took the caption of a fine, where a married woman, &c. was an infant. 3 Lev. 26.

Fines were to be levied in the city of Chester, by stat. 43 Eliz. c. 15. In the county palatine of Chester, by stat. 2 and 3 Ed. 6. c. 28. In the county palatine of Lancaster, stat. 37 H. 8. c. 19. In that of Durham, by stat. 5 and five years after the forfeiture of tenant for Eliz. c. 27. And in the courts of great sessions life. Plowd. 374. See stat. 4 H. 7. c. 24. Eliz. c. 27. And in the courts of great sessions life. in Wales, by stat. 34 and 35 H. 8. c. 26. § 40.

A fine levied in the C. P. of lands in a county palatine, or (previous to the abolition of the

lutely void.

The tenure of ancient demesne being a species of privileged villenage, the tenants thereof not be barred by fine and non-claim until five could not sue or be sued for their lands in the king's courts of common law, but had the privilege of having justice administered to them in the court of the manor by petit writ of droit close directed to the bailiffs of the king's manors or to the lord of the manor whereof the lands were held. In consequence of That he who would take the benefit of this this principle no fine could, properly speaking, be levied by a tenant in ancient demesne in the Court of Common Pleas; and as such tenants were allowed to commence actions in the court of the manor, were also permitted to 4. It must first have come by matter existcompound their suits; by which means fines ing before the fine. 1W. P. Taunton, 578. i were levied of lands held in ancient demesne No fine barred any estate in possession or upon little writs of right close in the court of reversion, which was not devested, or put to a the manor.

Where, however, a fine was levied in the Court of C. P. of lands in ancient demesne, it was not void, but only voidable, the lord having a right to reverse it by bringing a writ of right where a man was not bound to claim; disceit to restore the lands to his jurisdiction. See now 3 and 4 W. 4. c. 74. § 4: post, VII. And see also § 5. of the same act, whereby fines and recoveries are declared valid, though levied or suffered in courts not having jurisdiction extending over the lands therein comprised. Post, VII.

V. If a man purchased lands of another in fee, and after finding his title to be bad, and that a stranger had right to the land, levied a fine thereof with intent to bar him; and he suffered five years to pass without claim, &c., he was barred of his right for ever. 3 Rep. barred his own issue, even though it was levied Doct, & Stud. 83. 155.

authority by custom and not by any statute. | Femes covert had five years after the death of their husbands, to avoid the fine of the hus-Fines were taken by commissioners in the band of the wife's lands; and also to claim

An infant had five years after he came of

Strangers out of the realm at the time of the fines levied had five years after their return to prevent the bar; and so if they were in England when the fine was levied, and within five years were sent in the king's service by his commandment. Plowd. 366. A person in Scotland or Ireland was out of the realm. 4 H. 7. c. 24.

Five years were given after a remainder fell:

When once the five years allowed to make an entry for the purpose of avoiding a fine began, the time continued to run, notwithstandcourts of great sessions) in Wales, was absolving any subsequent disability. 4 T. R. 300. 306. n.

A future interest of another person could years after it happened; as in case of a remainder or reversion. 2 Rep. 93: Raym. 151.

The stat. 4 H. 7 c. 24. contained a saving for reversionary and future rights if claim were made within five years after title accrued. The Court of C. P. determined, 1. saving must be other than a party or privy to the fine. 2. That the right must first have come to him. 3. That it must so first have come after the fine and proclamations; and

right. 9 Rep. 106. He that at the time of a fine levied had not any title to enter should not be immediately barred by the fine; but this was in case of an interest not turned to a

4 H. 7. and 32 H. 8. That the heirs in tail might be barred, it was necessary only, that a fine should be levied by an ancestor, and duly proclaimed. The fine was effectual whether the person by whom it was levied had a vested estate in possession, reversion, or remainder. (Co. Lit. 372.); a contingent interest (10 Co. 50. a.); or only a title of entry or of action (3 Co. 88. 90. a: Jenk. Cent. 275.); and the fine of a person within the line of the entail would have before the entail descended on him the chief (Hob. 285: Jenk. Cent. 275.); or after aliena-1 tion: 3 Co. 90. a: 1 Prest. on Convey. 307.

62.); neither would non-claim on the fine of a operating as a bar by non-claim. The delivery mortgagor (1 Vern. 132: 2 Vern. 180.), or of a declaration in ejectment did not amount mortgagee (1 Vent. 132: 2 Ves. 482.), bar the to an entry sufficient for this purpose, even other of them. But if a cestui que trust entered though the defendant appeared to it, and conand claimed to hold adversely, as against his trustee, and made a feoffment and then levied a fine, the fine with non-claim would have

or easement, or right to sue execution under a judgment, could not be barred by non-claim | Burr. 1897: Doug. 433. 435. But no entry on a fine. 5 Rep. 124. a: Shep. T. 22. Neither was necessary where the fine was levied withcould an interesse termini while it remained out proclamations; for the stat. 4 H. 7. c. 24. such (Cro. Jac. 60: 5 Co. 124); in other words, did not extend to such a fine, and it might be till it gave a present right of entry; nor a condition till it operated by giving a right of entry (Plowd. Com. 373.); nor a power, or rather an authority given to executors to sell (Mo. 605: to the lands, or by some one appointed by him. 1 Atk. 474.) be barred by non-claim on a fine, 1 Inst. 258. a. since in all these instances there was not any adverse possession. Prest. on Convey, 231.

Lessees who pretended title to the inheritance of the lands, could not by fine bar the inheritance. 3 Rep. 77. But if a lease was made for years, and the lessor before entry of the lessee levied a fine with proclamations, and the lessee did not make his claim within five years, he was barred; for though he could stated. not levy a fine, yet he was barred by a fine levied by the tenant of the land, &c. 5 Rep.

As deans, bishops, parsons, &c. were prohibited by statute to levy fines, and might not have a writ of right, they were not barred by five years' non-claim, and their non-claim would not prejudice their successors. Ploud.

heir, a feme covert. Upon his death a stranger made a tortious entry on the lands, continued in possession, and levied a fine sur conuzance de droit come ceo with proclamations; B. afterwards died under coverture, no entry having been made on her behalf to avoid the fine, leaving C. her heir, of the age of twenty-one, of sound mind, out of prison, and within the realm. The fine was a bar of the right of C. unless he made his claim within five years after the death of B. 2 H. Blackst. 584.

tees an estate, of which the wife's father was courts of justice, being things of the greatest seised in fee-simple, and afterwards in the credit, cannot be questioned but by matters of life of the father they levied a fine of the lands equal notoriety with themselves: wherefore, to the use of the settlement, and the father af- though the matter assigned for error should be terwards died leaving the wife one of the co. proved by witnesses of the best credit, yet the heiresses; the Court of K. B. on a case out of judges would not admit it. 1 Rol. Ab. 757. Chancery, held, that the wife's moiety of the claiming title under them. 3 B. & A. 242.

By the 4 and 5 Anne, c. 16. there must have been an actual entry to an action commenced Non-claim on the fine of a trustee would not therein within a year, and prosecuted with bar the title of the cestui que trust (Gilb. Ch. effect, to prevent a fine levied by proclamation fessed lease, entry, and ouster; for there must have been an actual entry made animo clamandi; whereas in ejectment there is only a been a bar at law to the estate of the trustee. fictitious or supposed entry for the purpose of A rent charge, or other collateral interest, making a demesne. Barrington v. Parkhurst, Bro. P. C.: 2 Stra. 1086. Sec 1 Vent. 42: 3 avoided at any time within twenty years. 2 Wils. 45. The entry, when necessary, must have been made by the person who had a right

> VI. Fines may be reversed for error, so as the writ of error be brought in twenty years, &c., and not afterwards by stat. 10 and 11 W. 3. c. 14. Which twenty years are to be computed from the time of the fine levied, and not from the time the title accrued. 2 Stra. 1257. See tit. Recovery and stat. 23 Eliz. c. 3. there

No person can bring a writ of error to reverse a fine, or any judgment that is not entitled to the land of which the fine was levied; for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears; besides, where the plaintiff in the writ of error cannot make out a title, A. seised in fee of lands died, leaving B. his he can receive no damage by the fine, which the writ of error always supposes to be done, though it should be erroneous; and therefore it is no less than trifling with the courts of justice, to seek relief when he cannot make it appear that he has received any injury. 1 Rol. Ab. 747: Dyer, 90: 3 Lev. 36.

But if there be several parties to an erro-

neous fine, they shall all join with the party that is to enjoy the land, though they themselves cannot have any thing. 1 Rol. Ab. 747:

Nothing can be assigned for error that con-Where husband and wife granted to trus-tradicts the record: for the records of the

If there be error in proclamations it shall be estate became subject to the uses of that set- taken as a good fine at common law. 3 Rep. tlement by reason of the fine, as an estoppel 86. A fine may stand though the proclamaagainst the husband and wife, and all persons tions according to the statute are irregular, for fines are matters of record, and remain in substance and form as they were before. Ploud. | fore commissioners in the country in the long

a fine, the plaintiff cannot assign that the nor king's silver entered; yet the Common conusor died before the teste of the dedimus Pleas will permit the conusee to enter the potestatem, because that contradicts the record of the conusance taken by the commissioners, ther, Vin. Abr. Fine, F. b. 6. In the case of which evidently shows, that the conusor was Watts v. Birkett, however, where the conusor then alive, because they took his conusance died before the return of the writ of covenant,

the conusance taken, and before the certificate death of the conusor. 1 Wils. part 1. p. 115. thereof returned, the conusor died; because A fine proceeded as far as the allocation in thereof returned, the conusor died; because this is consistent with the record. 1 Rol. Ab.

peared to be on the 23d December, whereas parties as well as the solicitor, supposed that in fact the fine was not acknowledged till the the fine had passed, and were not aware of 2d of March following, and this was offered the contrary till Michaelmas Term 1827. the evidence, being of opinion, that no proof of parties interested were consenting, the court the time of acknowledging a fine ought to be permitted the fine to pass upon payment of admitted contrary to, or against the chirograph the king's silver. 6 Bing. 275. thereof: and that the record which is the chirograph of a fine cannot be falsified till it land passed, at the time of the fine levied, the is vacated or reversed. Say and Sele Ld. v. fine may be avoided: but where the cognisor Lloyd, 1 Salk. 341: 13 Mod. 40: Bro. P. C.

cord of the fine, which remains in the posses- a good fine in point of estate. 41 Ed. 3. c. sion of the chirographer, deemed the princi- 14: 22 H. 6. c. 43. pale recordum, and the record which remains with the custus brevium, the latter shall be pleading that neither of the parties had any

3 Leon. 183.

neation, mis-entry, &c., or any want of form; but it is otherwise if of substance. Stat. 23. very to uses, the deed need not be set forth; Eliz. c. 3. A fine shall not be reversed for but the pleader is to say, that the fine, &c., small variance which will not hurt it; nor is was levied to such uses, and produce the deeds there occasion for a precise form in a ren- in evidence to prove the uses. 8 W. 3 B. R. der upon a fine, because it is only an amicable assurance upon record. 5 Rep. 38. If a tained by fraud, covin, or deceit, though there fine be levied of lands in a wrong parish, be no error in the process; and that may be though the parish in which they lie be not done either by writ or disceit or averment named, it will be a good fine, and not errone. setting forth the fraud or covin. Cro. Eliz. ous, being an amicable assurance: and a fine 471. of a close may be levied by a lieu conus in a town, without mentioning the town, vill, &c. a purchaser, and the conusee pleads the fine Godb. 440: Cro. Jac. 574: 2 Mod. 47. It in bar, the purchaser may aver the fraud in there be want of an original, or no writs of avoidance of the fine, by 27 Eliz. cap. 4; and covenant for lands in every county; or if such averment is not contrary to the record, there is any notorious error, in the suing out because it admits the fine, but sets it aside for a fine, or any fraud or deceit, &c., writ of er- the covin and fraud in obtaining it. 3 Co. 8 a: ror may be had to make void the fine. Co. Ploud. 49. a. Lit. 9: Cro. Eliz. 469. So if either of the parties dies before finished, &c. And if the tract, it may be avoided by averment, because cognisor of a fine die before the return of the such fine being levied for ends the law has writ of covenant (though after the caption of prohibited, the law will not encourage any the fine) it is said it may be reversed. 3 Salk. evasion of the act, nor suffer such usurious 168.

the conusor's death, the fine may be reversed for error. 3 Mod. 140. But in 2 Ld. Raym. A fraudulent obtaining of a fine, or irregulative said, if a fine be acknowledged belarity therein, cannot be relieved against in

vacation, and before the next term the conu-Hence it is, that in a writ of error to reverse sor dies; though no writ of covenant was sued, after they were armed with the commission the fine was set aside after it had been comand the dedimus issued. Dyer, 89. b: 1 Rol. pleted, because the post fine, or king's silver,
Ab. 757: Cro. Eliz. 469. But the plaintiff in error may say, that after not before, became due and was paid after the

Trinity Term 1807, and the king's silver was compounded for: the clerk of the silver ab-By the chirograph of a fine the caption ap- sconded, taking the money with him. All the But the court refused to admit, Upon affidavit of these facts, and that all the

If the cognisor of a fine had nothing in the or cognisee was seised of an estate of freehold, If there is any difference between the re- whether by right or by wrong, the fine will be

But though a fine may be set aside, by amended, and made according to the former, thing in the estate, at the time of levying the fine; yet those that are privy to the person Fines are not reversible for rasure, interli- that levied the fine, are estopped to plead this plea. 3 Rep. 88. In pleading a fine or reco-

Fines may be avoided where they are ob-

If a fine be levied to secret uses to deceive

So, if a fine be levied upon an usurious concontracts to be supported by the solemn acts If the king's silver was not entered before of the courts of justice against the intention

FINE OF LANDS, VI. VII.

Chancery; but the relief must be sought in on the last day of the term. Reg. Ren. 5 W. the court where the fine was levied, though the officers may be examined and punished, day receive motions either for amending or if they did it criminaliter. And where one is passing fines or recoveries. 6 W. P. Taunton, personated on levying a fine, it was not set aside in equity, but a reconveyance ordered the bar on the last day of any term touching of the land. Prec. Ch. 150, 151. For though the amendment of any fine or recovery, or the Court of Chancery does not set aside a fine any of the proceedings therein. 2 B. & B. so fraudulently obtained, nor send the party 122. so fraudulently obtained, nor send the party aggrieved to the Court of C. P. to get it reversed, yet it considers all those who have uses. 6 W. P. Taunton, 145. The court are taken an estate by such a fine, with notice of not induced to amend fines by the difficulties the fraud, as trustees for the persons who have been defrauded, and decrees a reconveyance of the lands; on the general ground of laying hold of the ill conscience of the parties to rant the amendment. Ibid. 432. Fine make them do that which is necessary for amended by a certified copy of the memorial restoring matters to their situation. 1 Cruise, of a lost deed registered. 7 W. P. Taunton, 314. See Toth. 101: 1 Eq. Abr. 259: 1 Vez. 79. 289: 2 Vern. 307.

In some cases the court will vacate a fine upon motion, to prevent the parties the trouble and expense of a writ of error. 3 Lev. 36: 2 Wils. 115. In Hubert's case (Cro. Eliz. 521), where one levied a fine in the name of relating to fines.—By § 2. after the 31st Dec. another, not privy nor consenting thereto, the 1833, no fine shall be levied or common refine was declared void by a vacat on the roll; covery suffered of lands of any tenure, except and the Lord Keeper in that case said he had where parties intending to levy a fine or sufand the Lord Keeper in that case said he had where parties intending to levy a fine or sulalways noted this difference—if one of my name levy a fine of my land, I may well confess and avoid the fine by showing the especial matter, for that stands well with the fine. But if a stranger who is not of my name levies a fine of my land in my name, I shall not be received to aver, that I did not levy the not be received to aver, that I did not levy the not be received to aver, that I did not levy the name is for that is of suffer a common recovery of lands of any tenure, or suffer a common recovery of lands of any tenure, or suffer a common recovery of lands of any tenure, or suffer a common recovery of lands of any tenure, or suffer a common recovery of lands of any tenure, or suffer a common recovery of lands of any tenure are common recovery of lands of any tenure are common recovery. fine. 2 Atk. 380.

act. See § 12, post, VII.

was taken being left blank, was permitted to be effected by such fine or recovery, or any be supplied by affidavit. 4 W. P. Taunton, of them, cannot be effected by any disposi-589.

In a fine where the original writ is insensi-W. P. Taunton, 644.

raised by purchasers. Ibid. 162. A fine cannot be amended without an affidavit connecting the fine with the deed produced to war-

As to the cases in which a fine is now valid without amendment, see 3 and 4 W. 4. c. 74. § 7. post, VII.

VII. The provisions of the 3 and 4 W.c. 74.

all recognisances and other matters of record; | tenure, under a covenant or agreement alreabut I conceive when the fraud appears to the dy or hereafter to be entered into, before the court, as here, they may well enter a vacat on 1st January, 1834; then, if all the purposes the roll, and so make it no fine: although the intended to be effected by such fine or recoveparty cannot avoid it by averment during the ry can be effected by a disposition under this time that it remains as a record. If a fine be act, the person so liable shall, after the 31st levied by a person who got possession under December, 1833, be subject and liable under a forged deed, equity will decree against the such covenant or agreement to make or to procure to be made such a disposition under A fine wholly or partially reversed before this act as will effect all the purposes intendthe passing of the 3 and 4 W. 4. c. 74. is not ed to be effected by such fine or recovery; but rendered valid under the 7th section of the if some only of the purposes intended to be effected by such fine or recovery can be effectof amending fines.—A record of a fine may be amended (if the king's silver is paid), for misprison of the clerk. 5 Rep. 43.

The concord of a fine being lost before it passes the custos brevium office, the court suffered a new concord and acknowledgment to be prepared, and the fine to be perfected.

W. P. Taunton, 193.

The day were which an acknowledgment in these cases where the numbers intended to The day upon which an acknowledgment in those cases where the purposes intended to tion under this act, then the person so liable as aforesaid, shall, after the 31st December, ble, the court will permit it to be amended. 4 1833, be liable under such covenant or agreement to execute or procure to be executed Fines or recoveries shall not be amended some deed whereby the person intended to

declare his desire that such deed shall have vied or suffered in the lord's court shall, notthe same operation and effect as such fine or withstanding the alteration or change of the
recovery would have had if the same had been actually levied or suffered; and the deed by or suffered in the superior court, be as good,
which such declaration shall be made shall, if valid, and binding, as the same would have
none of the purposes intended to be effected been if the tenure had not been altered or by such fine or recovery can be effected by a changed; and in every other case where any disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had or suffered in a court whose jurisdiction does been actually levied or suffered; but if some not extend to the lands of which such fine or only of the purposes intended to be effected by such fine or recovery can be effected by a dis- such fine or recovery shall not be invalid in position under this act, then the deed by consequence of its having been levied or sufwhich such declaration shall be made, shall, fered in such court, and such court shall be so far as the purposes intended to be effected deemed a court of sufficient jurisdiction for all by such fine or recovery cannot be effected by the purposes of such fine or recovery; and in a disposition under this act, have the same every other case where persons shall have asoperation and effect in every respect as such sumed to hold courts in which fines or comfine or recovery would have had if the same mon recoveries have been levied or suffered, had been actually levied or suffered.

court of lands of the tenure of ancient demesne which at any time before the passing of this which hath not been reversed, and no fine act may have been levied or suffered in such hereafter to be levied of lands of that tenure, unlawful or unauthorised courts, shall not be shall, upon a writ of deceit already brought invalid in consequence of their having been by the lord of the manor of which the lands levied or suffered therein, and such courts were parcel, the proceedings in which are now shall be deemed courts of sufficient jurisdicpending, or upon a writ of deceit which at tion for all the purposes of such fines or recoveany time after the passing of this act may be ries. brought by the lord of the said manor, be reversed as to any person except the lord of the | before or after the passing of this act, the said manor; and every such fine so reversed tenure or ancient demesne has been or shall as to the lord of the said manor shall remain be suspended or destroyed by the levying of as good and valid against the conusors there- a fine, or the suffering of a common recovery of, and all persons claiming under them; and of lands of that tenure in a superior court, and no common recovery already suffered in a su- the lord of the manor of which the lands at perior court of lands of the tenure of ancient the time of levying such fine or suffering such demesne which hath not been reversed, and no recovery were parcel, shall not reverse the common recovery hereafter to be suffered of same before the 1st Jan., 1834, and shall not lands of that tenure, shall, upon a writ of de- by any law in force on the first day of this ceit already brought by the lord of the manor session of parliament be barred of his right to of which the lands were parcel, the proceed- reverse the same, such lands, provided within ings in which are no pending, or upon a writt the last twenty years immediately preceding of deceit which at any time after the passing the 1st Jan., 1834, the rights of the lord of the of this act may be brought by the lord of the manor of which they shall have been parcel said manor, be reversed as to any person ex- shall in any manner have been acknowledgcept the lord of the said manor; and every ed or recognised as to the same lands, shall, such recovery so reversed as to the lord of the from that day, again become parcel of the said said manor shall remain as good and valid manor, and be subject to the same heriots, against and as binding upon the vouchees rents, and services, as they would have been

ing of this act a fine or common recovery ceit for the reversal of any fine or common shall have been or shall be levied or suffered recovery shall be brought after the 31st Dec. in a superior court of lands of the tenure of 1833. ancient demesne, and subsequently a fine or common recovery shall have been or shall be that fines levied in the C. P. at Westminster levied or suffered of the same lands in the of lands in ancient demesne (and recoveries court of the lord of the manor of which the stood on the same footing), were only voidalands had been previously parcel, and the fine or reor common recovery levied or suffered in such superior court shall not have been reversed lands frank fee till the lord, by bringing a previously to the levying of the fine or the writ of deceit, reversed the fine or recovery. suffering of the common recovery in the lord's and restored them to their ancient tenure. By

levy such fine or suffer such recovery shall court, then the fine or common recovery le. such courts shall be unlawful or held without & 4. No fine already levied in a superior due authority, the fines or common recoveries

§ 6. In every case in which at any time, either therein, and all persons claiming under them. subject to if such fine or recovery had not § 5. If at any time before or after the pass- been levied or suffered; and no writ of de-

It has already been observed (ante, IV.),

wholly void; although justice required that it fine or common recovery as to lands of which should remain good against all parties except any person shall at the time of the passing of the lord. Frequently, also, after the lands had this act be in possession in respect of any fine or suffering a recovery in the superior valid, would have barred, nor any fine of comcourt, the owner not being aware of the change mon recovery which, before the passing of thus effected in the tenure, levied a fine or this act, any court of competent jurisdiction suffered a recovery in the lord's court, which, shall have refused to amend: nor shall this according to the latter opinion, was void, on act prejudice or affect any proceedings at the ground of its having been coram non law or in equity, pending at the time of the judice. See further, 1 Real Property Report, passing of this act, in which the validity of

nised within twenty years.

§ 7. If it shall be apparent, from the deed after the death of such party." declaring the uses of any fine already levied or hereafter to be levied, that there is in the in- records of all fines and common recoveries in dentures, record, or any of the proceedings of the Common Pleas at Westminster, and all such fine any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to said court shall from time to time direct; and have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission, shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omis-

§ 9. Provided "that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases

not provided for by this act."

§ 12. "Where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall be- may be made and extracts and copies obtainfore the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, ceedings shall, by the order of the court or such fine or recovery shall not be rendered justices having the control over the same, be valid by this act so far as the same shall have been reversed: and where any person who be made and extracts or copies obtained at would have been barred by any fine or com-mon recovery if valid shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery on the faith of the same being invalid, such fine available in evidence as if obtained from the or recovery shall not be rendered valid by this person whose duty it would have been to have

such reversal the fine or recovery became lact; and this act shall not render valid any been converted into frank fee by levying a estate which the fine or common recovery, if 28, 29.

The inconveniences arising from this state tween the party claiming under such fine or recovery, and the party claiming adversely last sections. 1st. By declaring a fine or re-thereto; and such fine or recovery, if the recovery so levied or suffered, is good against sult of such proceedings shall be to invalidate all other parties, notwithstanding its reversal the same, shall not be rendered valid by this by the lord. 2dly. By rendering valid all act; and if such proceedings shall abate or fines or recoveries in the lord's court, although become defective in consequence of the death the tenure of the lands has been changed. of the party claiming under or adversely to 3dly. By restoring the tenure of ancient such fine or recovery, any person who but for demesne where it has been suspended or des- this act would have a right of action or suit by troyed by fine or recovery in a superior court, reason of the invalidity of such fine or recoverin case the rights of the lord have been recogmence proceedings within six calendar months

§ 13. After the 31st December, 1833, the the proceedings thereof, shall be deposited in such place, and kept by such persons, as the the records of all fines and common recoveries in his Majesty's Court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as his Majesty's justices of as-size for the county palatine of Lancaster for the time being shall direct; and the records of all fines and common recoveries levied and suffered in the Court of Pleas of the county palatine at Durham, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said Court of Pleas shall from time to time direct; and in the meantime the said records and proceedings shall remain respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed: and while the said records and proceedings shall be kept by such persons, searches ed as therefore, and on paying the accustomed fees; and when any of the records and prokept by any other person, then searches may

796 FINES.

made and delivered out the same if this act | which is fully sufficient, when we consider

had not been passed.

to recoveries, see tit. Recovery; for those applicable to estates tail, see tit. Tail; for those For the bill of rights, st. 1 W. & M. st. 2. c. 2. concerning alienations by married women, see that title and Feme Covert.

FINE ADULANDO LEVATO DE TENEMENTO QUOD FUIT DE ANTIQUO DOMINICO. A writ diricted to the justices of C. B. for disannulling a fine levied of lands in ancient demesne, to the prejudice of the lord. Reg. Orig. 15. See tit.

FINES FOR ALIENATIONS, were fines paid to the king by his tenants in chief, for license to alien their lands according to the stat. 1 Ed. 3. c. 12. But these are taken away by the stat. 12 Car. 2. c. 24. abolishing all tenures but fee and common socage.

The premiums given on renewal of leases are also termed fines; and there are fines for alienations of copyholds paid to the lord. See

tits. Lease, Copyhold.

FINES, FOR OFFENCES. Fine, in this sense, is amends, pecuniary punishment, or recompense for an offence committed against the king and his laws, or against the lord of a manor. In which case a man is said finem facere de transgressione cum rege, &c. Reg. Jud. f. 25. a. Cowell.

It seems that originally all punishments were corporal; but that after the use of money, when the profits of the courts arose from the money paid out of the civil causes, and the fines and confiscations in criminal ones, the commutation of punishments was allowed of, and the corporal punishment, which was only in terrorem, changed into pecuniary, whereby they found their own advantage.

This begat this distinction between the greater and the lesser offences; for in the crimina majora there was at least a fine to the king, which was levied by a capiatur; but upon the lessor offences there was only an amercement which was affeered, and for which a distringas, or action of debt, lay. 2 New

The discretionary fines (and discretionary length of imprisonment) which the courts of justice are enabled to impose, may seem an exception to the general rule, that the punishment of every offence is ascertained by the But the general nature of the punishment is in these, as in other cases, fixed and determinate; though the duration and quantity of each must frequently vary, from the aggravations, or otherwise, of the offence, the quality and condition of the parties, and from innumerable other circumstances.

The quantum in particular of pecuniary fines neither can nor ought to be ascertained by an invariable law. Our statute law, therefore, has not often ascertained the quantity of to any suit) it was then denominated a fine. fines, nor the common law ever; it directing certain offences to be punished by a fine in when any such fine was imposed, to inquire general, without specifying the certain sum by a jury quantum inde regi dare valeat per

that however unlimited the power of the court For the provisions of the act relating solely may seem, it is far from being wholly arbihas particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted; and the same statute further declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory of the old constitutional law; and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby many times, undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit. 2 Inst. 48.

The reasonableness of fines in criminal cases has also been usually regulated by the determination of Magna Charta, c. 14. concerning amercements for misbehaviour by the suitors in matters of civil right. "Liber homo non amercietur pro parvo delicto, nisi se-cundum modum ipsius delicti, et pro magno delicto, secundum magnitudinem delicti; salvo contenemento suo: et mercator eodem modo, salva mercandisa; et villianus eodem modo amercietur, salvo wainagio suo." A rule that obtained even in Henry II.'s time (Glan. l. 9. cc. 8. 11.), and means only, that no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear: saving to the landholder his contenement or land; to the trader his merchandize; and to the countryman his wainage or team and instruments of husbandry. In order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms (sit in misericordia), shall be set, ponatur, or reduced to a certainty by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement of a precise sum, was usually performed in the superior courts by the assessment or affeerment of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the stat. West, 1.c. 18; and then the judges estreated them into the Exchequer. F. N. B. 76. But in the courtleet and court-baron it is still performed by affeerors or suitors sworn to afferee, that is, tax and moderate the general amercement according to the particular circumstance of the offence and the offender: the affeeror's oath is conceived in the very terms of Magna Charta Fitz. Surv. c. 11. Amercements imposed by the superior courts on their own officers and ministers were affeered by the judges themselves; but when a pecuniary mulct was inflicted by them on a stranger (not being party And the ancient practice was, 8 Rep. 40.

connum, salva sustentatione sua et uxoris, et power of fining a defendant for contempt com-liberorum suorum. Gilb. Exch. c. 5. And mitted by him in the course of addressing since the disuse of such inquest, it is never the jury. 4 Barn. & Ald. 329.

Every court of record may enjoin the peoable to pay, without touching the implements ple to keep silence under a pain; and impose of his livelihood: but to inflict corporal pun- reasonable fines, not only on such as shall be ishment, or a limited imprisonment, instead convicted before them of any crime on a of such fine as might amount to imprison-ment for life. And this is the reason why shall be guilty of any contempt in the face of fines in the king's court are frequently de-the court; as by giving opprobrious language nominated ransoms, because the penalty must to the judge, or disturbing the court, or obotherwise fall upon a man's person unless it stinately refusing to do their duty as officers be redeemed or ransomed by a pecuniary fine. of the court. 11 H.6. 12. b.: 1 Rol. Ab. 219: Mirr. c. 5. § 4: Lamb. Eir. 575. According 8 Co. 38: 11 Co. 43: Cro. Eliz. 581: 1 Sid. to an ancient maxim, qui non habet in crumena luat in corpore. Yet where any statute speaks both of fine and ransom, it is holden of justice to answer a writ, the offender doing that the ransom shall be treble to the fine at it shall be fined for the contempt. But there least. Dyer, 232. See 4 Comm. 378-380. has been a difference made where it is done But Lord Coke says, that such fine and ransom are all one. 1 Inst. 127.

I. Who may fine and amerce, and for what. II. How fines, &c. may be mitigated and recovered, and to whom they are payable.

I. The House of Lords in cases of breach of privilege possesses the power (recognised by the 3 and 4 W. 4. c. 90. § 23.) to inflict a fine, and it would seem to award imprison- dictment, the court may fine them. 1 Lil. ment for a term certain. The House of Com-mons formerly claimed for itself a similar sworn he may be fined. 7 H. 6. c. 12. And power to punish offences against its dignity if one of the jury depart without giving his verby fine and imprisonment, but its authority to dict; or any of the jury give their verdict to fine, which was questioned in the most arbi- the court before they are all agreed, they may trary period of our history, was at length re- be fined. 8 Rep. 28: 40 Ass. 10. pudiated by its own members; and since the restoration of Charles II. its right to imprison of a court-leet, have a discretionary power, has been restricted to the duration of the ses- either to avoid a fine or amercement for consion.

and pleasure of the king, that is intended of leet may either amerce or fine an offender, his judges, who are to impose the fine. 4 Inst. upon a presentment, &c. for an offence not capital, within his jurisdiction. Keilw. 66: prison a person (except as aftermentioned.) Kitchin, 43.51. And such a court may fine for an offence committed in court in their view, or by confession but not fine, as the constables at the petit sessions. 11 Co. 44: 1 Rol. Rep. 74: 11 Co. 621. A man shall be fined and imprisoned 43. b. Also some courts cannot fine or imfor all contempts done to any court of record, prison, but amerce, as the county, hundred, against the commandment of the king's writ, &c. 11 Co. 43. b. But some courts can nei-&c. 9 Rep. 60

to make an order to prohibit the publication con, &c., or their commissionaries, and such of the proceedings pending a trial likely to who proceed according to the canon, or civil continue for several successive days, and to law. 11 Co. 44. a. punish disobedience to such order by fine. Rex. v. Clement, 4 Barn & A. 218: Price, 68. whereon an inquest ought to be taken, be in-And if the offending party being summoned terred, or suffered to lie so long, that it putrefy to attend the court to answer for the contempt before the coroner hath viewed it, the gaoler, by order issued for that purpose should not or township, shall be amerced. 1 Keb. 278; appear, the court has jurisdiction to impose a 2 Hawk. P. C. If any homicide be commitfine on him in his absence. In re Clement, ted, or dangerous wound given, whether with 11 Price, 68. A judge at Nisi Prius has the or without malice, or even by misadventure,

Every court of record may enjoin the peo-145: 6 Term Rep. K. B. 530.

If a person is arrested coming to the courts by the plaintiff in the writ, and a stranger, who it is said shall not be fined. 9 H. 6. c. 55: 1 Danv. 469.

If an officer of the court neglects his duty, and gives not due attendance; a clerk of the aggravated; as, also, how they may be peace doth not draw an indictment well in matter of form, or return thereof, upon a certiorari to remove the indictment in B. R.; if a sheriff, &c. make an insufficient return of a habeas corpus issuing out of B. R., &c., or if justices of the peace proceed on an indict-ment after a certiorari issued to move the in-

Also the sheriff in his torn, and the steward tempt to the court; as for a suitor's refusing Where a statute imposes a fine at the will to be sworn, &c., and the steward of a court-

ther fine, imprison, nor amerce; as ecclesias-A court of general gaol delivery has power tical courts held before the ordinary, archdea-

If a dead body in prison, or other places,

or in self-defence, in any town, or in the lanes | sions, it may be mitigated at the King's Bench. or fields thereof, in the day-time, and the of- 1 Vent. 336. A defendant being indicted for fender escape, the town shall be amerced; an assault, confessed it, and submitted to a and if out of a town, the hundred shall be small fine; and it was adjudged that in such amerced. 3 Inst. 53: 4 Inst. 183. Cro. Car. a case he may produce affidavits to prove on 252: 3 Leon. 207: 2 Inst. 315: Dyer, 210.

that regularly there was a fine or amercement in all actions; for if the plaintiff or demandant did not prevail, it was thought reasonable that he should be punished for his unjust vexation; and therefore there was judgment against him, quod fit in misericordia pro fine, if the clerk in court will undertake to falso clamore. 8 Co. 39. F. N. B. 75.

Hence, when the plaintiff takes out a writ, the sheriff, before the return of it, was formerly obliged to take pledges of prosecution, which, when fines and amercements were considerable, were real and responsible persons, and answerable for those amercements; but being now so very inconsiderable that they are never levied, they are only formal pledges R. to give a defendant leave to speak with the entered, viz. John Doe and Richard Roe. 1

Saund. 227. See this Dict. tit. Bail.

the defendant, it was to be entered with a misericordia, or a capiatur; and herein the account, an inclination to set a moderate fine difference is, that if it be an action of debt, or on behalf of the king. Wood's Inst. 653. And founded on a contract, the entry is ideo in mis- in cases where costs are not given by law, ericordia, without assessing any sum in cer- after a prosecutor has accepted costs from the tain, which was afterwards affecred by the defendant, he cannot aggravate the fine; becoroners in the proper county; but if it were cause having no right to demand costs, if he in action of trespass, the court set the fine, takes them, it shall be intended by way of and levied it by a capiatur. 8 Co. 60: 1 Rol. satisfaction of the wrong. 2 H.P. C. 292. Ab. 212. 219: Cro. Eliz. 844: Cro. Jac. 255. See this Dict. tit. Costs. Therefore,

and the like; if judgment pass against the at his charge; and wherever the law puts the defendant in a court of record, he shall be king to any charge for the support and profined. 8 Rep. 59. But in actions which have not something of fraud, or deceit to the court; if the defendant come the first day he is called, and tender the thing demanded to the remains in prison, it is said the king shall be plaintiff, he is not to be fined. 4 Rep. 49: 8 satisfied the fine out of the offender's estate. Rep. 59: 60. 99: 3 Ass. 9: 22 Ass. 82: 1 A Leon. c. 393. By the common law, the king or lord may,

Fine.

II. A fine may be mitigated the same term it was set, being under the power of the court during that time; but not afterwards. T. Raym. 376. And fines assessed in court by judgment upon an information, cannot be afterwards mitigated. Cro. Car. 251. fine certain is imposed by statute on any conviction, the court cannot mitigate it: but if to have one. Hob. 129: Rast. Ent. 553: Co. the party comes in before conviction, and submits to the court, they may assess a less fine; for he is not convicted, and perhaps never might. The court of the Exchequer may mitigate a fine certain, because it is a court of sentment or affeerment, and also to show that equity, and they have a privy seal for it.

If an excessive fine is imposed at the ses-

the prosecutor, that it was son assault, and Besides fines imposed for offences, it seems, that in mitigation of the fine; though this cannot be done after he is found guilty. 1 Salk. 55. If a person is found guilty of a misde. meanor upon indictment, and fined, he cannot move to mitigate the fine, unless he appear in person; but one absent may submit to a pay it. 1 Vent. 206, 207: 1 Salk. 55: 2 Hawk. 446.

> The Court of B. R. refused to mitigate a fine imposed by the Court of Great Sessions in Wales, on the sheriff of the county for not attending; the record whereof was removed by certiorari. 8 Term Rep. K. B. 615.

It is a common practice in the Court of B. prosecutor, i. e. to make satisfaction for the costs of the prosecution, and also for damages In all actions, where the judgment is against sustained, that there may be an end of suits; the court at the same time showing, on that

All fines belong to the king, and the reason In actions quare vi et armis, as trespass, is, because the courts of justice are supported

All capiatur fines are taken away by stat. at their election, distrain, or bring an action 4 and 5 W. & M. c. 12. See tit. Capias pro of debt for a fine or americament. Cro. Eliz. 581: Savil. 93: Rast. Ent. 151. 553. 606: 2 H. 4. 24. b.; 10 H. 6.7: Raym 68. But with respect to fines set in inferior courts, every avowry, or declaration of this kind, ought expressly to show that the offence was committed within the jurisdiction of the court, for if it were not, all the proceedings were coram If a non judice, and a court shall not be presumed to have jurisdiction where it doth not appear Ent. 572. Also it is advisable to allege, that the offence was committed, as well as presented, and to show the names of the presentors and the affeerors in setting forth a pre-3 proper notice was given of holding the court But for this, see Hawk. P. C.

Of common right, a distress is incident to

every fine and amercement, in a torn or leet, position, and making satisfaction, &c. The for offences within the jurisdiction thereof; same with finem facere, mentioned in Leg. H. but if the offence were only the neglect of a 1. c. 53. And in Brompton, p. 105. and in duty created by custom, and of a private nature, it is clear that there must be a custom to warrant a distress, and perhaps such custom is also necessary, though the duty be of a public nature. 2 Hawk. P. C.

Also the sheriff or lord may for such fines or amercements distrain the goods of the offender even in the highway, or in land not holden of the lord, unless such land be in possession of the crown. 1 Rol. Ab. 670: 2 Inst. 104. But such fines and amercements being for a personal offence, no stranger's beasts can lawfully be distrained for them, though they have been levant and couchant upon the lands of the offender. Owen, 146: Noy, 20.

A joint award of one fine against divers persons is erroneous; it ought to be several against each defendant, for otherwise one who hath paid his part might be continued in prison till the others have paid theirs, which would be in effect to punish for the offence of

another. 2 Hawk. P. C.

A fine imposed by the Court of K. B. upon a defendant convicted of a misdemeanor, may be levied by a writ of levari facias, issued out of that court by the sheriff. 2 B. & A. 609.

The manner in which fines imposed in the aiding, and abetting therein, are capital felodifferents courts, &c. are to be returned and levied, is regulated by several recent statutes which are shortly noticed under the tit. Es-

FINES TO THE KING; Fines le Roy.] Under this head were included fines for original writs. On originals on trespass on the case, where the damages were laid above 40l. a fine was paid, viz. from 40l. damages to 100 marks (66l. 13s. 4d.), 6s. 8d. From 100 marks to 100l. the fine was 10s. From 100l. to 200 marks, 13s. 4d.; from 200 to 250 marks, 16s. 8d.; from 250 to 300 marks or 200l. it is 1l. fine; and so for every 100 marks more, you paid 6s. 8d., and every 100l. further 10s. Every 100l. paid 10s. fine. R. H. 6 W. & M. Fines were also paid for original writs in debt; for every writ of 40l. debt, 6s. 8d., and if it were of 100 marks, but 6s. 8d., and for every 100 marks, 6s. 8d., &c.; also for every writ of plea of land, if it were not a writ of right patent, which was for the yearly value of five marks, 6s. 8d., and so according to that rate. 19 H. 6. 44.: 7 H. 6. 33: New Nat. Br. Fine of Lands. See tit.

FINE PRO REDISSEISINA CAPIENDA. A Writ that lay for the release of one imprisoned for a redisseisin, on payment of a reasonable fine.

Reg. Orig. 222.

FINE FORCE, is where a person is forced to do that which he can no ways help; so that it seems to signify an absolute necessity or constraint not avoidable. Old Nat. Br. 63. Stat. 35 H. 8. c. 12.

FINIRE. To fine, or pay a fine upon com-lassistance are payable to the first turncock

Hovedon, p. 783.

FINITIO. Death, so called; because vita

finitur morte. Blount.

FINORS OF GOLD AND SILVER. Are those persons who purify and separate gold and silver from coarser metals, by fire and water. They are not to alloy it, or sell the same, save only to the master of the mint, goldsmiths, &c. Stat. 4. H. 7. c. 2.

FIRDFARE AND FIRDWITE. See Ferd-

fare and Ferdwit.

FIRDERINGA. A preparation to go into

the army. Leg. H. 1.

FIRE-ARMS. By stats. 53 G. 3. c. 115; 55 G. 3.c. 59; regulations are made to insure the proper and careful manufacturing of firearms in England: and for proving the barrels of fire-arms, usually called small arms, at the proof-house of the Gun-maker's company in London; or at the gun barrel proof-house in Birmingham. These acts do not extend to arms for military service.

By 9 G. 4. c. 31. § 11. unlawfully and maliciously shooting at any person, or by drawing a trigger, or in any other manner attempting to discharge any loaded fire-arms at any person with intent to murder, and counselling,

And by § 12. the like of such acts as are done with intent to maim, disfigure, disable, or do some grievous bodily harm, or to resist the lawful apprehension, &c. of the offender.

Under 43 G. 3. c. 58. (now repealed,) it was decided that the offence of shooting was complete, if a pistol is fired so near, and in such a direction, as to be likely to kill or do some bodily harm with such intent, though the pistol be loaded with gun-powder and paper only.

FIRE AND FIRE-COCKS. By stat. 14 G. 3. c. 78. (the last building act) churchwardens in London, and within the bills of mortality, are to fix fire-cocks, &c. at proper distances in streets, and keep a large engine and handengine for extinguishing fire, and ladders and fire-escapes, under the penalty of 10l. § 75. And to prevent fires, workmen in the city of London, &c. must erect party-walls between buildings of brick or stone, of a certain thickness, &c. under penalties, inflicted by various sections of the act. On the breaking out of any fire, all the constables and beadles shall repair to the place with their staves to protect property, and be assisting in putting out the fire, and causing people to work. § 85. No action shall be had against any person in whose house or chamber a fire shall accidentally begin. § 86. See this Dict. tit. Waste, and also stat. 6 Anne, c. 31. now said to be made perpetual. 1 Inst. 530. in n. 7.

By the said stat. 14 G. 3. c. 78. rewards for

10s.; to the first engine not exceeding 30s.; the second not exceeding 20s.; the third 10s. To be paid by the churchwardens or overseers. but not without the approbation of an alderman or justice of the peace. The churchwardens, &c. to be repaid by the inhabitant if the fire begins in a chimney. §§ 76, 77, 78. Insurance offices may lay out the insurance in rebuilding the premises, if the party suffering does not give security to do so: or in case of disagreement, not settled within 60 days. § 83.

Firemen exempt from being impressed. § 82. Penalty on servants firing houses by negligence, 100l. or eighteen months' imprisonment. § 84. Restrictions on boiling turpen- Leg. Inc. c. 34. tine, 25 G. 3. c. 77. See this Dict. tit. Arson,

Burning, Police.

FIREBARE, Sax.] A beacon or high tower by the sea-side, wherein are continual lights, either to direct sailors in the night, or to give warning of the approach of an enemy. See tit. Beacon.

FIREBOTE. Fuel for firing for necessary use, allowed by law, to tenants out of the lands, &c. granted them. See Estovers.

FIRE-ORDEAL. See tit. Ordeal. FIRE-WORKS. No person whatsoever shall make, sell, &c. squibs, rockets, serpents, &c. or cases, moulds, &c. for making the same; and every such offence shall be adjudged a common nuisance, and persons making or sel-

ling squibs, &c. shall forfeit 51.

Persons throwing or firing squibs, &c., or suffering them, &c. to be thrown or fired from their houses, incur a penalty of 20s. Likewise persons throwing, casting or firing, or aiding or assisting in the throwing, casting or firing of any squibs, rockets, serpents, or other fireworks, in or into any public street, house, or shop, river, highway, road or passage, incur the like penalty of 20s., and on non-payment may be committed to the house of correction. Stat. 9 and 10 W. 3. c. 7.

This statute does not take from any person injured, by throwing of squibs, &c. the remedy at common law; for the party may maintain a special action on the case or trespass, &c. for recovery of full damages. And as the above statute declares the offences to be common nuisances, they may clearly also be prosecuted by indictment. 2 Burn's Just. Fireworks: Russell, i. 47. 303.

By 3 G. 4. c. 126. § 121. a penalty of 40s. is imposed for making bonfires, or wantonly letting off any fire-work within eighty feet of the

centre of any turnpike road.

FIRE AND SWORD. Letters of; these anciently issued from the privy council in Scotland, directed to the sheriff of the county, authorising him to call for the assistance of the county to dispossess a tenant retaining possession, contrary to the order of a judge, or judgment of a court.

FIRMA. Victuals or provisions; also rent, &c. See tit. Farm.

FIRMA ALBA. Rent of lands let to farm. paid in silver not in provision for the lord's house. See Alba Firma.

FIRMA NOCTIS. A custom or tribute anciently paid towards the entertainment of the king for one night according to Domesday. Comes Meriton T. R. E. reddebat firman unius noctis, &c. i. e. provision or entertainment for one night, or the value of it. Temp. Reg. Edw. Confess.

FIRMAM REGIS. Anciently pro villà

regia, seu regis manerio. Spelm.

FIRMATIO. Firmationis Tempus. Doe season, as opposed to buck season. 31 H. 3. Firmatio signifies also a supplying with food.

FIRMURA. Free firmage. W. de Cressi gave to the monks of Blyth a mill, cum libera firmura of the dam of it. Reg. de Blyth. This has been interpreted liberty to scour and repair the mill dam, and carry away the soil,

Blount.

Sec. FIRST-FRUITS, Primitiæ.] The profits after avoidance of every spiritual living for the first year, according to the valuation thereof in the king's books. These were given in ancient times to the pope throughout all Christendom, and were first claimed by him in England of such foreigners as he bestowed benefices on here by way of provision; afterwards they were demanded of the clerks of all spiritual patrons, and at length of all other clerks on their admission to benefices; but upon the throwing off the popes' supremacy in the reign of Henry VIII. they were translated to, and vested in, the king, as appears by the stat. 26 H. 8. c. 3. and a new valor beneficiorum was then made, by which the clergy are at present This valor beneficiorum is what is commonly called, the king's books; a transcript of which is given in Ecton's Thesaurus and Bacon's Liber Regis. And for the ordering thereof, there was a court erected, 32 H. 8. but dissolved soon after. See Valor Ecclesiasticus.

Though by stat. 1. Eliz. c. 4. these profits are reduced again to the crown, yet the court was never restored; for all matters formerly handled therein, were transferred to the Exchequer, within the survey of which court

they now remain.

By stat. 26 H. 8. c. 3. (extended to Ireland by Irish act, 28 H. 8. c. 26.) the lord chancellor, bishops, &c. are empowered to examine into the value of every ecclesiastical benefice and preferment in their several dioceses; and clergymen entered on their livings before the first fruits are paid or compounded for, are to forfeit double value. But stat. 1 Eliz. c. 4. ordains, that if an incumbent on benefice do not live half a year, or is ousted before the year expire, his executors are to pay only a fourth part of the first fruits: and if he lives the year, and then dies, or be ousted in six months after, but half the first-fruits shall be paid; if a year and a half, three quarters of otherwise. The archbishops and bishops have injuring ponds and private fisheries, are refour years allowed for the payment, and shall pealed. pay one quarter every year, if they live so long upon the bishopric: other dignitaries in the church pay theirs in the same manner as rectors and vicars. By the stat. 27 H. 8. c. 8. no tenths are to be paid for the first year, as then of fishing therein, is a misdemeanor; and the first-fruits are due, and by several statutes 'taking or destroying, or attempting to take or of Anne, if a benefice be under 50l. per annum destroy, fish in any water not being such as clear yearly value, it shall be discharged of the payment of first-fruits and tenths.

had at first been thus indirectly taken from it, before a justice, to a penalty not exceeding 51. not by remitting the tenths and first-fruits over and above the value of the fish taken or entirely, but by applying these superfluities of destroyed. the larger benefices to make up the deficiencies of the smaller; for this purpose she in the daytime; but any person so angling in granted a charter, confirmed by stat. 2 Anne, such water as first mentioned is liable to a c. 11. whereby all the revenue of the first-fruits penalty of 5l., and in such water as last menand tenths is vested in trustees for ever, to tioned to one of 2l. on conviction before a jusform a perpetual fund for the augmentation of tice. poor livings under 50l. a year. This is usually \$35. Authorizes the owner of the ground, called Queen Anne's bounty, which has been water, or fishery, or his servants, to demand still further regulated by subsequent statutes; of any person offending against the act, his though it is to be lamented that the number of rods, lines, or other implements, and to seize such poor livings is so great, that this bounty, extensive as it is, will be slow, and almost impressive as it is a slow as it is a slo perceptible in its operation; the number of angling in the daytime, and whose implements livings under 50l. certified by the bishops at the commencement of the undertaking being 5597; the revenues of which, on a general average, did not exceed 23l. per ann. See 1 Comm. 285. 286. cum notis, ib. See also the stats. 5 Anne, c. 24: 6 Anne, c. 27: 1. G. 1. c. 10: and 45 G. 3. c. 84.

A similar application was made of these profits in Ireland under the board of firstfruits by the Irish act 2 G. 1. c. 15, and many subsequent statutes; all of which were repealed by the 3 and 4 W. 4. c. 37. and the payment of first-fruits abolished, so far as relates to that country.

FISH, FISHERIES, AND FISHING.

The taking of fish in rivers and great waters, where they were unrestrained of their natural liberty, has never been considered larceny at common law. But it was otherwise of fish contained in a trunk or net, on the principle that when animals, though feræ nature, are fit for the food of man, and are reclaimed or confined, larceny may be committed of them. 2 Inst. 109: 1 Hale, 511: 2 Hawk. c. 33. § 41: 4 Comm. 235: 2 East, P. C. 607. And some contended it was larceny to steal fish from a pond, if the pond were private enclosed property, and of such kind and dimensions that the fish within it might be considered as restrained of their natural liberty, and liable to be taken at any time, at the vember, or under size, &c. And by stat 1 G. 1. pleasure of the owner. 1 Hawk. c. 33. § 39: 2 East, P. C. 610: 2 Russ. 191.

This offence is now, however, declared by statute to be a misdemeanor. See post.

By the 7 and 8 G. 4. c. 27. all former sta-

them; and if two years, then the whole; not tutes relative to the offences of fishing in and

By § 34. taking or destroying fish in water running through or in land adjoining or belonging to the dwelling-house of any person who is the owner of such water, or has a right aforesaid, but which is private property, or in which there is any private right of fishing, This queen also restored to the church what subjects the offender, on summary conviction

These enactments do not extend to angling

are taken or delivered up, are exempted from any further damages or penalty.

For the provisions of the act with respect to

oysters, see that title.

Numerous statutes, commencing with the reign of Edward I., have been passed for the preservation of salmon and other fish in rivers. and regulating the size and time at which they, as well as sea-fish, may be taken. Many of the enactments are conflicting and obscure; and the law on the subject stands greatly in need of revision and consolidation. The following is a very general abridgment of some of the principal acts:—

By stat. 2 H. 6. c. 15. no person may fasten nets, &c. across rivers to destroy fish, and disturb passage of vessels, on pain of 51.

By stat. 1 Eliz. c. 17. (made perpetual by stat. 3 Car. 1. c. 4.) no fisherman shall use any net or engine to destroy the fry of fish: and persons using nets for that purpose, or taking salmon or trout out of season, or any fish under certain lengths, are liable to forfeit 20s., and justices of the peace and the lords of leets have power to put the acts in

The stat. 4 and 5 Anne, c. 21. was made for the increase and preservation of salmon in rivers in the counties of Southampton and Wilts; requiring that no salmon be taken between the 1st of August and the 12th of Noc. 18. (altered as to the river Ribble. by stat. 23 G.2. c. 26.) salmon taken in the rivers Severn, Wye, Were, Tees, Ouse, &c. are to be 18 inches long at least; or the persons catching them shall forfeit 5l.; and sea fish sold must

bot 16 inches, brill and pearl 14, codlin, bass, the sale of cels by stat. 42 G.3. c. 19. and mallet 12, sole and place 8, flounders 7, By this latter act every master of

ing 30s, to the poor and the fish.

Besides the above, thus particularised, the and if after such arrival, he shall wilfully des-Besides the above, thus particularised, the following statutes relate to the same subject. — West. 2. (13 E. 1.) c. 47. and 13 R. 2. c. 19. (altered by 9 Anne, c. 26: 1 G. 1. st. 2. c. 18: 123 G. 2. c. 26: 43 G. 3. c. 1xi.; and 45 G. 3. c. 1x -14 H. 6. c. 6. as to foreigners selling fish.— stat. 2 G. 3. c. 15. is repealed by stat. 50 G. 3. 11 H. 7. c. 23. as to pickled salmon and herrings.—2 and 3 E. 6. c. 6. forbids the granting licenses to fish in foreign parts.—5 Eliz. c. 5. as to toll of fish.—1 Jac. 1. c. 23. as to trespass by herring fishers.—3 Jac. 1. c. 12. as ployed in the fisheries on the coasts. The exto wears on the sea shore.—13 and 14 Car. 2. emption from being impressed, contained in c. 28. as to pilchard fishery.—15 Car. 2. c. 22. of 50 G. 3. c. 108. extends to a lobster 16. Packing herrings. Newfoundland fishery.—30 Car. 2 c. 3. Severn fishery.—4 Anne, goland, to supply London with that fish. 1 c. 15. Stower fishery.-2 G. 2. c. 19. Oyster fishery in Medway, &c. (and see tit. Oysters.) -9 G. 2. c. 33. Lobster fishery on the coast gerford market, which has been established of Scotland .- Stat. 30 G. 2. c. 21. regulates the fishery of the Thames and Medway .- 11 G. 3. 15 G. 3. c. 46.—Salmon fishery in the Tweed.-16 G. 3. c. 36.-Cornwall Pilchard fisheries as relates to the commerce and navifishery; and see also stat. 31 G. 3. c. 45: 45 gation of the country, see tit. Navigation G. 3. c. 102: 48 G. 3. c. 68.—Salmon fishery Acts, V. in England, 58 G. 3. c. 43.

particular supply and sale of fish in London 51. which is by 2 and 3 W. 4. c. 79. continued

and Westminster, viz.

Stat. 17 R. 2. c. 9. appoints the mayor of London conservator of the Thames. Stat. 10 and 11 W. 3. c. 4: 9 Anne, c. 26: 3 G. 3. c. continued by several subsequent acts. And 27: and 2 G. 3. c. 15. for regulating Billingsgate market; the water bailiff's duty, and the Fishmonger's Company. The 39 G. 3. c. 118. authorises the sale of fish in Billingsgate market by retail. A long and particular stat. c. 81: 27 G. 3. c. 10: 35 G. 3. c. 56: 39 G. 3. 22 G. 2. c. 49. to establish an open fish mar- c. 100: 48 G. 3. c. 110: 51 G. 3. c. 101: 52 G. ket in Westminster, was never put in force. 3.c. 153: 55 G. 3. c. 94: 1 and 2 G. 4. c. 79: See stat. 30 G. 3 c. 54. which vests the estate 5 G. 4. c. 64: 7 G. 4. c. 34: 11 G. 4. and 1 W. and property of the trustees of Westminster | 4. c. 54. fish market in the Marine Society. 24 G. 2. c. 44. was passed to protect officers in their 2 c. 23: 26 G. 3. c. 81. 106: 48 G. 3. c. 110. duty under the several statutes against forestallers of fish, &c.—Finally, the stats. 29 G. 2. c. 39. and 33 G. 2. c. 27. were made to of the fisheries on the coast of Ireland, see regulate the sale of fish at the first hand in stat, 59 G. 3. c. 109: 1 and 2 G. 4. c. 79: 5 G. the fish markets in London and Westminster; 4. c. 64: 7 G. 4. c. 34: 11 G. 4. and 1 W. 4. and to prevent salesmen of fish buying fish to c. 54. sell again on their own account; and to allow bret and turbot, brill and pearl, although un- tain districts on the coast of Newfoundland, der the respective dimensions mentioned in 1 Labrador, &c., see stat. 59 G. 3. c. 38. G. 1. c. 18. to be imported and sold; and to punish persons who shall take or sell any the Gallipagos islands, he who strikes a whale spawn, brood, or fry of fish, unsizeable fish, with a loose harpoon is entitled to receive or fish out of season, or smelts under the size half the produce from him who kills it. But

be of the length following, viz. bret and tur-1 of five inches. These acts are amended as to

By this latter act every master of a vessel whiting 6 inches long, &c. on pain of forfeit is to give a true account of the several sorts of fish brought alive to the Nore in his vessel, Maul. & Selw. Rep. 223.

A regular fish market is now held at Hunand re-built under the provisions of an act of

the 11 G. 4. c. 70.

For so much concerning the several national

The Newfoundland Fisheries are at present Various statutes have been made as to the regulated by stats. 28 G. 3. c. 35: 5 G. 4. c.

till 31st Dec. 1834.

Greenland Fishery .- Stats. 4 and 5 W. & M. c. 17: 1 Anne, st. 1. c. 16: 44 G.3 c. 35. see 55 G. 3. c. 39.

Southern Whale Fishery .- 42 G. 3 c. 77:

43 G. 3, c. 90: 51 G. 3, c. 34.

British White Herring Fishery.-26 G. 3.

Scotch Fisheries.—13 G. 1. c. 26. 30: 29 G. Scotch Salmon Fisheries .- 9 G. 4 c. 39.

For the encouragement and improvement

For permitting the Americans to fish in cer-

By the custom of the whale fishery among

unless he who strikes a fish continues his do-granted of it, by the express provision of Magminion until he has reduced it into possession, na Charta, c. 16. and the franchise must be any other person who kills it acquires the en- at least as old as the reign of Henry II.

tire property. 1 W. P. Taunt. 241.

However, the first striker is entitled to the fish, though the harpoon may be detached an "exclusive right of fishery in the soil of from the line when the second striker strikes, if the fish be so entangled in the line that he might probably have secured him without the interference of the second striker. 1 Moo. & Malk. 58. And if, while the fish is fast to the harpoon of the first striker, another comes up unsolicited, and so disturbs the fish that he breaks from the first harpoon, and then he strikes him and secures him, the fish still belongs to the first striker. 1 Moo. & Malk. 59.

By the 6 G. 4. c. 105. all former statutes relating to the importation of foreign fish were repealed; and by 6 G. 4. c. 107. all fish of foreign taking or curing, or in foreign vessels, except turbot and lobsters, stock-fish, live eels, anchovies, sturgeon, botargo, and caviare,

are prohibited.

The 6 G. 4. c. 107. prohibiting the importation of foreign fish with certain exceptions, has been repealed, but the clause has been re-

enacted in the 3 and 4 W. 4. c. 52.

FISHING, RIGHT OF, AND PROPERTY OF FISH. It has been held, that where the lord 4 Term Rep. K. B. 439. of the manor hath the soil on both sides the river, it is a good evidence that he hath the right of fishing, and it puts the proof upon him who claims a free fishery; but where a river ebbs and flows, and is an arm of the sea, there it is common to all, and he who claims a privilege to himself must prove it; for if trespass is brought for fishing there, the defendant may justify that the place where, is an arm of the sea, in which every subject of our lord hereditament, and consequently a term for

In the Severn, the soil belongs to the owners of the land on each side; and the soil of the river Thames is in the king, &c., but the fishing is common to all. 1 Mod. 105. He who is owner of the soil of a private river, hath a separate or several fishery; and he that hath free fishery hath a property in the fish, and may bring a possessory action for them; but communis piscaria is like the case of all other

commons. 2 Salk. 637. See post.

There are three sorts of fisheries or piscaries. Free fishery; several (or separate) fish-

ery; and common of piscary.

A free fishery, or exclusive right of fishing in a public river, is a royal franchise; this dif-standing immediately after the drapers, and fers from a several fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil. ter, wardens, and assistants of the Fishmon-It differs also from a common of piscary, in that the free fishery is an exclusive right, the common of piscary is not so; and therefore in after the 10th of June, who are constituted a a free fishery a man has property in the fish court of assistants; and they shall meet once before they are caught: in a common of piscary, not till afterwards: 2 Comm. 39, 40: abuses in fishery, register the names of fisherbut see 1 Inst. 122. (a) n. 7. As to a free men, and mark their boats, &c. fishery no new franchise can at present be FISHGARTH. A dam or wear in a river,

Comm. 417.

The strict definition of a several fishery is another," although it appears to be still an unsettled question, whether a person can have a several fishery without being also owner of the soil. 5 Burr. 2814: 2 Comm. 39: Co. Lit. 122. a. n. 7: Doug. 56. The better opinion, however, is, that although the right must have been originally derived from the owner of the soil, it may exist in a person having no interest therein; and one of the cases already quoted establishes, that by a grant or demise immediately from the owner of the soil, a several right of fishery may be created, and be declared on as such. 5 Burr. 2814.

Common of piscary or fishery is defined to be a liberty of fishery in common with others in a stream or river, the soil whereof belongs to a third person. 2 Comm. 34. It does not differ in any respect from other commonable rights, and trespass will not lie for an injury to it. 2 Salk. 637. See tit. Common.

There may be a prescriptive right in a subject to a several fishery in an arm of the sea.

Primâ facie, every subject has a right to take fish found upon the sea shore between high and low water mark. But such general right may be abridged by the existence of an exclusive right in some individual. 2 Bos. & Pull. 472.

A several fishery enjoyed by a subject in a navigable river, where the tide flows, under a grant before time of memory, is an incorporeal the king hath and ought to have free fishery. years cannot be created in it without decd.

5 Barn. & C. 875.

FISHMONGERS' COMPANY. Formerly the wealthiest and most powerful of the civic associations or companies of the city of London. Originally it consisted of two great bodies: the salt-fishmongers, who were incorporated by letters patent in 1433, during the reign of Henry VI.; and the stock-fishmongers, incorporated by charter from Henry VII. in 1509. These two companies were incorporated into one by Henry VIII. in 1536, under the title of "The Wardens and Commonalty of the Mystery of Fishmongers;" and thus united, they form the fourth city company, before the goldsmiths'.

By stat. 9 Anne, c. 26. there shall be a masgers' Company in London, chosen yearly at the next court of the lord mayor and aldermen

made for the taking of fish, especially in the he has himself affixed to the premises for the

rivers of Ouse and Humber.

FISH POND. One that has a close pond in which there are fish, may call them pisces suos in an indictment, &c. But he cannot call them as bona and catalla, if they be not in trunks. There needs no privilege to make a fish pond, as there doth in case of a warren. Mod. Ca. 143.

By 7 and 8 G. 4. c. 30. § 15. breaking down or destroying the dam of any fishpond, or of any water which is private property, or in which there is any private right of fishery, with intent to take, destroy, or cause the loss of the fish therein, or putting lime or other noxious material therein, with intent to destroy the fish, is declared to be a misdemeanor punishable with transportation for seven vears, &cc.

see tit. Fish.

FISH ROYAL. Whale and Sturgeon which the king is entitled to when either thrown on shore or caught near the coasts. Plowd. 315. See tit. King.

FISK (from fiscus, the Treasury). right of the crown to the moveable estate of a person denounced Rebel. Scotch Dict.

Chattels or articles of a FIXTURES. personal nature which have been affixed to land.

It is a maxim of great antiquity, that whatever is fixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties. the mere act of annexation a personal chattel becomes a parcel of the freehold itself, quicquid plantatur solo solo cedit. This general principle is recognized in almost all of the cases on the subject, and particularly in the following authorities. 10 H. 7. pl. 2: 20 H. 7. 13: 20 H. 7. 26: Co. Lit. 53. a. 4: Co. 63: B. M. P. 34: Amb. 113: 3 Atk. 13: 3 East. 50: Taunt. 190.

The rule has, however, been greatly relaxed in modern times, and many exceptions to it

established in favour of trade.

chiefly arise between three classes of persons: 1. Landlord and tenant: 2. The executors of tenant for life, or tenant in tail, and the remainder man or reversioner: 3. The personal like. 2 Freem. 249: Mos. 112: 1 P. W. 94: representative and the heir of the deceased Str. 1141: 3 Atk. 12: Amb. 113: 1 H. B. 260: owner of the inheritance.

I. Landlord and Tenant.—It is by no 191: 2 B. & B. 58: 1 B. & C. 77. means clear from the old authorities that an exception of any kind from the general rule removed where they are so attached to the was formerly allowed to lesses; but the privilege of a tenant to remove fixtures set up substance and fabric of the house. For it apin relation to trade was authoritatively laid pears that a tenant cannot remove an article, down by C. J. Holt in Poole's case, 1 Salk. 368, and has been recognised in a series of substantially united to the building that its modern decisions.

result of the cases between landlords and erections which may be considered as permatenants.

1. A tenant may take away things which 3 Esp. 11.

purpose of trade and manufacture.

For instance, vessels and utensils of trade, such as furnaces, coppers, brewing vessels, fixed vats, salt-pans and the like. 1 Salk. 368: 3 Atk. 13: Amb. 113: 1 H. B. 259: 3 East, 56: B. N. P. 34.

Machinery in breweries, collieries, mills, &c., such as steam-engines, cider-mills, and the like. 3 Atk. 12: Amb. 114: B. N. P. 34: 3 East, 53: 3 Esp. 11: 2 B. & A. 165.

Buildings for trade, as a varnish house; at least if built on plates laid on brickwork (2 East, 88); and so, it would seem, sheds called Dutch barns, formed of uprights rising from a foundation of brickwork. 3 Esp. 11. But see 3 East, 47. 55, 56.

It has not been distinctly established that a tenant may remove substantial and permanent As to taking or destroying fish in fishponds, additions to the premises, although built exclusively for the convenience of his trade; such as lime-kilns, pottery or brick-kilns (see 4 T. R. 504: 2 B. & C. 608); windmills (see 4 Leon. 241: 6 T. R. 377: 1 B. & B. 506) or watermills, or workshops, storehouses, and The buildings of that description. Neither is it satisfactorily laid down, that erections of a less substantial nature than these are in all cases removable by a tenant; as for example, the furnaces and flues of a smelting-house, glasshouse, &c., or the stones and floors of a malting-house. Cases of this kind are subject to considerable doubt, particularly where the removal of the article would greatly deteriorate the freehold to which it is attached, or where the structure and substance of the thing itself must be destroyed before it can be taken

2. Besides trade fixtures, a tenant may remove certain articles which he has put up for the ornament and furniture of his house, and for his domestic use and convenience.

Of the first class the authorities furnish the

following examples:-

Hangings, tapestry, and pier glasses nailed to the walls or pannels of a house; and even, Questions respecting the right to fixtures it is said, where they are put up in lieu of wainscot, marble, or other ornamental, as chimney-pieces; marble slabs, window blinds, 2 Saund. 259. n. 11: 3 East, 53: 7 Taunt.

But articles of this description can only be premises as not to have become a part of the though meant for ornament merely, if it be so removal would materially injure the structure. The following general rules seem to be the So neither will he be allowed to take away nent additions or improvements to the estate.

pull down a conservatory built on a brick foundation, and which is intimately connected with the dwelling house (2 B. & B. 54: 4 B. Moore, 440); or a pinery erected on brickwork, although built in a garden, and detached from the house itself. Id. Ibid.

But a tenant may so construct an erection or building that it shall not be considered to be affixed to the freehold in contemplation of the law; and then, whatever its purposes may be, and however substantial it is in itself, the landlord will have no right to it at the end of the term. For unless a thing is absolutely attached to the realty by being let into the ground, or united to the freehold by means of nails, screws, bolts, mortars, or the like, the law regards it as a mere loose and moveable

Thus if a tenant erects a barn, granary, stable, or any other building, upon blocks, rollers, stilts, or pillars, the landlord is not entitled to consider it as a part of his freehold. 11 Vin. Ab. 154: B. N. P. 34: 3 East, 55: 3 Esp. 1: 11 Taunt. 20.

So a varnish-house laid upon a wooden plate, resting on brickwork, the quarters being morticed into the plate, is a chattel and removable by the tenant. 4 Esp. N. P. C. 33: 2 East, 88. So a post windmill, at least if laid on cross traces not attached to the ground: 6 T. R. 377; and see 4 Leon. 241: 1 B. & B. 506. So vessels or utensils supported on brickwork frames, or horses standing on the ground. 9 East, 215. And the like of machinery let into caps or steps of timber, and even as it seems, although fastened by pins. 2 B. & A. 165.

By adopting, therefore, these or similar modes of construction a tenant may not only make valuable additions to his premises with perfect safety, but avoid the effect of a covenant in his lease to repair buildings erected after the commencement of the term. See 1

Taunt. 19: 2 B. & A. 165.

With respect to the second class of fixtures, those put up for ordinary use and convenience,

the cases furnish the subjoined list.

Grates, ranges, and stoves, fastened in brickwork; iron backs to chimneys; beds fastened to the ceiling; fixed tables; furnaces; coppers; mash-tubs and water-tubs fixed: coffeemills, malt-mills, jacks; cupboards fastened with holdfasts; clock-cases; iron ovens; and books, 8 H. 7. 12: 20 H. 7. 13: 21 H. 7. 26: Cro. Eliz. 374: 2 Freem. 249: Str. 1141: 1

Atk. 477: 6 T. R. 379: 7 Taunt. 191: 5 B. & A. 625: 1 B. & C. 77: 4 B. & C. 686: 6 Bing. 437: Burn's Ecc. Law, 301.

particularly to be observed, that they must be in this case he may be liable to an action, at so affixed and connected with the premises as the suit of his landlord, for being wrongfully to occasion but little damage in their removal; on the premises after his tenancy had expired. otherwise the tenant will not be allowed to 2 East, 88.

take them away.

But with regard to these fixtures, it is also

Thus it has been held, he is not entitled to privilege as a tenant in trace: were necessary to take away things; which he has anixed to the premises for purposes merely agricultural.

Thus a tenant may not remove a beast-house, a carpenter's shop, fuel-house, carthouse, pump-house, a fold-yard wall erected for the use of his farm, even though he left the premises in the same state as he found them on his entry. 3 East, 38.

This rule, however, is confined to articles of a strictly agricultural nature. For if the object of an erection has relation to a trade of any description, the tenant may take it away, notwithstanding it is the means or instrument of obtaining the profits of the land.

As for example, a mill for making cider; machinery for working mines and collieries; and, it would seem, utensils set up for manufacturing salt from springs upon the demised premises. 3 Atk. 12: Amb. 113: B. N. P.

34: 1 H. B. 259. n.

Fixtures of this kind belong to a class of cases which have been denominated mixed cases; and the questions to which they give rise with respect to the right of removing them are sometimes attended with much difficulty. See Amos on Fixtures, ch. 2. part. 1.

4. A nurseryman or gardener is entitled to remove and dispose of trees, shrubs, &c., which he has planted for the purpose of sale. 2 East, 89.7: Taunt 191: 4 Taunt. 316.

It has been held, however, that he cannot plough up strawberry beds in full bearing, at the close of his term, without having any reasonable object in view. 1 Camp. 227.

But a private person is not at liberty to sell and remove young fruit trees planted by himself (4 Taunt. 316); or a border of box (4 B. & C. 655); or even flowers (per Littledale, J.

The better opinion seems to be, that a gardener or nurserymam cannot take down hothouses, greenhouses, forcing pits, &c. which he has built during his tenancy. 2 East, 90: 3 East, 45.56: 2 B. & B. 58.

5. A tenant must remove his fixtures before the expiration of his tenancy, for he is not at liberty to insist on his claim afterwards (1 Salk. 368: 1 Atk. 477: Aub. 113: 7 Taunt 191: Com. Dig. Waste, D. 2.); neither can he, where he has neglected to take away during this term, maintain trover for them against the landlord. 1 B. & Ad. 394.

But if a tenant continues in possession of the premises after the end of his term (although against the will of his landlord), it seems he is entitled, during his continuing occupation, to remove the fixtures which he had previously neglected to take away. But even

It has been held that a custom for a lessee 3. A tenant in husbandry has not the same for years to remove his utensils within a cer-

Vol. I.-102

tain period after his term expires, is bad in of a deceased owner in fee have against the law. Palm. 211. If, however, the interest heir. For in the case of executor and heir. which the tenant claims in the demised pre- the rule is said to obtain with the utmost rigor mises is uncertain, as if he is tenant strictly at | in favour of the real estate; and the case of will, or tenant pour auter vie, &c., it is appredended that he will in general be allowed a reasonable time to remove his fixtures after executor, and that of landlord and tenant; and the determination of his tenancy.

The several foregoing rules are alike applicable, whether the tenant holds by lease under seal, or by a parol demise. And with respect to the description of fixtures which a tenant is authorized to remove, there is no distinction whether the party is lessee for life, for years, or merely tenant from year to year, &c.

But in applying these rules to practice, it should be observed that the rights both of landlord and tenant, in respect of fixtures, are frequently varied and controlled by the express terms of the demise, or the circumstances un- owner in fee. See post, III. der which it was orignally entered into. Thus if a tenant covenants to repair the demised premises, and all erections, &c. built, or heir of the deceased owner of the inheritance. that should be afterwards built thereon, such In the early periods of the law it was an ina covenant will prevent the tenant from taking down an erection put ap by himself, even although it was intended for the purpose of of the inheritance. 20 H. 7. c. 13: 21 H. 7. trade, and might have been removed but for c. 26: Owen, 71: Cro. Jac. 129: 4 Rep. 63, the covenant in question. 1 Taunt. 19:2 64. The first instance in which an exception Stark. 403: 2 B. & C. 608. And therefore was allowed as between the executor and heir before a tenant severs an article from the freehold, it is necessary that he should examine his claim, not only with reference to the general law of fixtures, but also as it may be affected by any covenant or stipulation, expressed or implied, in his lease.

II. The executors of tenant for life, or tenant in tail, and the remainder man or reversioner. -- The point to be decided between these two classes, is, whether chattels annexed to the freehold by a tenant for life, or tenant in tail, become part of the inheritance, and pass with it to him in remainder, or in reversion; or they are to be considered as part of the personal estate of the deceased tenant for life, or tenant erected for a purpose in which trade and the in tail, and go to his executors.

The only two cases that have been decided between the last mentioned classes are Lawton v. Lawton, 3 Atk. 13; and Dudley v. Ward, Amb. 113; which establish that the descend to the heir as a parcel of the inheri-executors of tenants for life or tenants in tail tance. Thus salt-pans used in salt-works, executors of tenants for life or tenants in tail are entitled to fixtures erected for the purpose erected by deceased owner in his life time, on of trade, even where trade and the profits of

land are combined.

In the former case it was held that a steam engine erected by a tenant for life; and in the latter, that fire-engines put up by a tenant for life, or tenant in tail; were to be considered as part of their personal estate, and were venience, the authorities are so contradictory. removable by their executors.

There is no doubt that the personal representatives of tenants for life or in tail, would be allowed at least the same privilege, in re- fixed to the freehold, and purchased with the moving fixtures against the remainder man or house, and hangings nailed to the wall (2 reversioner, that the personal representatives Freem. 249); hangings and looking glasses

tenant for life, or in tail, has been called an " intermediate" one, between that of heir and accordingly it seems to be generally understood, that any determination in favour of an executor against an heir will support a similar claim between whatever parties it may arise.

With respect to the right of the executors of tenant for life or in tail, to fixtures put up for ornament or convenience, in the absence of direct authority, all cases which cannot be brought without the class of trade fixtures must be left to be inferred from determinations between the heir and the executor of the

III. The personal representative, and the flexible rule, that whatever was affixed to the freehold should descend to the heir as parcel was a decision of C. B. Comyns respecting a cider-mill, which was mentioned and approved of by Lord Hardwicke in 3 Atk. 14. This is the only case to be found in which it has been expressly held, that the exception on the ground of trade operates in favour of the personal estate against the claim of the heir. It appears, however, to establish a general principle that erections for the purpose of trade may be removed by the executor as part of the personal estate.

It is also to be inferred from the decision of the cider-mill, and the instance put by Lord Hardwicke, of the fire engine in a colliery, that the executor is entitled to remove articles profits of land are combined. But if the property in dispute be absolutely essential to the value and enjoyment of the real estate, it cannot be taken away by the executor, but will his estate which contained a salt spring, were held to go to the heir, as being accessories to the enjoyment and use of the inheritance. Lawton v. Salmon, 1 H. B. 260. in notis.

With regard to the right of the executor to remove fixtures erected for ornament and conthat the extent of the executor's claim is still involved in uncertainty.

In the older cases it was held that a furnace

fixed to the walls with nails and serews (1 P. | and his laws, particularly against the courts W. 94); hangings, tapestry, and iron backs of justice; or for debt, when persons are unto chimneys (2 Str. 1141.); should belong to able or uniform to satisfy their creditors; the executor, and not to the heir. But in a there are large rules, and a warden or keeper later case it was said by the Court of K. B. that pots, ovens, and ranges, fixed by the owner Gaul. of a house, would go to the heir, and not to the executor. 5 B. & A. 625. And where the executor. 5 B. & A. 625. And where the question was, whether stoves, closets, slay.] An outlaw; and by virtue of the word shelves, brewing vessels, locks, blinds, &c. flemaftare were claimed bona felonum; as may passed to the purchaser of a house, the court be collected from a quo warranto, temp. Ed. 3. said that some of the articles, viz. the stoves, cooling coppers, mash tubs, water tubs, and blinds, might be removable as between landlord and tenant, but would not belong to the executor, but to the heir, and as between those persons were parcel of the freehold. 2 B. & C. And so, on a more recent occasion, it was said by Bayley, J. that stoves, grates, and cupboards, were parcels of the freehold; and though they might be removed by a tenant and the amerciaments. Flit in English is during the term, yet they would go to the heir treason. Terms de la Ley. But see Fledand not to the executor. 4 B. & C. 686: and wite. see 2 N. & M. 428.

According, therefore, to these authorities, the courts seem to consider that the old rule of law has received only a very partial relaxation in the case of heir and executor.

For further information on this subject, see Amos and Ferrard on Fixtures, from which the above sketch of the law has been princi-

pally taken.

By 7 and 8 G. 4. c. 29. § 44. stealing, rip. ping, cutting, or breaking with intent to steal, any glass or woodwork belonging to any building, or lead, iron, copper, brass, or other metal, or any utensil, or fixture, whether made of metal or any other materials, fixed to any building, or any thing made of metal fixed in land being private property, or for a fence to any dwelling-house, garden or area, or in any square, street, or other place dedicated to public use or ornament, is felony, and the offender may be punished as in case of simple larceny.

By § 45. persons stealing any chattel, or fixture let with any house or lodging, are guilty of felony, and punishable as in case of

simple larceny.

FLACO. A place covered with standing water. Mon. Angl. tom. 1. p. 209.

FLAX. See Hemp.

FLECTA. A feathered or fledged arrow;

FLEDWHITE, or FLIGHTWHITE, from Sax. flyth, fuga, et wite, mulcta.] In our ancient law signified a discharge from amerciaments, where a person having been a sometimes used in the commissions of water fugitive came to the peace of our lord the king of his own accord, or with license. Rastal.

up.] A prison in London, so called from a river are mentioned together: jetsam being where or ditch that was formerly there, on the side any thing is cast out of the ship when in danwhereof it stood. To this prison men are ger, and the ship notwithstanding perisheth; usually committed for contempt to the king and lagan is when heavy goods are thrown

FLEET OF SHIPS. See tit. Navy.

FLEMENEFRIT, FLEMENESFRIN-THE, FLYMENAFRYNTHE.] The receiving or relieving of a fugitive or outlaw. Leg. Inc., c. 29. 47: LL. H. 1. c. 10. 12.

FLEMESWITE, Sax.] fleta interprets it

hadere catalla fugitivorum. Lib. 1 c. 47. FLETWIT or FLITWIT. Is to be quit of contention and convictions, and that you may have plea thereof in your own courts

FLETA. The title of an ancient law-book, supposed to have been written by a judge who was confined in the fleet prison, temp. Ed. 1. Nicholson's Historical English Library, 225.

FLIGHERS. Masts for ships. Mon. Angl.

tom. 1. p. 799.

FLIGHT. For crimes committed. Fugam fecit.

FLOATSAM. See Flotsam. FLOOD GATE. Malicious Maliciously breaking down, or damaging, &c., any floodgate, or other work, on any navigable river or canal, is felony, and the offender is transportable for life, &c.; and maliciously opening any such flood-gate, with intent to obstruct, &c., the navigation, is also felony, and the offender may be transported for seven years, &c. 7 and 8 G. 4. c. 30. § 12.

FLOODMARK. The mark which the sea makes on the shore, at flowing water and the highest tide: it is also called high-water mark.

FLORENCE. An ancient piece of English gold coin; every pound weight of old standard gold was to be coined into fifty florences, to be current at 6 shillings each; all which made in tail fifteen pounds, or into a proportionate number of half florences or quarter pieces; by indenture of the Mint. 18 Ed. 3.

FLORIN. A foreign coin; in Spain, 4s. 4d., Germany, 3s. 4d., and Holland, 2s. FLOTA NAVIUM. A fleet of ships.

Rot. Francia, 6 R. 2. m. 21.

FLOTAGES. Such things as by accident swim on the top of great rivers; the word is

bailiffs.

FLOTSAM, is where a ship is sunk or cast FLEET. Sax. fleet, i. e. flota, a place of away, and the goods are floating upon the running water, where the tide or float comes sea. 5 Rep. 106, Flotsam, jetsam and lagan, overboard before the wreck of the ship, which | Confess cap. 35. Spelman says the folemote sink to the bottom of the sea, but are tied to was a sort of annual parliament, or conven-

5 Rep. 106.

guished: jetsam, is where goods are cast into and the king, and to preserve the laws of the the sea and there sunk, and remain under wa- kingdom, and then consulted of the common ter; flotsam, is where they remain swimming on the surface of the waves; lagan or ligan, is of our Saxon kings that it was an inferior where they are sunk in the sea, but tied to a cork or buoy in order to be found again.

lagan, when the ship is lost, and the owners of the goods are not known; but not other p. 48. Squire seems to think the folemote not of the goods may be known, they have a year neral meeting of the county. Angl. Sax. Gov. and a day to claim flotsam. 1 Keb. 647. Flotsam, jetsam, &c. any person may have by the king's grant, as well as the lord admiral, &c. den in London, wherein all the folk and people See 1 Comm. 292. and this Dict. tit. Wreck.

Foreign liquors and tobacco, derelict, flotsam, jetsam, or lagan, are made liable to duties city; and this word in Stowe's time contiof customs as if regularly imported. Stat. 52

G. 3. c. 149.

FOCAGE, focagium.] House-tote, or fire-

A right of taking fire-wood. FOCAL.

Mon. Angl. i. 779.

FODDER, Sax. foda i. e. alimentum.] Any kind of meat for horses, or other cattle: among the Feudists it was used for a preroga- freemen within a county, called the shiretive of the prince, to be provided with corn mote, where formerly all knights and military and other meat for his horses, by his subjects, tenants did fealty to the king, and elected the in his wars or other expeditions. Hotom. de annual sheriff on the first of October: till this verb. Feudal.

be paid by custom to the king's purveyor.

Cartular. MS.

F(ENUS NAUTICUM. Bottomry. See that

title; and tit. Insurance.

FŒSA, Fr. foisson.] Grass, herbage. Mon. Angl. ii. 506.

FOGAGE, fogagium.] Fog, or rank aftergrass, not eaten in summer. LL. Forrestar, Scot. c. 16.

FOITERERS. Vagabonds. Blount. See

Faitours.

so called in the time of the Saxons, as charter it signifies an assembly convened from the lands were called Boclands. Kitch. 174. Folk-whole city, or commonhall. Termes de la land was terra vulgi, or popularis, the land of Ley. See further, tit. Parliament. the vulgar people, who had no certain estate therein, but held the same under the rents and services accustomed or agreed, at the will liberty to fold sheep, &c. See Faldage, Faldonly of their lord the thane; and it was there- | fee fore not put in writing, but accounted prædium rusticum et ignobile. Spelm. of Feuds. 3. tract. 2. c. 10. House-keepers by the Saxcap. 5. See this Dict. tits. Copyhold, Tenure, ons were called husfastene, and their servants Bockland.

FOLC-MOTE, or FOLK-MOTE, Sax. 1. c. 9. folgemot, conventus populi.] Is compounded of folk, populus, and mote or gemote, conven- unwholesome ingredients in any thing made ire; and signified originally, as Somner, in or supplied for the food of man. his Saxon Dictionary, says, a general assem-

a cork or buoy in order to be found again. tion of the bishops thanes, aldermen and freemen, upon every May-day, yearly; where the In 1 Comm. 292, the three are thus distin- laymen were sworn to defend one another. safety. But Dr. Brady infers from the laws court, held before the king's reeve or steward, every month, to do folk right, or compose The king shall have flotsam, jetsum, and smaller differences, from whence there lav appeal to the superior courts. Brady's Gloss. F. N. B. 122. Where the proprietors distinct from the shiremote, or common ge-155. n.

Manwood mentions folkmote as a court holof the city did complain of the mayor and aldermen, for misgovernment within the said nued in use among the Londoners, and denoted Celebrem ex tota civitate conventum.

Stowe's Survey.

According to Kennet, the folkmote was a common council of all the inhabitants of a city, town, or borough, convened often by sound of bell to the mote-hall, or house; or it was applied to a larger congress of all the popular election, to avoid tumults and riots, FODERTORIUM. Provision or fodder, to devolved to the king's nomination. After which the city folkmote was swallowed up in a select committee or common council, and the county folkmote, in the sheriff's tourn and The word folkmote was also used assizes. for any kind of popular or public meeting; as of all the tenants at the court-leet or court baron, in which signification it was of a less extent. Paroch. Antiq. 120.

FOLKMOOT signifies, according to Lambard, in his exposition of Saxon words, two kinds of courts, the one now called the county-court, FOLC-LANDS, Sax.] Copyhold lands; and the other the sheriff's tourn. In London

FOLK-MOTE. See Folc-mote.

FOLDAGE AND FOLDCOURSE.

FOLGARII. Menial servants. Bract. lib. or followers, folgheres or folgeres. LL. Hen.

FOOD. It is an indictable offence to mix

Where a baker knew that his servant used bly of the people to consider of, and order alum in making bread, which is a noixious matters of the commonwealth. See Leg. Edw. substance when employed in any quantity, he was held liable to an indictment for supplying | wrongfully dispossessed of his goods may jus-

FOOL. A natural; one so from the time of his birth, See tits. Idiots and Lunatics. FOOT OF A FINE. See tit. Fine

FOOT-GELD. From the Sax. fot, pes; and geldan, solvere, Pedis redemptio. amercement for not cutting out and expedita-ting the balls of great dogs' feet in the forest: to be quit of foot-geld is a privilege to keep dogs within the forest unlawed, without punishment. Mannood, par. 1, p. 86. See tit. Forest.

FOOTWAY. See Highway.

FORAGE, Fr. fourage. | Hay and straw for horses, particularly for the use of horses in an army

FORAGIUM. Straw when the corn is

thrashed out. Cowel.

FORBALK, forbalka. Lying forward or next the highway. Petr. Blessensis Contin. Hist. Croyland, p. 116.

FORBARRE. To bar or deprive one of a thing for ever. See stats. 9. R. 2. c. 2: 6 H.

FORBATUDUS. The aggressor slain in combat.

FORCE, vis.] Is most commonly applied in pejorem partem, the evil part, and signifies any unlawful violence. It is defined by West to be an offence, by which violence is used to things or persons; and he divides it into simple and compound; simple force is that which is so committed that it hath no other crime accompanying it; as if one by force do only enter | naces, arms, and force, and without the auinto another man's possession, without doing thority of the law; whereby he who hath any other unlawful act: mixed or compound right of entry is barred or hindered. See 4 force, is when some other violence is commit- Comm. 148. ted with such a fact, which of itself alone is had right of entry into lands, &c., might recriminal; as where any one by force enters gain possession thereof by force; but this into another man's house, and kills a man, or liberty being much abused, to the breach of ravishes a woman, &c. And he makes seve-the public peace, it was found necessary that ral other divisions of this head. West. Sym- it should be restrained. bol. pa. 2. sect. 65. also a force implied in law; as every trespass, imprisonment and ransom at the king's will. rescous, or disseisin, implieth it; and an actual And by stats. 15 Ric. 2. c. 2: 8 H. 6. c. 9: 31 force, with weapons, number of persons, &c. Eliz. c. 11: 21 Jac. 1. c. 15. upon any forcible where threatening is used to the terror of another. Co. Lit. 257. By law any person try, into any lands (or benefices of the church), may enter a tavern; and a landlord may enter one or more justices of the peace, taking sufhis tenant's house to view repairs, &c. But ficient power of the county, may go to the if he that enters a tavern, commits any force place, and there record the force upon his own or violence; or he that enters to view repairs, view, as in case of riots; and upon such conbreaketh the house, &c., it shall be intended viction may commit the offender to gaol till that they entered for that purpose. 8 Rep. he makes fine and ransom to the king. And 146. All force is against the law; and it is moreover the justice or justices have power lawful to repel force by force; there is a maxim to summon a jury to try the forcible entry or in our law, quod alias bonum et justum est, si detainer complained of: and if the same be per vim vel fraudem petatur, malum et injus-found by that jury, then, besides the fine on tum est. 3 Rep. 78. Where a crime, in itself the offender, the justices shall make restitucapital, is endeavoured to be committed by tion, by the sheriff, of the possession, without force, it is lawful to repel that force by the death of the party attempting. 4 Com. 181. force is the only thing to be tried, punished Hawkins says that even at this day he who is and remedied by them; and the same may be

loaves containing crude lumps of that material. 3. M. &. S. 11. wrong-door if he refuse to re-deliver them. wrong-door if he refuse to re-deliver them. Hawk. P. C. c. 64. § 1. But Blackstone, 3 Com. 4, 5. and 4 Com. 363. thinks such a re-See tit. Fine of taking must be without force or terror, the public peace being a supreme consideration to any man's private property: and after conviction of the offender the proprietor may take his goods (stolen from him) wherever he can find them, so that it be done without a breach of the peace. 1 Hale, 546: 1 Chitt. C. L. 820. See tits. Duress, Murder, Robbery.

By stat. 7 and 8 G. 4. c. 29. § 6. persons with menace or by force demanding chattels, money, or valuable securities, with intent to steal, are guilty of felony, and may be transported for life, or imprisoned and whipped.

FORCE AND ARMS. These words do not appear to be absolutely essential, but they usually are inserted in an indictment; and where an actual violence constitutes an ingredient in the offence, it seems proper to introduce them.

By the stat. 7 G. 4. c. 64. § 20. no judgment upon any indictment or information for felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for the omission of these words.

FORCIBLE ENTRY AND DETAINER.

An offence against the public peace which is committed by violently taking or keeping possession of lands and tenements, with me-At common law, any one who By stat. 5 Ric. 2 st. Lord Coke says, there is 1. c. 8. all forcible entries are punished with

done by indictment at the general sessions, punishable for forcible entry; for continuing But this provision does not extend to such as in possession afterwards, amounts in law to a endeavour to maintain possession by force, new entry. Co. Lit. 256, 257. And an infant where they themselves or their ancestors have or feme covert may be guilty of forcible entry been in peaceable enjoyment of the lands, &c. within the statutes in respect of violence comfor three years immediately preceding. Comm. 148. And this may be alleged in stay done by others at their command, their comof restitution, and restitution is to be stayed mands being void. Co. Lit. 257. 357. till that be tried, if the other will traverse the same, &c. Dalt. 312. See T. Raym. 85: 1 Sid. 149 : Salk. 260.

Indictment for forcible entry must be laid of liberum tenementum, &c. to have restitution by stats. 15 Ric. 2. c. 2: 8 H. 6. c. 9. &c. But by stat. 21 Jac. 1. c. 15. justices of peace may give like restitution of possession to tenants for years, tenant by elegit, statute staple, &c. and copyholders, as to freeholders, since which statute the estate of the person ousted must be stated, for perhaps he is only tenant at will. Semb. 1 Salk. 260. R: 1 Sid. 102. See further as to what shall be a good indictment, Com. Dig. tit. Forcible Entry (D. 4.)

Having said thus much generally, we may proceed more particularly to inquire,

I. What shall be deemed a Forcible entry, and what a Forcible Detainer. II. The Remedy for parties aggrieved.

I. What shall be deemed a Forcible Entry.-By stat. 5 Ric. 2. st. 1. c. 8. "None shall make any entry into any lands or tenements (or forcible entry shall be adjudged to enter with benefice of holy church, stat. 15 Ric. 2. c. 2. or him, whether they actually come upon the other possessions, stat. 1 H. 6. c. 9. § 2.), but where entry is given by the law; and in such case not with strong hand or with multitude of people, but only in peaceable and easy though unlawfully, afterwards retains possesmanner; on pain of imprisonment and ran-

som at the king's will."

A forcible entry is only such an entry as is made with a strong hand with unusual weapons, an unusual number of servants or attendants, or with menace of life or limb; for an entry which only amounts in law to a trespass, is not within the statutes. But an entry may be forcible, not only in respect of a violence actually done to the person of a man, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it there with force, this makes a forcible deat the time or not; especially if it be a dwelling tainer. If I hear that persons will come to house. So if a man enter to distrain for rent | my house to beat me, &c., and I take in force with force; for though he does not claim the to defend myself, it is no forcible detainer; land itself, he claims a right and title out of it though where they are coming to take lawful And though a man enter peaceably, yet if he possession only, it is otherwise. 2 Shep. 203. turn the party out of possession by force, or I If a man have two houses next adjoining, frighten him out of possession by personal the one by a defeasible title, and the other by threats or violence, this also amounts to a for- a good title; and he uses force in that he hath cible entry; but not if he merely threaten to by the good title to keep persons out of the spoil the party's goods, or destroy his cattle, or tother house, this is a forcible detainer. 2 Shep. do any injury which is not of a personal na- | Ab. 203. 1 Hawk. c. 64. § 25. et seq.: 3 Bac. Ab. tit. Forcible Entry (B.)

4 mitted by them in person; but not for what is

A man enters into the house of another by the windows, and then threateneth the party, and he for fear doth leave the house, it is a forcible entry: so if one enter a house when no person is therein, with armed men, &c.

Moor. Cas. 185.

This offence may be committed of a rent, as well as of a house or land: as where one comes to distrain, and the tenant threatens to kill him, or forcibly makes resistance, &c. 2 Shep. 201. But forcible entry cannot be of a way or other easement: or of a common or office. 1 Hawk. P. C. So no man can be guilty of forcible entry, for entering with violence into lands or houses in his own sole possession at the time of entry; as by breaking open doors, &c. of his house detained from him by one who has the bare custody of it; but foint-tenants, or tenants in common, may be guilty of forcible entry, and holding out their companions.

A forcible entry may be committed by a single person as well as by twenty, and all who accompany a man when he makes a lands or not. 1 Hawk. P. C. c. 64.

What a Forcible Detainer .- A forcible detainer is where a man who enters peaceably, sion by force, and the same circumstances of violence or terror which will make an entry forcible will make a detainer forcible also. And a detainer may be forcible whether the entry were forcible or not. 1 Hawk. P. C. c.64

If a person after peaceable entry shall make use of arms to defend his possession, &c. it will be forcible detainer: a man puts another out of his house by force, if he then puts in one of his servants in a peaceable manner, who keeps out the party, &c. it will be a forcible entry, but not a detainer; butif himself remaineth

When a tenant keeps possession of the land at the end of his term against the landlord, it Also persons continuing in possession of a is a forcible detainer. And if a lessee takes a defeasible estate after the title is defeated, are new lease of another person, whom he con-

ceives to have better title, and at the end of that the defendant expulit et disseisivit, &c., the term keeps possession against his own yet it is said that every disseisin implies an landlord, this is a forcible detainer. Cro. Jac. expulsion in forcible entry. Cro. Jac. 31.

a house, and they refuse to let him in; this of itself will make a forcible detainer in all cases; but it must be upon complaint made. Dalt.

The Court of K. B. will not on motion hold plea of a forcible entry of the K. B. prison, and turning out the gaoler. Ld. Raym. 1005.

But a person is not guilty of a forcible detainer, by merely refusing to go out of a house, and continuing therein in despite of another. 1 Lil. Ab. 514: 1 Hawk. c. 64. s. 30. Neither is a man who keeps out of his lands by force, one claiming common upon it. Com. Dig. Forc. Det. (B. 2.)

II. The Remedy for Parttes aggrieved .-The remedy may be by action; or by justices of peace upon view; or by indictment or inquisition.

By stat. 8 H. 6. c. 9. § 6. "If any person be put out or disseissed of any lands or tenements in forcible manner, or put out forcibly and after holden out with strong hand; the party grieved shall have assize of novel dis- been in possession peaceably three years beseisin, or writ of trespass against the disseisor; and if he recover (or if any alienation be made to defraud the possessor of his right, which is also declared by the statute to be void), he shall have treble damages, and the defendant shall also make fine and ransom to the king,"

This act applies only to persons who have the freehold. Cole v. Eagle, 8 B. &. C. 409.

In an action on this statute if the defendant make title which is found for him, he shall be dismissed without any inquiry concerning the force; however punishable he may be for that

If in trespass or assize upon this statute the defendant is condemned by non sum informatus; he shall pay treble damages and treble costs; adjudged, and affirmed in error. For the words of the statute give them where the recovery is by verdict, or otherwise in due Jenk. Cent. 197. manner.

dictment for forcible entry, but commences a civil action on the case, on stat. 8 H. 6. c. 9. and it is provided by stats. 15 Ric. 2. c. 2: 8 the defendant is to plead not guilty; or may H. 6. c. 9, that after complaint made to such plead any special matter, and traverse the justice, &c. he shall within a convenient time, force; and the plaintiff in his replication must, at the costs of the party grieved, take suffianswer the special matter, and not the tra- cient power of the county, and go to the place verse; and if he be found against the defendant, where such force was made, and if he shall he is convicted of the force of course; where- find such force shall cause the offenders to be upon the plaintiff shall recover treble damages arrested, and make a record of such force by and costs. 3 Salk. 169.

ble entry, because he cannot be expelled, convict by the record of the same justice though he may be disseissed. Dyer, 141. The until they have made fine and ransom to the words in the writ to maintain the action are, king.

The party grieved, if he will lose the bene-If a justice of peace come to view a force in fit of his treble damages and costs, may be aided and have the assistance of the justices at the general sessions by way of indictment on this same statute. Which being found there, he shall be restored to his possession by a writ of restitution granted out of the same court to the sheriff. Dalt. c. 129.

Indictment of forcible entry lies not only for lands, but for tithes; also for rents; but not against a lord entering a common with force, for which the commoner may not indict him, because it is his own land. Cro. Car. 201. 486.

Indictments for forcible entry must set forth that the entry was manu forti, to distinguish this offence from other trespusses vi et armis; and there are many niceties to be observed in drawing the indictment, otherwise it will be quashed. Cro. Jac. 461: Dalt. 298. There must be certainty in this indictment; and no repugnancy, which is an incurable fault. An indictment of forcible entry was quashed, for that it did not set forth the estate of the party; so where the defendant hath not fore the indictment, without saying before the indictment found, &c. And force shall not be intended when the judgment is generally laid, for it must be always expressed. 2 Nels. Abr. 867. 869.

By the stat. 31 Eliz. c. 11. if on an indictment of forcible entry, &c., it is found against the party indicted, he shall pay such costs and damages as the judges or justices shall assess to be recovered and levied, as is usual for costs and damages in judgments upon other actions. See Ld. Raym. 1036.

An indictment will lie at common law for a at the king's suit. 1 Hawk. P. C. Dalt. c. forcible entry, though generally brought on the statutes. But it must show on the face of it sufficient actual force to constitute a breach of the peace. 3 Bur. 1702. 1732: 8 Term. Rep. K. B. 357.

> An indictment for a forcible detainer ought to show that the entry was peaceable. Cro. Jac.

For a more speedy remedy the party griev. If a plaintiff proceeds not criminally by in- ed may complain to any one justice or to a mayor, sheriff or bailiff, within their liberties: him viewed: and the offenders so arrested A reversioner cannot bring action of forci-shall be put in the next gaol, there to abide

enacted by the said stat. 8 H. 6. c. 9. though force of the disseisee. To a lessee, though that the persons making such entry be present, the lessor, who was disseised, thereby opposes or else departed before the coming of the justice, he may notwithstanding, in some town it. next to the tenements so entered, or in some other convenient place, have power to inquire by a jury of the county as to the persons making such forcible entry and detainer; and the justice may make his precept to the sheriff, who is to summon the jury. And if such forcible entry or detainer be found before such justice, then the said justice shall cause to reseise the lands and tenements so entered or holden, and shall restore the party put out to the full possession of the same. Persons who keep possession with force in any lands or out of possession by force, restitution must be tenements, whereof they or their ancestors have continued their possession in the same and then his lessee may re-enter. 1 Leon. for three years or more, are not within the 327. A termor may say that he was expelled, statute. And by 31 Eliz. c. 11. no restitution and his landlord in reversion disseised; or shall be made, if the person indicted had the rather that the tenant of the freehold is disoccupation, or was in quiet possession, for seised, and he, the lessee for years, expelled three years before the indictment was found, 4 Mod. 248: 2 Nels. Ab. 869. If a disseisee and his estate is not ended or determined.

may plead in bar of restitution quiet posses- disseisor. H. P. C. 139. Though it hath sion for three whole years; but such posses- been adjudged, that it is not the title of the sion must have continued uninterrupted. The possessor, but the possession for three years, plea need not show under what title, or of which is material. Sid 149. For a forcible what estate, the possession was; because it is detainer only it is said there is no restitution; not the title, but the possession only, which is the plaintiff never having been in possession.

material. 1 Hawk. c. 64. § 54.

By 21 Jac. 1. c. 15. judges, justices of peace, &c. are empowered to give restitution to ten- vowson, common, rent, &c.; for it shall only ants for years, tenants by copy of court roll, be to land. Dalt. c. 44. Nor where he who guardians by knight's service, tenants by ele- used force has the possession by operation of

git, statute merchant and staple.

quisition found) to the party ousted, by him-shall not be restored; for it was revested in self, or by his precept to the sheriff. T. Raym. the disseisee by his entry. Dalt. c. 132. Nor, 85: Carth. 496. So restitution shall be made if a lessor enters by force, upon the lessee, for upon an indictment at the quarter sessions. a forfeiture; nor to any other than him who H. P. C. 140.

bound to accept a traverse tendered of not erse to the inquisition. 1 Sid. 287. Upon a guilty, to the inquisition. 3 Salk. 169.

moved from before justices of peace into the indictment appears insufficient. Court of B. R. coram rege, which court may 140. And in such case restitution granted award restitution. 11 Rep. 65. See Ann. may be stayed before execution. H. P. C. 174: Latch. 172: 4 Inst. 176. And the 140. So restitution shall not be, after a conjustices, before whom such indictment was found, may, after traverse tendered, certify or deliver the indictment into the King's Bench, and refer the proceeding thereupon to the justices of that court. But in such case there can be no restitution, if the defendant either traverses the force or pleads three years' quiet possession. 1 Ld. Raym. 440: 1 Salk 260: possession. 1 Ld. Raym. 440: 1 Salk 260: 2 Salk. 588.

ment before them, may make restitution. So the justices may summon a jury for trial of re-restitution shall be, after an ill-restitution the traverse. 1 Salk. 353. The finding of the awarded. Sav. 68: Cro. Jac. 151. So restificate being in nature of a presentment by the

As to restitution to the party injured, it is tution shall be to a disseisor ousted by the it. To a copyholder, though his lord opposes Vide Dalt. c. 132. Contra before stat. 21 Jac. 1. c. 15. See Dy. 142. a. in marg.

A copyholder cannot be disseised, because he hath no freehold in his estate; but he may be expelled. And a copyhold tenant may be restored, where he is wrongfully expelled; but if the indictment be only of disseisin, as he may not be disseised, there can be no restitution but at the prayer of him who hath the freehold. Yelv. 81: Cro. Jac. 41. Possession of the termor is the possession of him in reversion; and when a lessee for years is put to him in reversion, and not to the lessee; within three years makes a lawful claim, this Any one indicted under the above statutes is an interruption of the possession of the 1 Vent. 23: Sid. 97. 99.

No restitution shall be awarded to an adlaw; as if a disseisee enters, and afterwards, The justice may make restitution (after in- by force, ousts his disseisor, the possession was ousted by force, or to his heir. Salk. 587. Upon an inquisition taken upon view of the Or any abator, after the death of the ancestor. justice, and restitution awarded, the justice is Dalt. c. 132. Nor if the party tenders a travitty, to the inquisition. 3 Salk. 169.

An indictment of forcible entry may be reported from before justices of peace into the indictment appears insufficient. H. P. C.

A record of justices of peace of forcible Salk. 588.

Justices of gaol delivery, upon an indict- force, &c. may be traversed in writing, and

jury, is traversable; and if the justices of not, on the removal of a conviction by certio-peace refuse the traverse, and grant restitution, rari, set a fine on the defendant, for they canon removing the indictment into B. R. there not execute the judgment of an inferior court, the traverse may be tried; and on a verget Str. 791: Ld. Raym. 1514. found for the party, &c. a re-restitution shall A conviction tor forcible entry, before a fine be granted. Sul. 287: 2 Sulk. 588. If no is set, may be quasied on motion; but after a force is found at a trial thereof before justices, line is set it may not; the detendant must restitution is not to be granted; nor shall it be bring writ of error. 2 Salk. 450.

had till the force is tried; nor ought the A conviction for a forcible detainer under had till the force is tried; nor ought the justices to make it in the absence of the defendant, without calling him to answer. 1

Huwk. P. C. c. 64.

Though forcible entry is punishable either.

No other justices of peace but those before whom the indictment was found, may either at sessions, or out of it, award restitution; the many cases it may be much more for the benesame justices may do it in person, or make a precept to the sheriff to do it, who may raise the power of the county to assist him in executing the same. 1 Hawk. P. C. c. 64. And the same justices of peace may also supersede the restitution before it is executed, on insufficiency found in the indictment, &c.; but no other justices, except of the Court of B. R. A certiorari from B. R. is a supersedeas to the restitution; and the justices of B. R. may set aside the restitution after executed if it be against law, or irregularly obtained, &c. Salk. 154. If justices of peace exceed their authority, an information may be brought against them.

On an indictment on the 21 Jac. 1. c. 15., or 8 H. 6. c. 9. where justices are empowered to give restitution of the lands entered upon or holden by force; the tenant whose land has been entered upon or holden by force is not a competent witness. 9 Barn. & Cres. 549.

Under the stat. 15 Ric. 2. c. 2. any justice of the peace upon view of the force, may make a record of it, and commit the offender. And this, without a writ directed to him to execute the statutes: and upon any information without a complaint of the party. So every justice may take the sheriff, and posse comitatus, to restrain; or he may break open a house to remove the force. Dalt. c. 44. The record made by a justice upon view shall be a conviction, and is not traversable and ought to be certified to B. R. or the next assizes or quarter sessions. And if a defect appears in the conviction to B. R., it shall be quashed. 1 Sid. 156. See 8 Co. 121. The justices have power to fine on view; but are not bound to prejudicial to the sellers of cattle in Smithfield, do it on the spot, but may take a reasonable time to consider. See Str. 794: Ld. Raym. 1515.

The justices, on forcible detainer, may punish the force upon view, and fine and imprison the foreign court; which last is within the the offenders. Sid. 156. And it hath been jurisdiction of the manor, but not within held, that in forcible entry and detainer the liberty of the bailiff of the borough; so jury are to fine all or none; and not the de- there is a foreign court of the honour of Gloutainer, without the forcible entry. 1 Vent. 25.

A conviction by a justice for a forcible entry on view must set a fine upon the desen- Customs. A foreign kingdom is one under dant; otherwise the Court of K. B. will disthe dominion of a foreign prince: so that charge him from a commitment on such con- Ireland, or any other place, subject to the

Though forcible entry is punishable either by indictment or action, the action is seldom brought, but the indictment often. fit of the party to bring the action.

If a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry hath before been made of the force. Dult.

See further on this subject, 1 Hawk. P. C. c. 64. at length: and Burns' Justice, tit. Forcible Entry

FORCIBLE MARRIAGE. See this Dict. tits. Abduction, Guardian, Marriage.

FORD, farda.] A shallow place in a river.

Mon. Ang. tom. 1. p. 657. See tit. Ferry. FORDOL, from Sax. fore, before, and dæle, a part or portion.] A butt or head-land, shooting upon other bounds.

FORECHEAPUM, from Sax. fore, ante, and ceapean, i. e. nundinari, emere.] Præ-emption. Chron. Brompton, col. 897, 898: LL. Æthelredi, c. 23.

FORECLOSED. Shut out or excluded; as the barring the equity of redemption on mortgages, &c. See tit. Mortgage.

FOREGOERS. The king's purveyors; they were so called from their going before to provide for his household. 36 Ed. 3. 5.

FOREIGN. Fr. foraign, Lat. forinsecus, extraneus.] Strange or outlandish, of another country, or society; and in our law is used adjectively, being joined with divers substances in several senses. Kitch. 126.

Foreign Apposer. See tit. Exchequer. Foreign Attachment. See tits. Attachment, Foreign.

FOREIGN BOUGHT AND SOLD. A custom within the city of London, which being found was abolished.

Foreign Coin. See tit. Coin, III.

Foreign Court. At Lemster (anciently called Leominster) there is the borough and cester. Claus. 8 Ed. 2.

Foreign Kingdom; Foreign Laws and viction by habeas corpus. But the K. B. can- crown of England, cannot with us be called

Vol I.—103

foreign; though to some purposes they are rica is acknowledged by Great Britain. Under distinct from the realm of England. If two all these circumstances A. may maintain an of the king's subjects fight in a foreign king- action on the bond against B. in England. dom, and one of them is killed, it cannot be Parl. Cases, 8vo. Judgment of the Court of tried here by the common law; but it may King's Bench (affirming the judgment of C. be tried and determined in the Court of the Constable and Marshal, according to the civil law; or the fact may be examined by the mous, the two former, and perhaps all three privy council, and tried by commissioners ap- of them, were given in some measure upon pointed by the king in any county of England, different grounds. But it appears upon the by statute 33 H. 8. c. 23: 3 Inst. 48. One two first decisions to be a principle not judi-Hutchinson killed Mr. Colson abroad in Por- cially controverted, that "the penal laws of tugal, for which he was tried there and ac- one country cannot be taken notice of to afquitted, the exemplification of which acquittal fect the laws and rights of citizens (or subhe produced under the great seal of that king- jects of such country becoming citizens) of dom; and the king being willing he should another; the penal laws of foreign countries be tried here, referred it to the judges, who being strictly local, and affecting nothing all agreed, that the party being already acquitted by the laws of Portugal, could not be tried again for the same fact here. 3 Keb. Rep. 733.735: 1 H. Black. Rep. 135.

kingdom, buys goods at London, and gives a that it would lead to the discussion of impronote under his hand for payment, and then per topics, would not permit the question to goes away privately into Holland, the seller be argued. That was the case of a covenant may have a certificate from the lord mayor, in a conveyance of lands in America, made on proof of sale and delivery of the goods, upon during the time of the rebellion (April, 1780), which the people of Holland will execute a "that the grantor had a legal title, and that legal process on the party. 4 Inst. 38. Also at the instance of an ambassador or consul, such a person of England, or any criminal against the laws here, may be sent from a foreign kingdom hither. Where a bond is given, or contract made in a foreign kingdom, it may be tried in the King's Bench, and laid to be done in any place in England. Hob. 11: 2 Bulst. 322.

It is now decided (though formerly held otherwise) that a party may be arrested in this country for a debt contracted in a foreign country, though the law of such country do not allow of arrest for debt. De la Vega v. Vianna, 1 Barn. & Adol. 284; overruling 1

Bos. & Pull. 138.

French persons marrying, touching the wife's over to Great Britain for a temporary purpose fortune, has been decreed here to be executed, does not deprive him of those advantages. according to the laws of England: and that the husband surviving should have the whole; but relief was first given for a certain sum,

Paris. Preced. Chanc. 207, 208.

States of America, while those states were the laws of this country, see 2 H. Blacket. colonies of Great Britain, and before the re- 409: 4 B. & C. 636: 8 Bing. 335: 2 B. & Ad. bellion of them as colonies, B. executes a bond | 951. to A. During the rebellion, after the declaration of independence by the American Con- in a foreign country, the sentence must be gress, but before the independence of America proved by producing it, and proving the handwas acknowledged by Great Britian, both writing of the judge of the court who subparties are attainted, their property confiscat- scribed it, and the authenticity of the seal afed, and vested in the respective states of fixed. 1 Phill. on Evid. 331. 379. (6th edit.): which they were inhabitants, by the legisla, and see 2 Stark. Ca. 6: 6 Maule & S. 34. tive acts of those states then in rebellion, and The courts of this country will not take a fund provided for the payment of the debts notice of the revenue laws of foreign states. of B. Afterwards the independence of Ame- 3 D. & R. 190: S. P. 1 Doug. c. 251.

P.) affirmed.

Though all these judgments appear unani.

In the case Dudley v. Folliot, the court If a stranger of Holland, or any foreign having no doubt about the law, and thinking independence. 3 Term Rep. 584.

A foreigner may gain a settlement in England by occupying a tenement of 10l. a year,

for forty days. 4 East's Rep. 103.

A natural born subject of Great Britain may also be a citizen of a foreign country for the purposes of commerce, and entitled to all advantages as such under a treaty with that An agreement made in France, on two country-and the circumstance of his coming 8 Term Rep. K. B. 31. Affirmed in the Exchequer Chamber. 1 Bos. & Pull. 430.

As to the effect of judgments in foreign and the rest to be governed by the custom of courts upon the property of British subjects within their jurisdiction, and how far such A. and B. being inhabitants of the United judgments shall be allowed to interfere with

In an action upon the judgment of a court

arms against a government in amity with the forms either to his own lord, or to the lord pagovernment of this country. 2 Bing. 314.

any foreign dominions which may belong to also to be used for knight's service, or escuage the person of the king by hereditary descent, uncertain. Perkins, 650: Salvo Forinseco by purchase, or other acquisition, as the territory of Hanover and his Majesty's other property in Germany; as these do not in any wise appertain to the crown of these kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English legislature, warned by past experience, wisely inserted in the Act of Settlement, which vested the crown in the present family, the following clause, "That in case the crown and imperial dignity of this 1 realm shall hereafter come to any person not being a native of this kingdom of England, this nation shall not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without consent of parliament." Stat. 12 and 13 W. 3. c. 3. Sec further tit. Plantations.

Foreign Plea. A plea in objection to a judge, where he is refused as incompetent to try the matter in question, because it arises out of his jurisdiction. Kitch. 75: Stat. 4 Hen. 8. c. 2. If a plea of issuable matter is alleged in a different county from that wherein the party is indicted or appealed, by the common law, such pleas can only be tried der, or felony, shall be forthwith tried without to that place where the plaintiff alleges the allegiance and abjuration should incur a formatter to be done in his declaration; and the defendant may plead a foreign plea whether the matter is transitory, or not transitory; but in the last case he must swear to it. Sid. 234: 2 Nels. 871. When a foreign plea is however refer to the 3 Jac. 1. c. 4. pleaded, the court generally makes the defendant put it upon oath, that it is true; or will subjects (without the license of his Majesty), enter up judgment for want of a plea. See accepting any commission, or enlisting or en-5 Mod. 335. Foreign answer is such an answer gaging to enlist or serve in foreign service, as is not triable in the county where made; military or naval, and any persons hiring or and foreign matter is that matter which is done procuring others to enlist, are declared guilty in another county, &c. Pleading, Indictment.

Nor will the courts take notice of a com-mission from a foreign prince. 1 W. Blackst. 3. lord holds of another, without the compass of It is illegal to raise loans for subjects in his own fee; or that which the tenant per-Vernment of this country. 2 Bing. 314. ramount out of the fee. Kitch. 299: see Foreign Dominions of the Crown. As to Bract. lib. 2. c. 16. Foreign service seems

> which subjects the party to an influence or control inconsistent with the allegiance due to the king of these realms, is a contempt against the prerogative, and a high misdemeanor at common law. Therefore if a subject enter into the service of a foreign potentate, or even receive a pension from any foreign state, without leave of the king, it is an indictable offence. 1 Hawk. c. 22. § 3: 4 Comm. 122: 1 East, P. C. 81. And by the common law it is also a high misprison and contempt, if a subject neglect to return from beyond the seas, when commanded by the king to do so; and his lands may be seized until he does return. 1 Hawk. c. 22. § 4: 4 Comm.

The 3 Jac. 1. c. 4. makes it felony for any person whatever to go out of the realm to serve any foreign prince or state, without having first taken the oath of allegiance. And by this act it is felony also for any gentleman or person of higher degree, or who hath borne office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties, not to be reconciled to the See of Rome, by juries returned from the counties wherein or enter into any conspiracy against his natuthey are alleged. But by the stat. 23 H. 8. c. ral sovereign. See § 18, 19. By 9 Geo. 2. c. 14. § 5., all foreign pleas triable by the coun- 30., enforced by 29 Geo. 2. c. 17., if any subtry, upon an indictment for petit treason, mur- ject of Great Britain enlisted himself, or if any person procured him to be enlisted in any delay, before the same justices before whom foreign service, or retained or embarked him delay, before the same justices before whom the party shall be arrainged, and by the jurors for that purpose without license under the of the same county where he is arrainged, notwithstanding the matter of the pleas is alleged to be in any other county or counties; though as this statute extends not to treason, nor appeals, it is said a foreign issue therein must still be tried by the jury of the county wherein alleged. 3 Inst 17: H. P. C. 255: was felony without benefit of clergy; and to 2 Hawk. P. C. c. 40. § 6, 7. In a foreign plea enter into the Scotch brigade in the Dutch in a civil action the defendant ought to plead service, or retained or embarked him for that purpose without license under the king's sign manual, he was guilty of felony without benefit of clergy; but if the person leged to be in any other county is so seduced, within fifteen days discovered his seducer, he was, on conviction, of the seducer, indemnified. By 29 Geo. 2 c. 17., to serve under the French king, as a mintary officer, was felony without benefit of clergy; and to 2 Hawk. P. C. c. 40. § 6, 7. In a foreign plea in a civil action the defendant ought to plead service without previously taking the oaths of

These two latter statutes (as also two Irish acts, 11 and 19 Geo. 2. in pari materia) were repealed by the 59 G. 3. c. 69. which does not

By this act, 59 Geo. 3. c. 69. natural born See further tits. of misdemeanor punishable by fine and imprisonment. Persons fitting out armed ves.

sels, without the king's license, to aid in mili- lands or tenements seized by a lord, for want tary operations with any foreign powers, or of services performed by the tenant, and issuing commissions for such ships, are de-quietly held by such lord beyond a year and a clared guilty of misdemeanor punishable as aforesaid: as also persons increasing the warlike equipment of vessels of foreign states. Vessels with persons on board engaged in foreign service may be detained at any port in any of the king's dominions. A penalty of 50l. per head is imposed on masters of ships taking on board persons enlisted contrary to the act. The statute excepts persons entering into the military service of any Asiatic power by license of the presidency of Bengal.

Foreign Powers. The stat. 1 Eliz. c. 21. punishes (by loss of goods for the first offence, and imprisonment for the second, and incurring the penaltics of treason for the third) persons maintaining any foreign authority in

this realm. See Dyer, 363.

A foreign sovereign prince suing in our courts brings no privilege which can displace the practice as applicable to other suitors. 1 Clark & F. 333.

FOREIGN PUBLIC STOCKS OR FUNDS. Stealing any tally, order, or other security, entitling or evidencing the title to any share or interest in, is punishable as larceny by 7 and 8 Geo. 4. c. 29. § 5.

As to embezzlement of such securities by agents or factors, &c. see those tits., and tits. Attorney, Banker, and Broker. See further this Dict. tits. Allegiance, Contempt, Treason.

FOREIGNERS. See tit. Alien. FOREJUDGER, forisjudicatio.] A judgment whereby a person is deprived of, or put Hampton Court, erected by King Hen. VIII., by, the thing in question. Bract. lib. 4. be forejudged the court, is when an officer or attorney of any court is expelled the same for some offence, or for not appearing to an they are mentioned by several writers and in action, on a bill filed against him. See tit. Attorney.

FORM OF A FOREJUDGER OF AN ATTORNEY.

BE it remembered, that on the day of, &c., this same term, A. B. came here into this court, by, &c., his corney, and exhibited to the justices of our Sovereign Lord the King, his bill against C. D. Gent., one of the attorneys of the Common Bench of our Sovereign Lord the King, personally present here in the court; the tenour of which bill follows in these words, that is to say: To the justices of our Sovereign Lord the King, ss. A. B. by, &c., his attorney, complains of C. D., one of the attorneys, &c., for that whereas, &c. (setting forth the whole bill). The pledges for the prosecution are John Doe and Richard Roe: whereupon the said C. D. being solemnly called, came not; thereby he is forejudged from exercising his office of attorney of this court for his contumacy, &c.

FORESCHOKE, derelictum.] Forsaken; in one of our statutes, it is specially used for round with metes and bounds; which being

day; now the tenant, who seeth his land taken into the hands of the lord, and possessed so long, and doth not pursue the course appointed by law to recover it, doth in presumption of law disavow or forsake all the right he hath to the same; and then such lands shall be called foreschoke. See stat. 10 Ed. 2. c. 1.

FOREST.

Foresta; Saltus.] A great or vast wood; locus sylvestris et saltuosus. Our law writers define it thus: Foresta est locus ubi feræ inha. bitant vel includuntur; others say it is called Foresta quasi ferarum statio, vel tuta mansio ferarum. Manwood, in his Forest Laws, gives this particular definition of it: " A forest is a certain territory or circuit of woody grounds and pastures, known in its bounds and privilege, for the peaceable being and abiding of wild beasts, and fowls of forest chase and warren, to be under the king's protection for his princely delight: replenished with beasts of venary or chase, and great coverts of vert for succour of the said beasts; for preservation whereof there are particular laws, privileges, and officers, belonging thereunto." Manw.

par. 2. c. 1.

Forests are of that antiquity in England, that (except the New Forest in Hampshire, erected by William called the Conqueror, and see stat. 31 H. 8. c. 5.) it is said there is no record or history doth make any certain mention of their erections and beginnings; though divers of our laws and statutes. 4 Inst 319. Our ancient historians tells us, that New Forest was raised by the destruction of twenty two parish churches, and many villages, chapels, and manors, for the space of thirty miles together; which was attended with divers judgments, as they are termed, on the posterity of King William I., who erected it; for William Rufus was there shot with an arrow, and before him Richard the brother of Hen. I. was there killed; and Henry, nephew to Robert, the eldest son of the Conqueror, did hang, by the hair of his head, in the boughs of the forest like unto Absalom. Blount.

Besides the New Forest, there are sixtyeight other forests in England, thirteen chases, and mose than seven hundred parks: the four principal forests are New Forest on the Sea, Shirewood Forest on the Trent, Dean Forest on the Severn, reafforested by stat. 20 Car. 2. c. 3., and Windsor Forest on the Thames. The way of making a forest is thus: Certain commissioners are appointed under the great seal of England, who view the ground intended for a forest, and fence it returned into the Chancery, the king causes and court of attachment. The third property it to be proclaimed throughout the county is the officers belonging to it; as first, the where the land lieth, that it is a forest, and to justices of the forest, the warden or warder, be governed by the laws of the forest, and the verderors, foresters, agisters, regarders, prohibits all persons from hunting there with- keepers, baliffs, beadles &c. See tit. Attachout his leave; and then he appointeth officers fit for the preservation of the vert and venison, and so it becomes a forest on record. Manw. c. 2. Though the king may erect a forest on his own ground and wastes, he may not do it in the ground of other persons, without their consent; and agreements with them for that purpose ought to be confirmed by parliament. 4 Inst. 300.

Proof of a forest appears by matter of record; as by the eyres of the justices of the forests, and other courts, and officers of forests, &c., and not by the name in grants. 12 Rep. 22. As parks are enclosed with wall, pale, &c., so forests and chases are enclosed by metes and bounds; such as rivers, highways, hills, which are an enclosure in law, and without which there cannot be a forest. And in the eye of the law, the boundaries of a forest go round about it as it were a brick wall, directly in a right line the one from the other, and they are known either by matter of record or prescription. 4 Inst. 317. Bounds of a forest may be ascertained by commission from the Lord Chancellor; and commissioners, sheriffs, officers of forests, &c., are empowered to make inquests thereof. Stat. 16 and 17 Car. 1. c. 16. Also the boundaries of forests are reckoned a part of the forest; for if any person kill or hunt any of the king's deer in any highway, river or other inclusive boundary of a forest, he is as great an offender as if he had killed or hunted deer within the forest itself. 4 Inst. 318.

By the grant of a forest, the game of the forest do pass; and beasts of the forest are the hart, hind, buck, doe, boar, wolf, fox, hare, &c.: the seasons for hunting whereof are as follow, viz. that of the hart and buck begins at the Feast of St. John Baptist, and ends at Holyrood-day; of the hind and doe, begins at Holyrood, and continues till Candlemas; of the boar, from Christmas to Candlemas; of the fox, begins at Christmas, and continues till Lady-day; of the hare, at Michaelmas, and lasts till Candlemas. Dyer, 169: 4 Inst.

Not only game, &c., are incident to a forest but also a forest hath divers special properties. 1. A forest, truly and strictly taken, cannot be in the hands of any but the king; for none but the king hath power to grant com- other writ Custodi Foresta, Domini Regis vel mission to any one to be a justice in the eyre ejus locum tenenti, &c. Which writ of sumof the forest; but if the king grants a forest to a subject, and granteth further that upon request made in Chancery, he and his heirs shall have justices of the forest, then the subject hath a forest in law. 4 Inst. 314: Cro. Jac. 155.

ment of the Forest.

As to the Courts. The most especial court of a forest is the swainmote, which is no less incident to it than a court of piepowder to a fair; and if this fail, there is nothing remaining of the forest, but it is turned into the nature of a chase. Manw. c. 21: Crompt. Jur. 146.

The court of attachment or woodmote in forests is kept every forty days; at which the foresters bring in the attachments de viridi et venatione, and the presentments thereof, and the verderors do receive the same, and inrol them; but this court can only inquire, not convict. The court of swainmote is holden before the verderors as judges, by the steward of the swainmote, thrice in the year; the swains or freeholders within the forest are to appear at this court to make inquests and juries; and this court may inquire de superoneratione forestariorum et aliorum ministrorum forestæ, et de eorum oppressionibus populo nostro illatis: and also may receive and try presentments certified from the court of attachments, against offences in vert or venison. And this court may inquire of offences, and convict also, but not give judgment, which must be at the justice seat. 4 Inst. 289.

The Court of Regard, or survey of dogs, is holden likewise every third year, for expeditation, or lawing of dogs, by cutting off to the skin three claws of the fore feet, to prevent their running at or killing of deer. No other dogs but mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the forest, it being supposed that the keeping of these, and these only, was necessary for the defence of a

man's house. 4 Inst. 308.

The principal court of the forest is the Court of the Chief Justice in Eyre, or justice seat, which is a court of record, and hath authority to hear and determine all trespasses, pleas, and causes of the forest, &c. within the forest, as well concerning vert and venison, as other causes whatsoever; and this court cannot be kept oftener than every third year. As before other justices in eyre, it must be summoned forty days at least before the sitting thereof; and one writ of summons is to be directed to the sheriff of the county, and anmons consists of two parts; first, to summon all the officers of the forest, and that they bring with them all records, &c. Secondly, All persons who claim any liberties or franchises within the forest, and to show how they claim the same. It may also proceed to try pre-The second property of a forest is the sentments in the inferior courts of the forest, courts; as the justice-seat, the swainmote, and to give judgment upon conviction of the

fore after presentment made, or indictment sworn officer ministerial of the forest, and is found, but not before, issue his warrant to the officers of the forest to apprehend the offenders. to watch over the vert and venison, and to officers of the forest to apprehend the offenders. Stat. 7 R. 2. c. 4. This court being a court of all manner of trespasses done within the forrecord, may fine and imprision for offences est; a forester is also taken for a woodward; within the forest, and therefore if there be this officer is made by letters patent, and it is crroneous judgment at the justice-seat, the said the office may be granted in fee, or for record may be moved by writ of error into B. life. 4 Inst. 293. Every forester, when he R., or the chief instice in eyre may adjourn the matter to that court. 4 Inst. 291.5.313.

These justices in eyre were instituted by Henry II. A. D. 1184: and their courts were formerly held very regularly; but the last court of justice seat of any note was that holden in the reign of Charles I. before the Earl of Holland; the rigorous proceedings at which are reported by Sir W. Jones. After the restoration another was held, pro forma only, before for life, is made justice of the same forest pro the Earl of Oxford; but since the æra of the hac vice, the forestership is become void; for revolution in 1688, the forest laws have fallen these offices are incompatible, as the forester is into total disuse, to the great advantage of under the correction of the justice, and he the subject. See 3 Comm. 73 .- Much therefore of what follows is matter rather of curiosity than use. There is but one chief justice king's woods and lands in a forest, receive of the forests on this side Trent, and he is and take in cattle, &c. by agistment, that is, named Justiciarius Itinerans Forestarum, &c. citra Trentam; and there is another, Capi- the pannage, &c. And this officer is constitalis Justiciarius; and he is Justiciarius Iti- tuted by letters patent. 4 Inst. 293. Persons nerans omnium Forestarum ultra Trentam, &c., who is a person of greater dignity than herbage for beasts commonable within the forknowledge in the laws of the forest; and therefore when justice seats are held, there are associated to him such as the king shall appoint, who, together with him, shall deter- | held, that sheep may be commonable in formine omnia placita, foresta, &c. 4 Inst. 315. ests by prescription. 3 Bulst. 213. By stat. 32 H. 8. c. 35. justices of the king's forests may make deputies.

justices in eyre are abolished on the termina-

tion of the existing interests.

The chief warden of the forest is a great officer, next to the justices of the forest, to bail and discharge offenders; but he is no judicial officer; and the constable of the castle where a forest is, by the forest law is chief warden of the forest, as of Windsor Castle, &c.

A verderor is a judicial officer of the forest, and chosen in full county, by the king's writ: his office is to observe and keep the assizes or laws of the forests, and view, receive, and inrol the attachments and presentments of all trespasses of the forest, of vert and venison, and to do equal right and justice to the people; the verderors are the chief judges of the swainmote court; although the chief warden,

est, and to view and inquire of offences, con- resolved by all the judges, that though justices cealments, defaults of foresters, &c. Before in eyre, and the king's officers within his any justice-seat is holden, the regarders of the forests, have charge of venison, and of vert or forest must make their regard, and go through green-hue, for the maintenance of the king's 4 Inst. 291.

swainmote. And the chief justice may there- | A forester is, in legal understanding, a est; a forester is also taken for a woodward: is called at a court of justice seat, ought upon his knees to deliver his horn to the chief justice in eyre; so every woodward ought to present his hatchet to my lord.

A riding forester is to lead the king in his hunting. 1 Jones, 277. The office of forester, &c. though it be a fee-simple, cannot be granted or assigned over without the king's license. 4 Inst. 316. If a forester, by patent cannot judge himself. 1 Inst. 313.

An agister's office is to attend upon the to depasture within the forest, or to feed upon inhabiting in the forest may have common of est: but by the forest law, sheep are not commonable there, because they bite so close that they destroy the vert; and yet it has been

A ranger of a forest is one whose business is to rechase the wild beasts from the purlieus By stat. 57 G. 3. c. 61. the offices of these into the forest, and to present offences within the purlieu, and the forest, &c. And though he is not properly an officer in the forest, vet he is a considerable officer of, and belong.

> The beadle is a forest officer, that warns all the courts of the forest, and executes process, makes all proclamations, &c. 4 Inst. 313.

> There are also keepers or bailiffs of walks in forests and chase, who are subordinate to the verderors, &c. And these officers cannot be sworn on any inquests, or juries out of the If any man hunts beasts within a forest. forest, although they are not beasts of the forest, they are punishable by the forest laws; because all hunting there, without warrant, is unlawful. 4 Inst. 314.

A justice in eyre cannot grant license to sell or his deputy, usually sits there. 4 Inst. 292. any timber, unless it be sedente curiá, or after The regarder is to make regard of the for- a writ of ad quod damnum; and it hath been and view the whole forest, &c. They are ministerial officers, constituted by letters patent browse, and pannage; yet when timber of the king, or chosen by writ to the sheriff. forest is sold, it must be cut and taken by power under the great seal, or the exchequer

seal, by view of the foresters, that it may not | Lex Foresta is a private law, and must be be had in places inconvenient for the game: and the justice in eyre, or any of the king's served, that the laws of the forest are estabofficers in the forest, cannot sell or dispose of any wood within the forest without commission; so that the exchequer and the officers st. 2. c. 2. of the forest have divisum imperium, the one for the profit of the king, the other for his pleasishall lose life or member for killing the king's windfalls, or dotard trees, for their perquisites, he have nothing to pay the fine, he shall be because they were once parcel of the king's in-imprisoned a year and a day; and then be heritance; but they ought to be sold by com- delivered, if he can give good security not to

Stat. 3 vol. p. 301, 305.

for browse, &c. they forfeit their offices. 9 Rep. 50. The lord of a forest may by his offi- wards by hunting it is driven out of the forest, cers enter into any man's wood within the re- and the forester follows the chase, and the gard of the forest, and cut down browsewood owner of the ground where driven kills the for the deer in winter. A prescription for a deer there; yet the forester may enter into the person to take and cut down timber trees in a lands and retake the deer; for property in the forest, without view of the forester, it is said deer is in this case by pursuit. 2 Leon. 201. may be good; but of this quere, without He that hath any manner of license to hunt in allowance of a former eyre, &c. If a man hath a forest, chase, park, &c. must take heed that wood in a forest, and hath no such prescrip- he do not abuse his license, or exceed his aution, the law will allow him to fell it, so as he thority; for if he do, he shall be accounted a does not prejudice the game, but leave sufficient vert; but it ought to be by writ of ad quod fact as if he had no license at all. Manu. 280. damnum, &c. 4 Inst. Cro. Jac. 155. And 288. every person in his own wood in a forest may take house-bote and hay-bote by view of the king, may, in coming and returning, kill a forester; and so may freeholders by prescrip- deer or two in the king's forest or chase tion, copyholders by custom, &c. 1 Ed. 3. st. 2. c. 2. The wood taken by view of the forester ought to be presented at the next court of attachment, that it was by view, and may appear of record.

Fences, &c. in forests and chases, must be with low hedges, and they may be destroyed, though of forty years' continuance, if they passers in hunting or killing of deer, knowing were not before. Cro. Jac. 156. He whose them to be such, or any of the king's venison, wood is in danger of being spoiled, for want of repairing fences by another, ought to request the party to make good the hedges; and if he refuse, then he must do it himself, and have quent agreement amounts to a commandment; action on the case against the other that should

have done it. 1 Jones 277.

A person may have action at common law for trespass in a forest, as to wood, &c. to re-

cover his right. Sid. 296.

a forest at all times of the year; though it was death in the life-time of the heir, contrary to formerly the opinion of our judges, that the fence-month should be excepted. 3 Lev. 127. by the forest law for trespass, as to venison; He that hath a grant of the herbage or pan- for not pursuing hue and cry in the forest, a herbage or pannage, but of the surplusage over trespass and offence of the forest in vert or and feeding for the game; and if there be no ransomed, and bound to the good behaviour of surplusage, he that hath the herbage and pan- the forest, which must be executed by a judinage cannot put in any beasts; if he doth, cial sentence by the lord chief justice in eyre they may be driven out. Read. on Stat. vol. 3, of the forest. 365. None may gather nuts in the forest without warrant.

By Charta de Foresta, 9 H. 3. c. 2. no man Also no officer of the forest can claim deer in a forest, &c. but shall be fined : and if mission, for the king's best benefit. Read, on offend for the future : and if not, he shall abjure the realm; before this statute, it was fe-If any officers cut down wood, not necessary lony to hunt the king's deer. 2 Rol. 120.

If a deer be hunted in a forest, and aftertrespasser ab initio, and be punished for that

Every lord of parliament, sent for by the through which he passes; but it must not be done privily, without the view of the forester, if present; or, if absent, by causing one to blow a horn, because otherwise he may be a trespasser, and seem to steal the deer. Chart. Forest. c. 11: 4 Inst. 305.

By the law of the forest, receivers or tresare principal trespassers; though the trespass was not done to their use or benefit, as the common law requires; by which the subscbut if the receipt be out of the bounds of the forest, they cannot be punished by the laws of the forest, being not within the forest jurisdiction, which is local. 4 Inst. 317.

It a trespass be done in a forest, and the There may be a prescription for common in trespassor dies, it shall be punished after his the common law. Hue and cry may be made A forest may be disafforested and laid open; though it cannot be pursued but only within but right of common shall remain. Poph. 93. the bounds of the forest. 4 Inst. 294. And nage of a park, or forest, cannot take any township may be fined and amerced. In every and above a competent and sufficient pasture venison, the punishment is to be imprisoned,

> No officer of the forest may take or imprison any person without due indictment, or per

shall constrain any to make obligation against the assise of the forest, on pain to pay double damages, and to be ransomed at the king's

will. Stat. 7. R. 2. c. 4.

A forester shall not be questioned for killing a trespasser, who (after the peace cried unto him) will not yield himself; so as it be not done out of some former malice. Stat. 21 Ed. 1. st. 1. If trespassers in a forest, &c. kill a man who opposes them, although they bore no malice to the person killed, it is murder: because they were upon an unlawful the woods, in which there was any stock of act, and therefore malice is implied. Rol. Ab. 548. And if murder be committed by such trespassers, all are principals. Kel. 87.

If a man comes into a forest in the night time, the forester cannot justify beating him before he makes resistance; but if he resists, he may justify the battery. Persons may be fined for concealing the killing of deer by others; and so for carrying a gun, with an intent to kill the deer; and he that steals venison in the forest, and carries it off on horseback, the horse shall be forfeited, unless it be that of a stranger ignorant of the fact. Where heath is burnt in a forest, the offenders may be fined: and if any man cuts down bushes and thorns, and carries them away in a cart, he is fineable, and the cart and horses shall be seized by the forest laws. But a man may prescribe to cut wood, &c. And every freeman within the forest may on his own ground make a mill-dyke, or arable land, without inclosing such arable; but if it be a nuisance to others, it is punishable. Chart. Forest. c. 11: 12 Rep. 22. And if any having woods in his own ground, within any for est, or chase, shall cut the same by the king's license, &c. he may keep them several and inclosed, for seven years after felling. Stat. 22 Ed. 4. c. 7.

.The cruel and insupportable hardships which the forest laws created to the subject, occasioned our ancestors to be as zealous for reformation, as for the relaxation of the fædal rigours and the other exactions introduced by the Norman family. And accordingly we find, in history, the immunities of Charta de Foresta as warmly contended for, and extorted from the king with as much difficulty, as those of Magna Charta itself. By this charter confirmed in parliament many forests were disafforested st. 2. c. 46: 53 G. 3. c. 143: 47 G. 3. or stripped of their oppressive privileges; and 56 G. 3.c. 132. regulations made in the regimen of such as remained. And by a variety of subsequent statutes, together with the long acquiescence thorised to appoint three persons to be "Comof the crown without exerting the forest laws missioners of his Majesty's Woods, Forests, this prerogative is become no longer a grievand Land-revenues," in whom are vested all ance to the subject. 2 Comm. 416.

Lands in Scotland conveyed by the crown with the right of forestry, carried all the privileges of a royal forest, but no such grants ury are empowered to alienate small parcels have been made there since 1680.

the Charta de Foresta as relates to the pun- Commissioners of his Majesty's Woods, &c.

main ouvre, with his hand at the work: nor ishment of taking the King's venison is re-

See further as to the forest law, tits. Deer. Stealing, Game, Chase, King, Park, Parlieu.

Drift of the Forest, Timber, &c.

In the year 1787-1793, a series of reports. (17 in number,) was made by commissioners specially appointed to inquire into the state of the woods, forests, and land revenues of the crown. The third report gives a list of the forests, parks, and chases in England, then under the survey of the surveyor general of timber; these are in Berkshire, Windsor Fo. rest, Cranburn Chase, and Windsor Great and Little Park. Essex, Waltham Forest, anciently called the Forest of Essex, and sometimes Epping or Hainault Forest. Glouces. tershire, Dean Forest. Hampshire, the New Forest, Alice Holt, and Woolmer Forest, Bere Forest. Kent, Greenwich Park. Mid. dlesex, St. James's Park, Hyde Park, Bushy Park, and Hampton Court Park. Northamp. tonshire, the Forests of Whittlewood, Salcey, and Rockingham. Nottinghamshire, Sherwood Forest. Oxfordshire, Whichwood Forest. Surrey, Richmond Park. Of these, Sherwood is the only one North of Trent; the others all being South of Trent.

By several acts, passed in consequence of these reports and further inquiries, the boundaries of several of these and other forests have been ascertained, and regulations made for disafforesting and inclosing them in part or in the whole; and applying them to the bene-

fit of the public; viz.

Alice Holt Forest, 52 G. 3. c. 72.

Bere Forest, Hants, 50 G. 3. c. 21. (local.) Brecknock Forest, 48 G. 3. c. 73: 55 G. 3. c. 190: 58 G. 3. c. 99.

Dean Forest, 48 G. 3. c. 72: 59 G. 3. c. 86. Delamere Forest, 52 G. 3. c. 136. (local.) Exmoor Forest, in Somersetshire and De-

vonshire, 55 G. 3. c. 138.

New Forest, 39 and 40 G. 3. c. 86: 41 G. 3. c. 108: 48 G. 3. c. 72: 50 G. 3. c. 116: 52 G. 3. c. 161: 59 G. 3. c. 86.

Quernmore Forest, 51 G. 3. c. 131. (local.) Rockingham Forest, 52 G. 3. c. 161. § 25. and acts there cited.

Sherwood Forest, 58 G. 3. c. 100.

Woolmer Forest, 52 G. 3. c. 71.

By stat. 50 G. 3. c. 65. his Majesty is auand Land-revenues,"in whom are vested all the powers of surveyor general of the land revenues, and surveyor general of the woods, &c.

By stat. 52 G. 3. c. 161. § 5., &c. the Treasof crown lands in the forests, intermixed with By stat 7 and 8 G. 4. c. 27. § 1. so much of the property of subjects, upon report of the

and to make compensation and grant leases 12 G. 3. c. 71; by the preamble of which to persons relinquishing purprestures or in- it should seem that the remedy was found croachments in the forests; and by § 11, 15. to be worse than the disease. But these of of the same act, additional powers are given fences still continue punishable upon into the court of attachments in forests for pre- dictment at the common law by fine and imventing and punishing unlawful inclosures, and regulating the conduct of regarders, under-foresters, under-keepers, and other officers of the forest.

By the 10 G. 4. c. 50. the laws relating to the management and improvement of woods and forests belonging to the crown are con-

solidated and amended.

FORESTAGIUM. Duty payable to the king's foresters, Chart. 18 Ed. 1.

FORESTALL. To be quit of amerciaments and chattels arrested within your land, and the amerciaments thereof coming. Termes

FORESTALLING. Forestallamentum, from the Saxon fore, before, and stal, a stall.] To intercept on the highway. Spelman says it is viæ obstructio, vel itineris interceptio; with whom agrees Coke on Lit. fol. 161. And, according to Fleta, forestalling significat obstructionem viæ vel impedimentum transitus et fugæ avariorum, &c. lib. 1. c. 24. In our law, forestalling is the buying or bargaining for any corn, cattle or orther merchandise, by the way, as they come to fairs or markets to be sold, before they are brought thither; to the intent to sell the same again, at a higher and dearer price.

All endeavours to enhance the common price of any victuals or merchandise, and practices which have an apparent tendency thereto, whether by spreading false rumours, or buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, &c. are highly criminal by the common law; and all such offences anciently came under the offence against public trade. This was desgeneral appellation of forestalling. 3 Inst. 195, 196. And so jealous is the common law of practices of this nature, which are a general merchandise, or victual coming in the way to inconvenience and prejudice to the people, and very oppressive to the poorer sort, that it ing their goods or provisions there; or persuadwill not suffer corn to be sold in the sheaf before thrashed: for by such sale the market is any of which practices makes the market dearin effect forestalled. 3 Inst. 197: H. P. C. 152.

are offences generally classed together as of victual, in any market; and selling it again in the same nature and equally hurtful to the the same market, or within four miles of the public. Ingressing seems derived from the place. For this also enhances the price of the words in and gross great or whole; and, re- provisions, as every successive seller must have grating from re, again, and grater Fr. to a successive profit. scrape, from the dressing or scraping of cloth

Several statutes were from time to time quantities of corn or other dead victuals with made against these offences in general, and intent to sell them again. This must be of also specially with respect to particular species of goods according to their several circumstances; all of which, from the 5 and 6 the price of provisions at their own discre-Ed. 6. c. 14. downwards, and all acts for en- tion. forcing the same were repealed by stat. The above descriptions given by the statutes

prisonment.

The following have been held to be offences

at common law, viz. :

The total ingressing of any commodity, with intent to sell it at an unreasonable price, is an offence indictable and fineable at common law. Cro. Car. 232.

Spreading rumours with intent to enhance the price of hops, in the hearing of hop planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price.-Ingressing large quantities of hops, by buying from many persons, certain quantities with intent to resell the same for an unreasonable profit, and thereby to enhance the price.-Accumulating large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to resell at an unreasonable profit, &c .- Ingrossing hops then growing, by forehand bargains, with like intent.—Buying all the growth of hops on certain lands, in certain parishes, by forehand bargains, with intent to sell at an unreasonable price, &c. Rex v. Waddington, 1 East's Rep. 143-169. In which case it was ruled that to forestall any commodity which is become a common victual and necessary of life, or used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law.

The offence of forestalling the market is an cribed by the said stat. 5 and 6 E. 6. c. 14. to be the buying or contracting for any cattle, the market, or dissuading persons from bringing them to enhance the price when there; er to the fair trader.

Regrating was described by the same sta-Forestalling, Ingrossing, and Regrating, tutes to be the buying of corn, or other dead

Ingressing was also described to be the getor other goods in order to sell the same again. ting into one's possession or buying up large

Vol. I.—104

fences at common-law, and are therefore here see that tit. By breach of copyhold customs:

The indictment should specify the quantity, feited for neglect of duty; see tit. Office. of the article ingressed: an indietment for ingrossing a great quantity of fish, geese, and ducks, without specifying the quantity of each, was held bad. Rex v. Gilbert, 1 East Rep.

By stat. 7 and 8 G. 4. c. 38. no constable shall be required to make presentments of forestallers at any gaol delivery or quarter-ses-

See further this Dict. tit. Monopoly, and the several articles to which the same is appli-

cable.

FORESTER. See tit Forest.

FORETHOUGHT FELONY. See Mur-

FORETOOTH. Striking out the fore-

tooth is a Mayhem. See tit. Maihem.

FORFANG or FORFENG, from the Sax. Fore, ante, and fangen, prendere. Antecaptio vel Preventio. The taking of provision from any one in fairs or markets, before the king's purveyors are served with necessaries for his Majesty. Chart. Hen. 1. Hosp. Sanct. Barth. Lond. Anno 1133.

FORFEITURE.

effect, or penalty, of transgressing some law. that is put in jeopardy, by such act of the par-For an ingenious discussion to prove the pro-ticular tenant, it is but just, that, upon discopriety and policy of such punishment, see Mr. Charles Yorke's " Considerations on the Law and taken from him who has shown so maniof Forfeitures," corrected and enlarged, 8vo. 1775.—See also this Dict. tit. Tenures, III. of it. The other reason is, because the par-

punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments: whereby he loses all entitled to enter regularly, as in his remainder his interest therein, and they go to the party or reversion. 2 Comm. 274. injured, as a recompense for the wrong, which either he alone or the public together with is, that the act done is incompatible with the him hath sustained. 2 Comm. 267.

be forfeited in various degrees and by various in the case of a tenant for life or years enfeofmeans. Forfeitures may therefore be divided fing a stranger in fee-simple, this is a breach into civil and criminal. The latter will be of the condition which the law annexes to his

see this Dict. under that title; or by particu- implied condition annexed to every fædal dolar tenants, when the estates they convey are greater than the law entitles them to make.

This latter alienation divests the remainder or reversion, and is also a forfeiture to him tenants of the mere freehold, or of chattel integrated thereby.

serve as a guide for the indictment of these of of Conditions; see tit. Condition. By Waste: see tit. Copyhold. Offices also may be for-

I. Of Forfeitures in Civil Cases.

II. Of Forfeitures in Criminal Cases; and herein,

- 1. Generally for what Crimes such Forfeitures are inflicted: and to what Time they bear relation.
- 2. More particularly; what Estates are subject to Forfeiture.
- 3. When Forfeitures may be seized.

I. As to alienations by particular tenants; if tenant for his own life aliens, by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion. Litt. § 415. For this there seem to be two reasons: first. because such alienation amounts to a renunciation of the fædal connection and dependence; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one, and it tends in its consequence to defeat and divest the re-FORISFACTURA, from the Fr. Forfait.] The mainder or reversion expectant: as therefore very, the particular estate should be forfeited fest an inclination to make an improper use ticular tenant, by granting a larger estate than Forfeiture is defined by Blackstone to be a his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is

Another reason assigned for these forfeitures estate which the tenant holds, and against the Lands, tenements, and hereditaments, may implied condition on which he holds it. As presently considered more at large under this estate, viz. that he shall not attempt to create a greater estate than he himself is entitled to. Civil forfeitures arise either by alienation 1 Inst. 215. So if tenant for life, or years, or contrary to law; as in mortmain; for which in fee, commit felony, this is a breach of the

whose right is attacked thereby. 1 Inst. terests. But if tenant in tail aliens in fee, this is no immediate forfeiture to the remain-Forfeiture in civil cases may also accrue der man, but a mere discontinuance of the by non-presentation to a benefice, when it is called a Lapse; see this Dict. tit. Advowson.

By Simony; see that tit. By nonperformance der or reversion hath only a very remote, and barely possible interest therein, until the issue in tail is extinct. See this Diet. tit. Discon- could re-enter for a forseiture; and no grantee tinuance.

But in case of such forfeitures, by particular tenants, all legal estates by them before created (as if tenant for 20 years grants a lease for 15), and all charges by them lawfully made on the lands, shall be good and available in the law. For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself hath created. 1 Inst. 233: 2 Comm. 275.

This kind of forfeiture differs from that incurred by the breach of a condition principally in this respect; that the former, which arises enter; though he has the fee, or only an estatefrom a general rule of law, does not affect derivative estates or incumbrances created before the wrongful act; but the latter, which tled to the rent, if there had not been any lease, arises from a special contract, defeats at once can re-enter for a forfeiture. Loft. 319. a: 2 the principal estate to which it was annexed, and all interests which may have been derived 710. But a lessor who has demised all his out of it. Co. Lit. 234. a.

to pay his rent, or to do suit of court; one to being broken, though he have no reversion. whom an estate is granted upon condition, 2 B. & A. 162. does not perform the same; in all these cases

forseitures are incurred. 1 Rep. 15.

If tenant for life, in dower, by the curtesy, or after possibility of issue extinct, or lessee for of the copyholder and the lords reversion. 2 years, tenant by statute-merchant, staple, or elegit, of lands or tenements that lie in livery, shall make any absolute or conditional feoffment in fee, gift in tail, lease for any other life than his own, &c., or levy a fine sur conusance de droit come ceo, &c., or suffer a common recovery thereof: or being impleaded in a writ of right brought against him, join the mise upon the mere right, or, admit the reversion to be in another; or in a quid juris clamat, ticular tenant, is the civil crime of Disclaimer; claim the fee-simple; or if lessee for years, being ousted, bring an assise ut de libero tenemento, &c .- by either of these these things, there will be a forfeiture of estate. Ploud. 15: 1 Rep. 15: 8 Rep. 144: Co. Lit. 251: Dyer, 152, 324: 1 Bulst. 219.

yer, 152, 324: 1 Bulst. 219. in the demise. These will be treated of here-But where the land granted by tenant for after. See tit. Lease. e, or years, is not well conveyed; or the By 3 and 4 W. 4. c. 27. § 2, 3. a party must life, or years, is not well conveyed; or the

A breach of a condition does not render a lease for life void, but only voidable, and it is therefore not determined till the lessor re- tial ground, of any forfeiture for crimes, conenters, by bringing an ejectment for the for- sists in this: that all property is derived from feiture; for it is a rule that where an estate society, being one of those civil rights confercommences by livery, it cannot be avoided by red on individuals in exchange for that degree re-entry; but a lease for years is absolutely of natural freedom, which every man must void on breach of the condition without entry. sacrifice when he enters into social commu-1 Inst. 214.

At common law no one but the grantor or assignee of the reversion could take the benefit or advantage of a condition for reentry. To remedy this, it was enacted by the 32 H. 8. c. 34. that all persons grantees of the reversion of lands, their heirs, executors, successors, and assigns, should have like advantage against the lessees, &c., by entry, for non-payment of rent, or for doing waste, or other forfeiture.

Entry for a forfeiture ought to be by him who is next in reversion or remainder after the estate forfeited. As, if tenant for life or years commits a forfeiture, he who has the immediate reversion, or remainder, ought to

tail. 1 Rol. 857. l. 45. 50. 858. l. 5

No one but the person who would be enti-Tyrr. 289: S. C. 2 Cromp. & I. 232: 2 Tyrr. interest subject to a right of re-entry on breach When a copyholder commits waste, refuses of a condition, may enter on the condition

> The lord may enter for waste committed by copyholder for life, though there be an intermediate estate in remainder between that

M. & S. 68. See tit Copyhold

It shall be a dispensation of the forfeiture. if he in reversion or remainder be a party to the estate made, and accept it: as if a husband, seised in right of his wife for life, leases to him in reversion for his own life. 1 Rol.

Equivalent, both in its nature and its consequences, to an illegal alienation by the paras to which see this Dict. tit. Disclaimer.

The cases in which the question of forfeiture principally occurs at the present day, are those arising between landlord and tenant, for the breach of express stipulations contained

thing does not lie in livery, as a rent, commake his entry, or bring his action for a formon, or the like; he will not forfeit his estate: and therefore if a feoffment, gift in years after such forfeiture was incurred, or tail, or lease for another's life, made by the tenant for life, is not good, for want of words in making it, or due execution in the livery and scisin, this shall not produce a forfeiture.

2 Rep. 55.

A breach of a condition does not render a

II. 1. The true reason, and only substannities. If therefore a member of any national

of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of crown for treason is by no means derived from property, or any part of it, which the laws the feudal policy, but was antecedent to the have before assigned him. Hence, in every offence of an atrocious kind, the laws of Eng. | See this Dict. tit. Tenures, III. 10. land have exacted a total confiscation of the moveables or personal estate; and in many cases perpetual, in others only a temporary loss of the offender's immoveables or landed property: and have vested them both in the king, as the person supposed to be offended, being the one visible magistrate in whom the himself. By a subsequent statute, namely, the majesty of the public resides. 1 Com. 299.

lands and tenements are principally the fol-the sons of the late Pretender. And by 39 G. lowing five. 1. Treason. 2. Felony. 3. Misprison of Treason. 4. Pramunire. 5. Drawing a weapon on a Judge; or striking any one in the presence of the king's courts of justice.

Forteiture in criminal cases is twofold; of real and personal estates. First as to Real Estates.

By the common law, on attainder of high treason a man forfeits to the king all his lands life; and after his death all his lands and teneand tenements of inheritance, whether feesimple or fee-tail, and all his right of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards: to be forever vested in the crown. And also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. Co. Lit. 392: 3 Inst. 19: 1 Hal. P. C. 240: 2 Hawk. P. C. c. 49.

This forfeiture relates backwards to the time of the treason committed so as to avoid all intermediate sales and incumbrances, but not those before the fact. 3 Inst. 211. A wife's jointure is not forfeitable for the treason of her husband; if it was settled upon her previous to the treason committed. But her dower is forfeited by the express provision of 5 and 6 Ed. 6. c. 11. repealing in that particular 1 Ed. | fee; without any mention of waste. See Mirr. 6. c. 12.

Yet the husband shall be tenant by the curtesy of his wife's lands if the wife be attained of the king should have his year, day, and waste, treason, for that is not prohibited by the statute. 1 Hal. P. C. 359. Although, after attainder, the forfeiture relates back to the time of the treason committed, yet it does not take effect ancient one, of the royal prerogative. Mirr. unless an attainder be had, of which it is one c. 5. § 2: 2 Inst. 37. of the fruits: and therefore if a traitor dies This year, day, and waste, were usually before judgment pronounced, or is killed in compounded for; but otherwise regularly beopen rebellion, or is hanged by martial law, it longed to the crown, and after their expiration works no forfeiture of his lands; for he never was attainted of treason; and by the express provision of stat. 34. E. 3. c. 12. there shall be quality intercepted such descent and given it no forfeiture of lands for treason, of dead persons, not attainted in their lives. See 3 B. & A. 510.

community violates the fundamental contract open rebellion, records it, and returns the record into his own court, both lands and goods shall be forfeited. 4 Rep. 57.

Forfeiture of lands and tenements to the establishment of that system in this island.

With a view to abolish such hereditary punishment entirely, it was provided by stat. 7 Ann, c. 21. § 10. that after the decease of the Pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor stat. 17 G. 2. c. 39. the operation of 7 Anne, C. The offences which induce a forfeiture of 21, was still farther suspended till the death of 3. c. 93. the provisions of both these acts were repealed: so that the forfeiture for treason stands as it did before the passing of 7 Anne, c. 21. See 4 Comm. 384. and this Diet. tits. Attainder, Corruption of Blood.

In petit treason, misprison of treason, and felony, the offender, until recently, forfeited the profits of all estates of freehold during ments in fee simple (but not those in tail), to the crown for a short period of time: for the king should have them for a year and a day, and might commit therein what waste he pleased, which was called the king's year, day, and waste, 2 Inst. 37. 3 Inst. 392. Formerly the king had a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. But this tending greatly to the prejudice of the public, it was agreed in the reign of Hen. I. that the king should have the profits of the land for a year and a day, in lieu of the destruction he was otherwise at liberty to commit; and therefore Magna Charta, c. 22. provided that the king should only hold such lands for a year and a day, and then restore them to the lord of the c. 4. § 16: Flet. l. 1. c. 28. But the stat. 17 E. 2. de prærogativa regis seemed to suppose that and not the year and day instead of waste: which Lord Coke and the Mirror very justly considered as an encroachment, though a very

the land would have descended to the heir (as it did in gavel kind tenure), had not its feudal by way of escheat to the lord. See tits. Tenure, Escheat.

But by the 54 G. 3. c. 145. no future attain-Yet if the chief justice of the King's Bench | der for felony, except in cases of high treason, (the supreme coroner of all England) in per- petit treason (now reduced to murder), or murson upon the view of the body of one killed in | der, shall extend to the disinheriting of any

offender during his life.

Forfeitures of lands for felony also arise only upon attainder; and therefore a felo de se forfeits no lands of inheritance or freehold, for he never is attainted as a felon. 3 Inst. 55. They likewise relate back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. 4 Comm. 386.

These are all the forfeitures of real estates upon attainders by judgment of death or outlawry. The particular forfeitures created by the statutes of pramunire and others are here omitted, being rather a part of the judgment and penalty inflicted by the respective stat. in treason and felony they are. See post, 2.

As a part of the forfeiture of real estates. of lands during life: which extends to two drawing a weapon upon a judge there sitting in the king's courts of justice. 3 Inst. 141. And it seems that the same forfeiture is incurthe courts there, committed by the judges. Cro. Jac. 367.

The forfeiture of goods and chattels accrues in every one of the higher kinds of offence; in high treason or misprison thereof; felonies of all sorts; self-murder, or felo de se; and the above mentioned offences of

striking, &c. in Westminster-hall.

Formerly, for flight also, on an accusation of treason, felony or even petit larceny, whether the party was found guilty or acquitted, if the jury found the flight, the party forfeited his goods and chattels; for the very flight was considered an offence, carrying with it a strong presumption of guilt; and was the jury very seldom found the flight; forfeiture being looked upon, after the vast increase of personal property, is too large a penalty of rent-charges, commons, &c. shall be for-

lands, tenements, or goods of the person indicted, or whether he fled for such treason

or felony.

tween the forfeiture of lands, and of goods and on the attainder of the offender, without any chattels. 1. Lands are forfeited upon attainoffice found, saving the rights of others. See
der, and not before: goods and chattels are
stat. 33 H. 8. c. 20. Lands and hereditaments
forfeited by conviction. Because in many of
in fee simple and fee tail, are forfeited in high the cases where goods are forfeited there nev- treason: but lands in tail could not be forfeited er is any attainder; which happens only only for the life of tenant in tail, till the statwhere judgment of death or outlawry is ute 26 H. 8. c. 13. by which statute they may given; therefore in those cases the forfeiture be forfeited.

heir, or to the prejudice of the right or title of must be upon conviction, or not at all; and any person other than the right or title of the being necessarily upon conviction in those it is so ordered in all other cases: for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment, but the goods and chattels are forfeited by a man's being first put in the exigent, without staying till he is quinto exacttus or finally outlawed, for the scereting himself so long from justice is construed a flight in law. 3 Inst. 232. (See this Dict. tit. Outlawry.) 3. The forfeiture of lands has relation to the time created by the common law as consequential of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may bonâ fide sell utes, than consequences of such judgment, as any of his chattels, real or personal, for the sustenance of himself or family, between the fact and conviction. 2 Hawk. P. C. c. 49. may be mentioned, the forfeiture of the profits For personal property is of so fluctuating a nature, that it passes through many hands in other instances besides those already spoken a short time; and no buyer could be safe if of; the striking in Westminster Hall, or he were liable to return the goods which he had fairly bought, provided any thing of the prior vendors had committed a treason or felony. Yet if they be collusively and not bond red by rescuing a prisoner in or before any of fide parted with, merely to defraud the crown, the law, and particularly stat. 13 Eliz. c. 5., will reach them; for they are all the while truly and substantially the goods of the offender; and as he, if acquitted, might recover them himself, as not parted with for a good consideration, so in case he happens to be convicted, the law will recover them for the king. 4 Comm. 388. See Gordon's case, Dom. Proc.

2. Where land comes to the crown, as forfeited by attainder of treason, all mesne tenures of common persons are extinct; but if the king grant it out, the former tenure shall be revived, for which a petition of right lies. 2 Hale's Hist. P. C. 254. In treason, all lands at least an endeavour to clude and stifle the of inheritance, whereof the offender was seizcourse of justice prescribed by the law. But ed in his own right, were forfeited by the common law; and rights of entry, &c. And the inheritance of things not lying in tenure, as by the natural love of liberty. 4 Comm. 387. whatsoever to lands of innermance is leaved. And now by the 7 and 8 G. 4. c. 28. § 5. either by the common or statute law. 2

And now by the 7 and 8 G. 4. c. 28. § 5.

By stat. 26 H. 8. c. 13. all lands, tenements, &c. of inheritance are forfeited in treason. And the king shall be adjudged in posses. There are some remarkable differences be- sion of lands and goods forfeited for treason

Upon outlawry in treason or felony, the offender shall forfeit as much as if he had ap- albeit any person should be attainted of trea peared, and judgment had been given against him; so long as the outlawry is in force. 3 Inst. 52. 212.

Gavelkind land in Kent is not forfeited by committing of felony; and by a felony only, entailed lands are not forfeit. S. P. C. 3. 26. common law and ad astium ecclesia. Inch to

A copyholder surrenders to the use of his will; the devisee is convicted of felony and hanged before admittance; the lands are not forfeited to the lord, but descend to the heir of c. 11. did not extend to dower ex assensu the surrenderor. 2. Wil.. 13.

Land that one hath in trust; or goods and chattels in right of another, or to another's use &c. will not be liable to forfeiture. Though reclesse are both now abolished. See tit. leases for years, in a man's own, or his wife's right, estates in a joint-tenancy, &c. and all statutes, bonds, and debts due thereby, and upon contracts, &c. shall be forfeited. Co. Lit. 42. 151: Staund. 188.

his wifes term; and if a wife kill her husband, of treason, and afterwards pardoned, yet the

a person, attainted of felony, is seised of an estate of inheritance in right of his wife; or of an estate for life only in his own right; are forfeited to the king, and nothing is forfeited to the lord. 3 Inst. 19: Fitz. Ass. 166.

In manslaughter, the offender forfeits goods

and chattels. Co. Lit. 319.
Chance-medley and se defendendo were Chance-medley and se defendendo were been taken to provide for the wife's dower. formerly also attended with forfeiture of goods 3 New Abr. 584. See 12 Vin. Abr. tit. Forand chattels, but offenders received their par-feiture: 2 Hawk. P. C.c. 49. don as a matter of course. Co. Lit. 319. Artificers going out of the kingdom and Now by the 9 G. 4. c. 31. § 10. it is provided teaching their trades to foreigners, were liable that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.

Those that are hanged by martial law in the time of war forfeit no lands. Co. Lit. 13. And for robbery or piracy, &c. on the sea, if tried in the Court of Admiralty, by the civil law, and not by jury, there is no forfeiture: but if a person be attainted before commis- feitures shall be construed favourably. Coup. sioners by virtue of the stat. 28 Hen. 8. c. 15. 585. 8. there it works a forfeiture 1 Lill. Abr.

In a premunire, lands in fee simple are forfeited, with goods and chattels. Co. Lit. toried, and a charge made thereof before indict-

Before the statute of 1 Ed. 6. c. 12. the wife not only lost her dower at common law, but also her dower ad ostium ecclesia, or ex assensu patris, or by special custom (except that of gavelkind), by the husband's attainder of 875. treason, or capital felony, whether committed before or after marriage. Co. Lit. 31. b: 37. a: 41. a: F. N. B. 150: Perk. § 308: Bro. persons named by the king or by the attortit. Dower, 82: Plowd. 261.

her husband and her, whether by way of frank treason committed, and the value: and that marriage or otherwise, only for the year, day, they seize them into the king's hands. And and waste. Co. Lit. 37: 3 Inst. 216.

By 1 Ed. 6, c. 12, 517, it was enacted that son or felony his wife should have her dower. This, however, was repealed as to treason by 5 and 6 Ed. 6. c 11. 8 9. . . ante, 1.

Therela Lord Coke expressly makes dower or asserts of patries as well as the dowers at be defeated at common law, by the husbrand's treason or felony; 1 Inst. 27. a: vet some have inclined to think that the 5 and 6 Ed. 6. patris, so as to make it forfeitable on the trea-

Dower ex assensu patris and ad ostium

If the husband seised of lands in fee, makes a feoffment and then commits treason, and is attainted of it, the wife shall not recover dower against the feoffee. Bendl. 56: Dyer, 140; A married man, guilty of felony, forfeits Co. Lit. 111. a. So if the husband is attainted wife shall not recover dower; but of lands purchased by the husband after the pardon, In cases of felony the profits of lands whereof the wife shall be endowed. 3 Leon. 3: Perk.

> After the making of the above mentioned statute, 1 Ed. 6. c. 12. it seems to have been doubted, whether the wife should not lose her dower in case of any new felony made by act of parliament; therefore where several ofsences have been made selony since, care has

> to forfeit their lands, &c. by the 5 G. 1. c. 27; and similar forfeitures were inflicted by several other statutes; all of which were repealed by the 5 G. 4. c. 97

> In all cases where a penalty or forfeiture is given by statute, without saying to whom it shall be, or a limitation for a recompense for the wrong to the party, it belongs to the king. Stra. 50. 828: 2 Vent. 267. And such for-

> 3. Goods of a felon, &c. cannot be seized before forfeited: though they may be invenment. Wood's Inst. 659. Where goods of a felon are pawned before he is attainted, the king shall not have the forfeiture of the goods till the money is paid to him to whom they were pawned. 3 Inst. 17: 2 Nels. Abr. 874,

After conviction by judgment or outlawry, for high treason, &c. a commission goes to ney-general, to inquire what lands and tenc-But the wife forfeited lands given jointly to ments the offender had at the time of the the inquisition taken thereon shall be returned to the Court of Exchequer, and filed in the every alteration of or addition to a true instruoffice of the king's remembrane r. Lat. 90% ment. 2 East's P. C. 319. c. 1. § 49.

So after conviction for felony, a scire facias The publishing or uttering of a forged inshall go against the will, or any other, who strunent, knowing it to be forged, although has the goods in his custody. S. P. C. 194. distinct from the act of forgery, comes also But if any one has title to the goods or lands within the legal definition of the offence. found by inquisition to be the goods or lands being rendered by the statute law, with very of the offender, he may make his claim by pleading his title. Lut. 998. To which the making or counterfeiting. attorney-general shall demur, or reply. Vid. Com. Dig. tit. Prarogative (D. 83, 84.)

forfeiture is more general: whereas confiscation is particularly applied to such as are forfeit to the king's exchequer. Staundf. P. C.

There is a full forfeiture, plena forisfactura, otherwise called plena wita, which is a forfeiture of life and member, and all that a man hath. Leg. H. 1. c. 88. And there is mention in some statutes, of forfeiture, at the king's will, of body, land, and goods, &c. 4 Inst. 66. See further on this subject this Dict. tits. Attainder, Corruption of Blood, Escheat, Felony, Treason, &c. and Com. Dig. tit. Forfeiture.

See the recent act amending the law relative to the forfeiture of property held in trust.

Tenure, II. 7.

Forfeiture of Marriage, Forisfactura maritagii.] A writ which anciently lay against him, who, holding by knight's service, and being under age, and unmarried, refused her whom the lord offered him without his dispar-

FORFEITED ESTATE. Several statutes have been from time to time passed, appointing commissioners of forfeited estates, on rebel-lions in this kingdom and Ireland. Thus by stat. 11 and 12 W. 3. c. all lands and tenements, &c. of persons attainted or convicted Bank of Ireland. These are now the only of treason or rebellion in Ireland, were vested in several commissioners and trustees for sale thereof. And by several stat. temp. G. 1. commissioners were appointed to inquire of forfeited estates in England and Scotland, on the rebellion at Preston, &c. And the estates of persons attainted of treason were vested in his Majesty for public uses; but afterwards in trustees, to be sold for the use of the public; and it was provided, that the purchasers should be Protestants.

FORGAVEL, Forgabulum.] A small reserved rent in money, or quit-rent. Cartular.

* Abhat. de Rading. MS. f. 88.

FORGE, Forgia.] A smith's forge, to melt

and work iron. Chart. H. 2.

FORGERY, from Fr. forger, i. e. accuderc, fabricare, to beat on an anvil, to forge or form.] is usually made manifest, it may be proved Fraudulent making or alteration of any re- as satisfactorily by other evidence. 2 Lord R. cord, deed, writing, instrument, register, 1469: 1 Leach, 173: 2 New R. 93. stamp, &c. to the prejudice of another man's right. 4 Comm. 247. A false making, a mak- written instrument, but a fradulent insertion, ing malo animo of any written instrument for alteration, or erasure even of a letter, in any

few exceptions, equally penal with the act of

At common law, forgery was only a misdemeanor, and in some of the early statutes it is Forfeiture differs from confiscation, in that treated rather as a civil injury than a criminal offence. When, however, the extension of trade and commerce gave birth to the system of paper credit, it was found necessary to repress forgery by innumerable acts, which, for the most part, rendered the crime a capital felony. The severity of the statute law was partially mitigated by the 11 G. 4. and 1. W. 4. c. 66. which repealed many of the former acts, and incorporated and consolidated all forgeries that were intended still to be punishable with death. By this act, those offences which were made capital felonies by previous statutes, but are not therein declared to be such, are punishable with transportation for life or seven years, or with imprisonment not exceeding four, and not less than two years. The feeling of the country calling strongly for a further relaxation of the rigor with which this offence was treated, induced the legislature shortly afterwards to pass the 2 and 3 W. 4. c. 123. which abolished the penalty of death, and substituted transportation agement, and married another. N. N. B. fol. for life in all cases which, by the former 141: Reg. Orig. fol. 163. See tit. Tenure. statute, were declared capital felonies, or were so punishable in Scotland or Ireland, with the exception of the forgery of wills, and powers of attorney for transferring or receiving the dividends upon any stock transferable at the Bank of England, the South Sea House, or the forgeries which are visited with death.

I. What amounts to a Forgery.

II. What is an Uttering. III. Of the Intent to Defraud.

IV. The Instruments whereof Forgery may be committed, &c. .

V. Of Accessories.

VI. Of the Indictment, Venue, &c.

I. What amounts to a Forgery.—The making of any instrument which is the subject of forgery with a fraudulent intent, is of itself a sufficient completion of the offence without uttering or publishing, and consequently before any injury is sustained; for though publication be the medium by which the intent

Not only the fabrication of the whole of a the purpose of fraud or deceit; including material part of a true instrument, giving a be afterwards executed by another person should not be illegal in its very frame. 2 ignorant of the deceit. 2 East, P. C. c. 19. East, P. C. 948. Thus, although it is for-§ 4. p. 855. And the fraudulent application of gery to make a false will of a living person, a true signature to a false instrument, for which it was not intended, or vice versa, will also be a forgery. Id. ibid.

To make a mark to a promissory note, or any other document, in the name of another person, with intent to defraud, is as much a forgery as if the party had signed that person's name. 1 Leach, 57: 2 East, P. C.

Forgery may be committed by a party making a false deed in his own name; as where a party made a feoffment of lands, and dated it prior to a former deed, whereby he conveyed the same lands; for he falsifies the date in order to defraud his own feoffee. 3 Inst. 169: 1 Hall, 683: Fost. 117: 1 Hawk. c. 70. § 2.

So a man is guilty of forgery who gets possession of a bill of exchange drawn in favour of another person of the same name, and, knowing he is not the real payer, indorses it for the purposes of fradulently appropriating

the money. 4 T. R. 28.

Also where a note is made by a party in an assumed name and character with intent to defraud, the offence is forgery, though the note is made, and offered as that of the party himself, and not as the note of another person. 1 Leach, 57: 2 East, P. C. 962.

And the making of any false instrument with a fraudulent intent, although in the name of a fictitious person, is as much a forgery as if it had been made in the name of one who was known to exist, and to whom credit was due. 2 East, P. C. 957, 958: Post. 116: 1

Leach, 83. 94.

In order to constitute the crime of forgery. it is immaterial whether, in discounting a bill in an assumed name, any additional credit is gained by the assumption, or whether the money might not have been as well obtained by indorsing the bill in the real name of the party uttering it. 1 Leach, 172: 2 East, P. before the time he had the fraud in view, even C. 359. And it is the same where a receipt in the absence of proof as to what name he is given in a false name as the party's own name, and the object is to escape detection, and the intent to defraud: 1 Leach, 214: 2 East, P. C. 960; nothwithstanding the credit has been given to the person, and not to the name. 1 Leach, 226. And the case will be equally forgery, though the bill or draft is taken by the prosecutor on the personal credit of the party, and on the presumption that the assumed name is his own, and though the prosecutor would have given him equal credit if he had passed by his real name. R. & R. 75. 90. 209.

Neither is it material that the forged instrument should be so made, that, if genuine, employed for a criminal purpose, the employer it would be valid; but it is essential to the is responsible for his acts. 2 Leach, 978: 1 crime of forgery, that the false instrument N. R. 96: R. & R. 72. And it seems to be should carry on its face the semblance of that equally held an uttering where the note was

new operation to it, as a forgery, although it | for which it was counterfeited, and that it notwithstanding it can have no validity as a will until his death; 2 East. P. C. 948, 9: 1 Leach, 99. 449; or to fabricate any false ininstrument on unstamped paper, which by law requires a stamp; 1 Leach, 257: (and sec other cases, 2 East, P. C. 955, 6.) yet to forge a promissory note without a signature; R. & R. 445; or a will of lands attested by only two witnesses; 2 East, P. C. 953; would not subject the maker or utterer to the punishment of forgery; as these documents have no semblance of validity in law.

It seems that a man cannot be guilty of forgery by a bare nonfeasance; as if in drawing a will he should omit a legacy which he was directed to insert; but it appears to have been holden, that if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causes a devise of the same lands to another, to pass a present estate, which would otherwise have passed a remainder only, the person making such an omission is guilty of forgery. Moor, 763: Noy. 101: 1 Hawk. P. C.

c. 70. § 6: 2 East, P. C.c. 70. § 2.

Where a person drew a bill inserting the real name of the acceptor, but giving a false description of him, it was held not to be a forgery. R. & R. 405: 3 B. & B. 228. And where a prisoner was convicted of forging an acceptance to a bill of exchange in the name of Scott, and it did not appear that he had not gone by that name before the time of accepting the bill in question, or that he assumed it for that particular purpose; a majority of the judges held the conviction wrong. R. & R. 260. But if there be satisfactory proof of the prisoner's real name, and that the false name has been assumed for concealment, with a view to a fraud of which the forgery is a part; it is for him to prove that he used the assumed name had used for several years before the fraud was perfected. R. & R. 278.

II. What is an Uttering .- Any disposal or negotiation of a forged instrument to another person with a fraudulent intent, provided the party disposing of it knows it to be forged, is an uttering, which by most of the statutes on the subject is made a substantive offence.

Where a person knowingly delivers a forged note to an innocent agent, for the purpose of its being uttered by him, and he utters it accordingly, this is an uttering by the first party; for wherever an innocent person is

given to an accomplice. R. & M. 166. And | tent, whereby another may be prejudiced, is though it has been doubted whether in a case forgery at common law. 2 East's P. C. c. 19. like the last the party ought not to be indict. \ \ 7. ed as an accessory before the fact, and not as a principal; it appears to be the better opi-struments comprised in the statutes on the nion that he may be charged as the utterer. 1 N. R. 96. But to indict as a principal, there must be satisfactory proof, either of an actual delivery of the note by him to the accomplice, are declared capital felonies by acts passed or else that he was present when the latter uttered it; otherwise he can only be charged as an accessory before the fact. R. & R. 25; H. 363. See post, V.

The offence of uttering is complete, though the note was delivered by the prisoner to an agent employed to detect him; if the note be the 2 and 3 W. 4. c. 123, may at the discretion delivered to the agent for the purpose of being disposed of as a good one. 2 Leuch, 1019: 2 Taunt. 331: R. & R. 154. So delivering a box containing forged instruments to the party's own servant, that he may take them to an inn to be conveyed by a carrier to a customer in the country, is an uttering. 2 Leach. 1048: 4 Taunt. 300: R. & R. 212. So likewise the offence of uttering was held complete, where the prisoner delivered a forged bill to another person as a pledge to obtain credit. R. & R. 86.

III. Of the Intent to defraud .- By all the statutes a fraudulent intent is made an essential ingredient to the crime of forgery. But it is immaterial, whether any person be actually defrauded or not; it is sufficient if he may be thereby prejudiced. 2 East, P. C. 854. And the intent need not be to defraud any particular person, as a general intent to defraud is sufficient; for if a man wilfully do life, forfeiture of lands, &c. 2 and 3 Anne, an act, the probable consequence of which is c. 4. § 19: 5 and 6 Anne, c. 18. § 8: 7 Anne, to defraud, it will, in contemplation of law, c. 20. § 15: 8 G. 2. c. 6. § 21. Uttering a false constitute a fraudulent intent. 3 T. R. 216. certificate of a previous conviction; felony; n. (a); R. & R. 291. And even though the transportation or imprisonment, and whipping. prosecutor believes the prisoner did not intend to defraud him. R. & R. 169.

IV. The Instruments whereof Forgery may be committed, &c .- Forgery by the common law extends to false and fraudulent making or altering of a deed or writing, whether it be a matter of record, in which seems to be included a parish register; which is punishable linens, calicoes, stuffs; capital felony. 10 by fine, imprisonment, and corporal punish. Anne, c. 19. § 97: 13 G. 3. c. 56. § 5. See 52 ment, at the discretion of the court; or any G. 3. c. 142. § 1.—Forging the stamp on camother writing, deed, or will. 3 Inst. 169: 1 brics, &c.; capital felony. 4 G. 3. c. 87.— Rol. Abr. 65: 1 Hawk. P. C. c. 70.

nature, as letters, and such like, it hath been | - Forging registers, certificates, &c. of ages said, is not properly forgery; but the deceit is of nominees, or annuitants of annuities securpunishable.-However, in the case of John ed in the public funds; capital felony. 29 G. forge a lease or acquittance for the delivery of § 3.—Contracts and certificates for the regoods, although not under seal, was forgery demption and sale of the land tax; capital at common law. See Barn. K. B. 10: Ld. felony. 42 G. 3. c. 116. § 194: 52 G. 3. c. Raym. 737. 1461: 5 Mod. 137: Raym. 81: 143. § 6—A hawker's license; three hundred Stra. 747. And this case is considered as pounds fine. 50 G. 3. c. 41. § 18. Forging the having now settled the rule that the counter-stamps on parchment, playing cards, alma-feiting of any writing with a fraudulent in-nacs, plate, newspapers, &c.; capital felony.

The following is a list of the different insubject, with the punishment annexed to each act of forgery. It must be remembered, as already observed, that those offences which previously to the 11 G. 4. and 1 W. 4. c. 66. are now only punishable with transportation for life, or seven years, or with imprisonment, not exceeding four, or less than two years.

And by 3 and 4 W. 4. c. 44. § 3. persons punishable with transportation for life under of the court before whom they are convicted, te previously imprisoned with or without hard labour in the common jail or house of correction, or be confined in the penitentiary, for a term not exceeding four years, or less than one.

1. Seals, &c .- Forging the great seal of the United Kingdom, his Majesty's privy seal, any privy signet of his Majesty, his Majesty's sign manual, the seals of Scotland, the Great seal and privy seal of Ireland, treason; 11 G. 4. and W. 4. c. 66. § 2; transportation for life; 2 and 3 W. 4, c. 123.

2. Records, &c.—If any judge or clerk of-fend by false entering of pleas, or raising of rolls, to the disherison of any, he is punishable by fine to the king, and shall make satisfaction to the party. 8 Ric. 2. c. 4. Avoiding records; felony. 8 H. 6. c. 12. Forging a memorial or certificate of a registry of lands in Yorkshire or Middlesex, imprisonment for 7 and 8 G. 4 c. 28. § 11. Forging a court roll, or copy of a court roll; felony; transportation; or imprisonment. 11 G. 4. and I W. 4. c. 66. § 10. An entry in a register, relating to baptism, marriage, or burial; felony; transportation, or imprisonment. 11 G. 4. and 1 W. 4. c. 66. § 20, 21, 22.

3. Revenue, &c .- Forging the stamp on Franks, felony; transportation for seven years. The counterfeiting writings of an inferior 24 G. 3. Sess. 2. c. 27. § 9: 42 G. 3. c. 63. § 14. Ward, of Hackney, it was determined that to 3. c. 41: 48 G. 3. c. 142. § 27: 49 G. 3. c. 64.

Vol I.—105

52 G. 3. c. 143. § 7, 8: 55 G. 3. c. 184. § 7: The name of the registrar of the High Court 52 G. 3. c. 145.; 67, 61: 63 G. 3. c. 164. § 71.

55 G. 3. c. 185: 6 G. 4. c. 116. Transposing of Admiralty, or the Bank receipts for suitor's stamps from plate to other plate, or inferior money; felony. 53 G. 3. c. 151. § 12. The metal; capital felony. 52 G. 3. c. 143. § 8. Forging debentures or certificates for payment or return of money, required by the statutes or return of money, required by the statutes of the adjutant-general of the volunteers and local militia, &c. to any draft, &c. on the Bank; capital felony. 54 G. 3. c. relating to the customs or excise; capital felo- 151. § 16. The hand writing of the receiverny. 52 G. 3. c. 143. 10. Forging declara- general, or comptroller-general of the customs tions of return of insurance; felony; transportation for seven years. 54 G. 3. c. 133. upon the Bank; capital felony. 6 G. 4. c. § 10. Forging the mark of postage on letters; 106. § 10. The hand-writing of the receiverfine and imprisonment. 54 G. 3. c. 169. The general of the excise, or excise controller of stamp denoting the duty to have been paid on paper, pastehoard, &c.; fine. 1 G. 4. c. 58. § 13.

4. Public Securities.—Forging an entry, &c. in the books of the Bank of England, South Sea Company; felony; death. 11 G. 4. and W. 4. c. 66. § 5. A transfer of stock of the Bank of England, South Sea Company, or any other body corporate, company, or society, now or hereafter to be established, or a power of attorney to transfer it, or transferring it by personating the proprietor; felony; death. 11 G. 4. and 1 W. 4. c. 66. § 6. Forging the names of witnesses to such power of attorney; felony; transportation, or imprisonment. 11 G. 4. and 1 W. 4. c. 66. § 8. Clerks, &c. employed in the Bank of England, or South Sea Company, wilfully making or delivering any dividend warrant for a greater or less sum than the party is entitled to; felony, transportation, or imprisonment. 11 G. 4. and 1 W. 4. c. 66. § 3; transportation to him; felony, transportation. 55 G. felony. 11 G. 4. and 1 W. 4. c. 66. § 3; transportation for life. 2 and 3 W. 4. c. 123. § 1. officers of the navy for their half pay; capital See the different statutes for issuing them.

5. Public Offices .- Counterfeiting the handwriting of the treasurer, or other signing or vouching officer of the navy, to any paper whereby his Majesty's naval treasure money may be paid or disposed of. See 1 G. 1. st. 2. Forging seamen's remittance bills; felony, c. 25. § 6. Forging the hand of the account- transportation. 1 and 2 G. 4. c. 49. § 2. Forgant-general, registrar, &c. of the Court of ing receipts or certificates of annuity for mili-Chancery, or of the cashier of the Bank, to tary and navy pensions; capital felony. 3 G. any instrument relating to suitors' money; capital felony. 12 G. 1. c. 32. § 9. Forg. ing any contracts, certificates, receipts, &c. relating to the redemption of the land tax; capital felony. 42 G. 3. c. 116. § 194: 52 G. 3. c. 143. § 6. The handwriting of the treasurer of the Ordnance, &c. to any draft, &c. on the Bank; capital felony. 46 G. 3. c. 45. § 6. The hand-writing of the receiver-general of the London and Royal Exchange Insurance the stamp duties, or of his clerk, or of the commissioners of stamps, to any drafts, &c. on the Bank; capital felony. 46 G. 3. c. 76. 99: The hand-writing of the receiver-general of ish Society, for extending the fisheries, &c., the Post Office, &c. to any draft, &c. on 26 G. 3. c. 106. § 26; the British Plate Glass the Bank; capital felony. 46 G. 3. c. 83. § 9: Manufactory, 13 G. 3. c. 38. § 28: 38 G. 3. c. 47 G. 3. st. 2. c. 50. § 3. Forging the hand- 17. § 23. There are various other statutes writing of the surveyor-general of the woods relating to forgeries upon companies, which it and forests, &c. to any draft, &c. on the Bank; is unnecessary to refer to, as the late act, 11 capital felony. 46 G. 3. c. 143. § 14. Forg. G. 4. and 1 W. 4. c. 66. § 28. extends to boing the marking or hand-writing or the re- dies corporate, or companies or societies of ceiver-general of the prefines of any writ of persons not incorporated; and to any person covenant; capital felony. 52 G. 3. c. 143. § 5. or number of persons whatsoever, who may

cash, or other person duly authorised, to any draft, &c. upon the Bank of England; capital felony. 7 and 8 G. 4. c. 53. § 56.

6. Navy and Army.-Forging the name of any officer's widow to any remittance bill, certificate, voucher, or receipt, respecting her pension; felony, transportation. 49 G. 3.c. 35. § 10. The name of any officer of the navy entitled to allowances on the compassionate list, or of any marine officer entitled to half pay, to any remittance bill, certificate, voucher, or receipt, in relation to the same; felony, transportation; 49 G. 3. c. 45. § 11; and the same as to marines. 7 and 8 G. 4. c. 8. Any letter of attorney, order, last will, &c., in order to receive money due on account of any out pension granted by Greenwich Hospital; capital felony. 54 G. 3. c. 113. § 6. The signafelony. 56 G. 3. c. 101. § 4. Any letter of attorney, order, assignment, last will, &c., in order to receive pay or prize money due to any officer or seaman, or any marine officer or marine; capital felony. 57 G. 3. c. 127. § 4. 4. c. 51. § 15.

7. Public Companies, &c .- Forging a receipt or warrant of the South Sea Company for subscriptions; capital felony. 6 G. 1. c. 11. § 50. A bond of the East India Company; felony; 11 G. 4. and 1 W. 4. c. 66. § 3; transportation for life. 2 and 3 W. 4. c. 123. § 1.

8. Public Trade.—As to the forgeries on Company, see 6 G. 1. c. 18. § 13; the Globe Insurance, 39 G. 3. c. 83. § 22; the English Linen Company. 4 G. 3. c. 37. § 15; the Britbe intended to be defrauded, whether they reside or carry on business in England or elsewhere. Forging Mediterranean passes; felowhere. Forging Mediterranean p 47 G. 3. sess. 2. c. 66. § 26. Forging quarantine certificates; felony. 6 G. 4. c. 78. § 25. tion, and jointly co-operated in making forged Forging certificates, &c. mentioned in the Bank of England notes, they were all held act for the abolition of the slave trade; felony. guilty as principals, though each of them ex-6 G. 4. c. 78. § 25. Alchouse certificates; ecuted by himself a distinct part of the forgmisdemeanor. 3 G. 4. c. 77. § 2. Certificates ery, and though one of them was not present relating to children employed in factories; when the notes were completed by the signamisdemeanor. 3 and 4 W. 4. c. 103. § 28.

have any frame, &c. for the making of paper, though none of them knows by whom the with the words "Bank of England" visible other parts are executed, they are all prinon the substance, or to make paper with cipals. Moo. C. C. R. 304: Ibid. 307. curved or waving bar or wire lines, &c., or to make, &c., or to sell, &c. such paper, &c.; felony, fourteen years' transportation. 11 G. 4. and 1 W. 4. c. 66. § 13: see § 14. To engrave on any plate, &c. any Bank note, or blank Bank note, bill, &c., or use and have possession of such plate, &c., or utter or have P. C. 974: S. P. R. & R. 249: Id. 363. So paper upon which a blank Bank note, &c. the fact of an accomplice coming with the shall be printed; felony, fourteen years' transportation. 11 G. 4. and 1 W. 4. c. 66. § 15.

To engrave on any plate, &c. any word, number of the put up a little before the time when it ber, figure, character, or ornament resembling any part of a Bank note, &c., or use or have such plate, &c., or utter or have any paper on which there shall be an impression of any word, &c.; felony, fourteen years' transporta-11 G. 4. and 1 W. 4. c. 66. § 16. To make use of, or have possession of, any frame, &c. for the making of paper, with the name or firm of any person or persons, body corporate or company, carrying on business as bankers, appearing on the substance, or to make, sell, &c., or have possession of such paper; felony, transportation for fourteen or seven years, or imprisonment for three years or one year. 11 G. 4. and 1 W. 4. c. 66. § 17. To engrave on any plate, &c., any bill of exchange or promissory note of any bankers, &c., any words resembling the subscription thereto, or use such plate, &c., or sell or have any paper on which any part of such bill, &c. shall be printed; felony, transportation for fourteen or seven years, or imprisonment for three years or one year. 11 G. 4. and 1 W. 4. c. 66. § 18. To engrave plates, &c. for terms, particularly in the word forge, which foreign bills or notes, or use or have such plates, or utter any paper on which any part of such bill, &c. may be printed; felony, transportation for fourteen or seven years, or forged instrument, and the slightest variance imprisonment for three years or one year. 11 G. 4. and 1 W. 4. c. 66. § 19. Persons knowingly having forged dies or stamps in their it is enacted, "that in all informations or inpossession, or fraudulently affixing stamps, dictments for forging, or in any manner utter-&c.; felony, transportation for life or seven ing any instrument or writing, it shall not be years, or imprisonment for four or two years. necessary to set forth any copy or fac-simile 3 and 4 W. 4.c. 97. § 12. thereof, but it shall be sufficient to describe

ture. R. & R. 446. So where several parties 9. Instruments of Forging.—To make or make distinct parts of a forged instrument,

With respect to uttering, accomplices not present when the note is actually uttered are not chargeable as principals, although acting in concert with the party by whom it is put off, and although they have been concerned with him in passing another forged note. 2 East. P. C. 974: S. P. R. & R. 249: Id. 363. So was uttered, joining him again in the street a little after the uttering, and near to the place where the note was uttered, and then running away when his companion was apprehended, was held insufficient to make the accomplice a principal in the uttering. R. & R. 113.

Where a wife by the incitement of her husband, but in his absence, knowingly uttered a forged order and certificate for receiving prize money from the commissioners of Greenwich Hospital, it was decided they might be indicted together, the wife as principal, and the husband as accessory before the fact. 2 Leach, 1096: R. & R. 270.

As to the trial of accessories, independently of their principals, see tit. Accessory.

V. Of the Indictment, Venue, &c .- It is usual to charge in the indictment that the party falsely, forged and counterfeited; but it is said to be enough to allege that he forged and counterfeited, without adding falsely, which is sufficiently implied in either of those is always taken in an evil sense in our law. 2 East. P. C. c. 19. p. 985: Str. 12.

It was formerly requisite to set out the from the words or figures of the original was fatal; but by the 2 and 3. W. 4. c. 123. § 3. the same in such manner as would sustain an 27-34. where this crime is treated of with

indictment for stealing the same."

Where the forgery consists in the alteration of a genuine instrument, the indictment may allege it to be a forgery of the whole instrument; 1 Str. 19; but it has hitherto been more usual to lay forgeries of this kind, by stating the particular alteration in some one or more of the counts of the indictment. 2 East P. C. 980.

Where the forgery is merely an addition to side. an instrument, and has not the effect of altering it, but is only collateral to it, as forging an | nor as to that part of it which lies without the acceptance or indorsement to a genuine bill of exchange, proof of the forgery of such addition will not support an indictment charging the forgery of the entire instrument, and the forgery of such addition must be specially alleged and proved as laid. K. & R.

By 11. G. 4. and 1 W. 4 c. 66. § 28. it is sufficient in an indictment to name one person only of any company or society of persons not incorporated, or any person or number of persons whatsoever, who may be intended to be defrauded by any offence within the act, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be.

Formerly great difficulty existed with respect to the venue or place where the offence was to be tried, as direct proof can seldom be given of the act of forgery; but this has been removed by the 11 G. 4. and 1 W. 4. c. 66. § 24. under which persons guilty of any species of forgery, whether at common law or otherwise, may be indicted, tried, and punished in any county or place where they have been apprehended, or are in custody.

By § 27. offences punishable under the act committed within the jurisdiction of the Admiralty, may be tried as other offences com- field's Surv. 56.

mitted within that jurisdiction.

By the stat. 9 G. 4. c. 32. § 2. on any prosecution by indictment or information, either at common law or by virtue of any statute against any person for any species of forgery, or for an accessory thereto, if the same be a felony, or for aiding, &c. in the commission of the offence, if the offence be a misdemeanor, | method of proceeding cannot be altered but by no person shall be deemed an incompetent witness for the prosecution by having any interest, or supposed interest, in the instrument

The offence of forgery at common law cannot be tried at the quarter sessions, nor can they take cognizance of it as a cheat. 2 Hawk. P. C. c. 8. § 64: 2 East, P. C. c. 19. § 7.

The Court of B. R. will not ordinarily, at the prayer of the defendant, grant a certiorari for a removal of an indictment of forgery, &c. | 1 Sid. 54.

See tit. Certiorari, Indictment. See further on this subject of forgery, 1 Hawk. P. C. c. common law (independent of the 11 H. 7. c. 70: 2 East's P. C. c. 19: Russell on Crimes, c. 12. which relates only to civil suits) of allow-

great minuteness and accuracy.

In Scotland the punishment of forgery is not expressly laid down by statute, but the common law and practice of that country hath been to inflict a capital punishment in all cases of gross forgery. Bell's Scotch Law Dict. But now see 2 and 3 W. 4 c. 123 ante.

FORINSECUS. Outward, or on the out-Kennet's Gloss.

FORINSECUM MANERIUM. The matown, and not included within the liberties of Paroch. Antiq. 351.

FORINSECUM SERVITIUM. The payment of extraordinary aid, opposed to intrinsecum servitium, which was the common and ordinary duties, within the lord's court. Ken. net's Gloss. See tit. Foreign Service.

FORISBANITUS. Banished. Mat. Paris.

Ann. 1245.

FORISFAMILIARI. When a son accepts of his father's part of lands, in the life. time of the father, and is contented with it, he is said forisfamiliari to be discharged from the family, and cannot claim any more. Blount. Hence for isfamiliation signifies in general the separation of a child from the family of the

FORLAND, or FORELAND, forelandum.] Lands extending further or lying before the

rest. A promontory. Mon. Angl. tom. 2 fol. 342. FORLER-LAND. Land in the bishopric of Hereford, granted or leased dum episcopus in episcopatu steterit, so as the successor might have the same for his present revenue: this custom has been long since disused, and the land thus formerly granted is now let by lease as other lands, though it still retains the name by which it was anciently known. Butter-

FORM, is required in law proceedings, otherwise the law would be no art; but it ought not to be used to ensnare or entrap. Hob. 232. Matters of form in pleas that go to action, may be helped on a general demurrer; as when a plea is only in abatement. 2 Ld. Raym. 1015. The formal part of the law or parliament; for if once those were demolished, there would be an inlet to all manner of innovation in the body of the law itself. 1 Com. 142.

FORMA PAUPERIS. Bythe 11 H.7.c. 12. poor persons (who in practice have been held to be such as will swear themselves not worth 51.; 1 Tidd. 93.) are to have writs and subpœnas gratis, and counsel and attorneys assigned them without fee. But a defendant in a civil action is never allowed to defend it in formâ pauperis. Hullock on Costs, 220: Barnes, 328.

The courts have a discretionary power at

ing a party indicted to defend as a pauper. 2 the gift is stated, and the happening of the Stra. 1041. But where the party is the prose- event upon which the remainder depended. cutor, he will not be permitted to prosecute in This writ is not given in express words by formá pauperis without special ground shown. the statute de donis, but is founded upon the 3 Burr. 1308.

The effect of being allowed to sue in forma pauperis is to prevent as well the officers of the court, as those assigned to conduct the case on the motion of the defendant from taking fees. Hullock on Costs, 228. n. l.

By 2 G. 2. c. 28. § 8. persons arrested on a capius, or information relating to the Customs, upon affidavit of not being worth 51., may be

admitted to defend as paupers.

Formerly the court would order a party guilty of delay to be dispaupered, but would make no order about costs; 1 Tidd. 98; but now by one of the general rules made by the judges in H. T. 2 W. 4. r. 110. where a pauper omits to proceed to trial pursuant to a notice or undertaking, he may be called upon by a rule to show cause why he should not pay costs, though he has not been dispaupered. See further tit. Costs. II.

FORMEDON, breve de formà donationis.] A writthat lieth for him who hath right to lands

or tenements by virtue of any intail.

Upon alienation by a tenant in tail, whereby the estate tail is discontinued, and the remainder or reversion is, by failure of the particular estate, displaced and turned to a mere right, the remedy is by this action of formedon (secundum formam doni), which is in the nature of a writ of right, and is the highest action that tenant in tail can have. Finch. L. 257: Co. Litt. 316. For tenant in tail cannot have an absolute writ of right, which is confined to such only as claim in fee-simple; and for that reason this writ of formedon was granted him by the statute de donis (Westm. 2. 13 Ed. 1. c. 1.), which is therefore emphatically called his writ of right. F. N. B. 255.

This writ is distinguished into three species; a formedon in the descender, in the re-

mainder, and in the reverter.

A writ of formedon in the descender lieth where a gift in tail is made, and the tenant in tail aliens the land intailed, or is disseised of them and dies: in this case the heir in tail shall have this writ of formedon in the descender, to recover these lands so given in tail, against him who is then the actual tenant of the freehold. In which case the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir secundum formam doni. F. N. B. 211, 212.

A formedon in the remainder lieth where a man giveth lands to another for life or in tail, with remainder to a third person in tail or in fee; and he who hath the particular estate dieth without issue inheritable and a stranger intrudes upon him in remainder, and keeps him out of possession. In this case the remainder-man shall have this writ of formedon

equity of the statute, and upon this maxim in law, that if any one hath a right to land, he ought also to have an action to recover it. See F. N. B. 217.

A formedon in the reverter lieth where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns; in such case the reversioner shall have this writ to recover the lands, wherein he shall suggest the gift, his own title to the reversion minutely derived from the donor, and the failure of issue upon which his reversion takes place. F. N. B. 219: 8 Rep. See 3 Comm. 192. n. This lay at common law, before the statute de donis, if the donee aliened before he had performed the condition of the gift by having issue and afterwards died without any. Finch. L. 268.

The time of limitation in a formedon, by stat. 21 Jac. 1. c. 16. is twenty years, within which space of time after his title accrues, the demandant must bring his action, or else is for ever barred. See 3 Comm. 191-193.

There is a writ of formedon in descender, where partition of lands held in tail is made among parceners, &c., and one alieneth her part; in this case her heir shall have this writ; and by the death of one sister without issue, the partition is made void, and the other shall have the whole land as heir in tail. Also there is a writ of formedon insimul tenuit, that lies for a coparcener against a stranger upon the possession of the ancestor; which may be brought without naming the other coparcener who hath her part in possession. This writ may be likewise had by one heir in gavelkind, &c. of lands intailed; and where the lands are held without partition. New Nat. Brev. 476, 477. 481.

Where a fee-simple is demanded in a formedon in reverter, the taking of the profits ought to be alleged in the donor and donee: if an estate tail is demanded, it must be alleged

in the donee only. 1 Lutw. 96.

There are several pleas both in bar and in abatement, which the tenant may plead to this action; such as non-tenure, which is a plea in abatement, and by which the tenant shows that he is not tenant of the freehold, or of some part thereof, at the time of the writ brought, or at any time since, which is called the pleading non-tenure generally. Booth. 28.

Special non-tenure is where the tenant shows what interest and estate he hath in the land demanded, as that he is tenant for years, in ward, by statute merchant, elegit, or the like; and therefore the plea of special nontenure must always show who is tenant.

Booth, 29. See 1 Brownl. 153.

At common law, non-tenure of parcel of an in the remainder, wherein the whole form of entire thing, as a manor, &c. abated the whole writ; but now, by the stat. 25 Ed. 3. c. held and possessed beyond the year and day. 16. it is enacted, "That by the exception of Termes de la Ley. non-tenure of parcel, no writ shall be abated, but only for that parcel whereof the non-tenure | led in Westmoreland. Camd. Britan. was alleged. Booth, 29: 1 Mod. 181.

If the tenant pleads non-tenure of the whole, he need not show who is tenant; but in a plea of non-tenure of parcel he must show who is tenant, and this even before the statute: for the common law would not suffer a writ, good in part, to be wholly destroyed, except the tenant showed the demandant how he might Scotch law is an action in the nature of a fohave a better. 1 Mod. 181. The tenant can- reign attachment. See Attachment. not after a general imparlance plead non-tenure

The writ of formedon has long fallen into 1. c. 29. disuse, and is abolished by the 3 and 4 W. 4. 3 c. 27. § 36. after the 31st Dec. 1834, except in is an argument often used by Littleton, to this the cases mentioned in the two following sections.

FORMELLA. A certain weight of above of an ancient right, &c. Co. Lit. 253. 260. 70lbs. mentioned in the statute of weights

and measures. Stat. 51 H. 3.

FORMS of Court. See Practice, Process. FORNAGIUM, or FURNAGIUM, Fr. fournage, furnage.] The fee taken by a lord 2. c. 6. extends to forts and other places of of his tenant bound to bake in the lords common oven (in furno domini), or for a permission to use their own: this was usual in the of which belongs to the king, in his capacity northern parts of England. Plac. Parl. 18 of general of the kingdom. 2 Inst. 30. Ed. 1: and see Assissa panis et cervisia. 51 H. 3.

fornices in Rome, where lewd women prosti- which might ensue, if every man at his tuted themselves for money]. Whoredom, or pleasure might do it. 1 Inst. 5: 1 Comm. 263. the act of incontinency in single persons: for if either party is married it is adultery. FORTUNE-TELLERS. Persons pretend-The stat. 1 H. 7. c. 4. mentions this crime; ing or professing to tell fortunes are by 5 G. which by an act made anno 1650, c. 10. dur-ing the times of the usurpation, was punish-bonds. ed with three months' imprisonment for the first offence; and the second offence was made felony without clergy: adultery was made Mat. Paris, anno 1241. felony without clergy in both parties on the first offence. Scobel's Collect. 121. The Spi. attachment in forests or Woodmote Court. See ritual Court hath cognizance of this offence; and by stat. 27 G. 3. c. 44. the suit must be instituted within eight months, and not at all after the intermarriage of the parties offending: and formerly courts-leet had power to inquire of and punish fornication and adultery; in which courts the king had a fine assessed on the offenders, as appears by the book of Domesday. 2 Inst. 488.

FORPRISE, forprisum.] An exception or reservation: This word is frequently inserted in leases and conveyances, wherein excepted or service done by tenants, &c. for repairing and furprised is an usual expression. In and maintenance of ditches is called fussatoanother signification it is taken for any ex-rum opperatio; and the contribution for it action, according to Thron. anno 1285.

or tenements seized by the lord for want of fthrough England. See tit. Watling Street. services due from his tenant, and so quietly

FORSES, catatudæ.] Water-falls, so cal-

FORSPEAKER. An attorney or advocate in a cause. Blount. Scotch Dict.

FORTALICE. A fortress or place of strength, which anciently did not pass without especial grant. Scotch Dict. See also stat. 11 H. 7. c. 18.

FORTHCOMING, action of. In the

FORTIA. Power, dominion, or jurisdicof part, though he may plead non-tenure of tion; whence infortiare placitum, to enthe whole. 3 Lev. 55. force a plea by judges assembled. Leg. H.

> FORTIORI, a fortiori or multo fortiori, purpose. If it be so in a fcoffment passing a new right, much more is it for the restitution

> FORTLETT, Fr.] A place or fort of some strength; or rather a little fort. Old Nat. Brev. 45.

> FORTS and CASTLES. The stat. 13 Car. strength within the realm; the sole prerogative, as well of erecting as manning and governing

No subject can build a castle or house of strength imbattled or other fortress defensible, FORNICATION, fornication [from the without the license of the king, for the danger

FORTUNA. Treasure-trove.

FORTUNIUM. A tournament or fighting with spears; or an appeal to fortune therein.

FORTY-DAYS COURT. The court of tit Forest.

FORUM. The court to the jurisdiction of

which a party is liable.

FOSSA. A ditch full of water, wherein women committing felony were drowned: it has been likewise used for a grave in ancient writings. See Furca.

FOSSATUM, FOSSATURA, Lat.] ditch, or place fenced round with a ditch or trench; also it is taken for the obligations of citizens to repair the city ditches. The work fossagiam Kennett's Gloss.

FORSCHOKE, seems to signify forsaken. FOSSEWAY, or the fosse from fossus, dig-It is especially used in stat. 10 Ed. 2. for lands ged.] One of the four ancient Roman ways

FOSTERLEAN, Sax.] A nuptial gift;

the jointure or stipend for the maintenance of the appearance or essoign of one will excuse

FOTHER, or FODDER, from Teuton. fuder.] A weight of lead containing eight pigs, soigned one day, and for want of the other's and every pig one and twenty stone and a appearing, have day over to make his appearhalf; so that it is about a ton or common cart ance with the other party; and at that day load. Among the plumbers in London it is allowed the other party doth appear, but he nineteen hundred and a half; and at the mines that appeared before doth not, in hopes to have it is two and twenty hundred weight and a another day by adjournment of the party who half. Skene.

FOUNDATION. The founding and building of a college or hospital is called foundatio, of Westm. 1. (3 Ed. 1.) c. 43. it is termed quasi fundatio, or fundamenti locatio. Co. lib. fourcher by essoin; where are words to this 10. The king only can found a college; but effect, viz. coparceners, joint-tenants, &c., there may be a college in reputation, founded may not fourth by essoin to essoin severally; by others. Dyer, 267. If it cannot appear by but shall have only one essoin, as one sole inquisition who it was that founded a church, or college, it shall be intended it was the king; who has power to found a new church, &c. be put to answer without fourching, &c. 2 Moor, 282. The king may found and erect a Inst. 250. So by stat. 9 Ed. 3 st. 1 c. 3. exhospital, and give a name to the house, upon the inheritance of another, or license another person to do it upon his own lands; and the words fundo, creo, &c. are not necessary in every foundation, either of a college or hospi- of murder, &c. the year and day shall be tal made by the king; but it is sufficient if be computed from the beginning of the day there be words equivalent. The incorporation on which the wound was given, &c. and not of a college or hospital is the very foundation: but he who endows it with land is the founder; and to the erection of a hospital no-thing more is requisite but the incorporation and foundation. 10 Rep. Case of Sutton's Hosp.

Persons seised of estates in fee simple may erect and found hospitals for the poor, by deed inrolled in Chancery, &c., which shall be incorporated, and subject to such visitors as the founder shall appoint, &c. Stat. 39 Eliz. c. 5. Where a corporation is named, it is said the name of the founder is parcel of the corporation. 2 Nels. 886. Though the foundation of a thing may alter the law as to that particular thing, yet it shall not work a general preju-1 Lil. Abr. 634. By stat. 7 and 8 W.3. c. 37. the crown may grant licenses to alien in mortmain. By stat. 9 G. 2. c. 36. gifts in mortmain by will, &c. are restrained; but there are exceptions with respect to universities and royal colleges. See this Dict. tits. Corporation, Mortmain, University. FOUNDER OF METAL, from Fr. foun-

dre, to melt or pour. He that melts metal, f. fa., and at a later hour of the same day the and makes any thing of it by pouring or east. ing it into a mould : hence bell-founder, a fount of letter, &c. See this Dict tit. Money.

FOURCHER. Fr. fourchir, Lat. furcare, under the statute of James, as from the time because it is two-fold.] A putting off, or de- of his arrest: the court of K. B. held, in an laying of an action; and has been compared action by his assignees to recover the value to stammering, by which the speech is drawn of the goods, that they would notice the fracout to a more than ordinary length of time; so tion of a day; and therefore that the sheriff, a suit is prolonged by fourching, which might having entered before the bankrupt had surbe brought to a determination in a shorter rendered in discharge of his bail, the assigan action or suit is brought against two per- 586. See Time. sons, who being jointly concerned, are not to answer till both parties appear; and is where &c.

the others default, and they agree between themselves that one shall appear or be asthen made his appearance. Termes de Ley.

This is called fourther; and in the statute of Westm. 1. (3 Ed. 1.) c. 43. it is termed tenant. And in stat. Glouc. 6 Ed. 1. c. 10. it is used in like manner: the defendants shall ecutors are in like manner prevented from fourthing by essoin.

FRACTION.—The law makes no fraction of a day; if any offence be committed, in case from the precise minute or hour. See Co. Lit. 225. and this Dict. tit. Homicide, III.

An act of record will not admit any division of a day, but is said to be done the first instant of the day. Mo. 137.

In presumption of law, when a thing is to be done upon one day, all that day is allowed to do it in, for the avoiding of fractions in time, which the law admits not of, but in case of necessity. Sti. 119.

Insurance for H.'s life; H. died on the last day; per Holt, Ch. J., The law makes no fraction in a day; yet, in this case, he dying after the commencement, and before the end of the last day, the insurer is liable, because the insurance is for a year, and the year is not complete till the day be over; yet if A. be born on the 3d day of September, and on the 2d day of September, twenty-one years afterwards, he makes his will, this is a good will, for the law will make no fraction of a day, and by consequence he was of age. 2 Sulk. 625.

Where the sheriff took possession under a defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of bankruptcy The devise is commonly used when nees were not entitled to recover. 2 B. & A.

See further, tits. Bond, Condition, Infant,

FOUTGELD. See Footgeld. FRACTITIUM. Arable land. Mon Angl. tom. 2. 873. FRACTURA NAVIUM. Wreck of ship-

ping at sea.

FRAMES, or FRAME-WORK. By stat. 7 and 8 G. 4. c. 30. § 3. persons maliciously cutting, &c., or destroying or damaging with intent to destroy, silk, woollen, linen, or cotton goods, or mixed goods, or any framework-knitted piece, stocking, hose, or lace in the loom, frame, &c., or on the rack, or tenters, or in any stage of manufacture; or any warp or shute of silk, &c., or any loom, frame, &c., whether fixed or moveable, employed in carding, spinning, &c., any such goods; or by force entering into any place with intent to commit any such offences, are guilty of felony, and transportable for life, &c., or punishable with imprisonment not exceeding four years, and whipping. And see tit. Malicious Injuries.

FRAMPOLE FENCES. Such fences as the tenants in the manor of Writtle in Essex set up against the lord's demesnes; and they are entitled to the wood growing on those fences, and as many poles as they can reach from the top of the ditch with the helve of an axe, towards the reparation of their fences. It is thought the word frampole comes from the Saxon frempul, profitable; or that it is a corruption of francpole, because the poles are free to the tenants to take. But chief Justice Brampton, whilst he was steward of the court of the manor of Writtle, acknowledged that he could not find out the reason why those fences were called frampole; so that we are at a loss to know the truth of this name etymologically.

Blount.

FRANCHILANUS. A freeman. Chart. H. 4. Francus homo is used for a freeman,

in Domesday-book.

FRANCHISE, Fr.] A privilege or exemption from ordinary jurisdiction; as for a corporation to hold pleas to such a value, &c. And sometimes it is an immunity from tribute, when it is either personal or real, that is, belonging to a person immediately; or by means of this or that place whereof he is a chief or member. Cromp. Jurisd. 141

There is also a franchise royal; which seems to be that where the king's writ runs not. 21 H. 6. c. 4. But franchise royal is said by some authors to be where the king grants to one and his heirs, that they shall

be quit of toll, &c. Bract. lib. 2. c. 5.

Franchises are a species of incorporeal hereditaments. Franchise and liberty are used as synonymous terms; and their definition is, "A royal privilege or branch of the king's prerogative, subsisting in the hands of a subject." Finch. L. 164. Being therefore derived from the crown, they must arise from the king's grant; or in some cases may be held by prescription, which pre-supposes a grant. Finch. L. 164. The kinds

of them are various and almost infinite: they may be vested either in natural persons, or in bodies politic; in one man or many: but the same indentical franchise that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant. 2 Rol. Ab. 191: Keilw. 196.

The principality of Wales is a franchise. To be a county palatine is also a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do corporate acts; and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court-leet; to have a manor or lordship; or at least to have a lordship paramount; to have waifs, wrecks, estrays, treasure-trove, royal-fish, forfeitures, and deodands; to have a court of one's own, or liberty of holding pleas, and trying causes; to have the conusance of pleas, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction (see this Dict. tit. Cognizance); to have a bailiwick, or liberty exempt from the sheriff of the county, wherein the grantee only and his officers are to execute all process; to have a fair or market, with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like), else the franchise is illegal and void. 2 Inst. 220. (see this Dict. tits. Fair, Toll.) Or lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty. F. N. B. 230. See this Dict. tit. Forest, &c.

Usage may uphold franchises, which may be claimed by prescription, without record either of creation, allowance, or confirmation; and wreck of the sea, waifs, strays, fairs, and markets, and the like, are gained by usage, and may become due without any matter of record. But goods of felons and outlaws, and such like, grow due by charter, and cannot be claimed by usage, &c. 2 Inst. 281; 9 Rep. 27: 2 Comm. 265.

It hath been adjudged that grants of franchises, made before the time of memory, ought to have allowance, within the time of memory, in the King's Bench; or before the barons of the Exchequer, or by some confirmation on record; and it is said they are not records pleadable, if they have not the aid of some matter of record within time of memory; and such ancient grants, after such allowance, shall be construed as the law was when they were made, and not as it hath been since altered; but franchises granted within time of memory are pleadable without any allowance or confirmation; and if they have been allowed or confirmed as aforesaid, the franchises may be claimed by force thereof, without showing the charter. 9 Rep. 27, 28: 2 Inst. 281, 494. sheriff, upon a non omittas, or on a capias ter. 9 Rep. 27, 28: 2 Inst. 281, 494.

There have been formerly several ancient prerogatives derived from the crown, besides the franchises aforementioned; as power to pardon felony, make justices of assize, and of the peace, &c. But by the stat. 27 H. 8. c. 24. they were resumed and re-united to the crown. The king cannot grant power to another to make strangers born denizens here, because such power is by law inseparably annexed to his person. 7 Rep. 25.

By Magna Charta, c. 1. and several ancient statutes, the church shall have all her liberties and franchises inviolable. And the lords spiritual and temporal shall enjoy their liberties, &c., and the king may not deprive them of any of them. 14 Ed. 3. st. 2. c. 1: 2 H. 4. c. 1.

By Magna Charta, c. 37., the franchises and liberties of the city of London, and all other cities, towns, &c., are confirmed. By stat. 27 H. 8. c. 24. all writs, processes, &c., in franchises, are to be made in the king's name; and stewards, bailiffs, and other ministers of liberties, shall attend the justices of assize, and make due execution of process, &c.

Some franchises, as York, Bristol, &c., have return of writs, to whom mandates are directed from the courts above, to execute writs and process; and a mayor or bailiff of a town may have liberty to keep courts, and hold pleas in a certain place, according to the course of the common law; and power to draw causes out of the king's courts, by an exclusive jurisdiction: but the causes here may be removed to the superior courts. Co. Lit. 114: 4 Inst. 87. 224.

Sheriffs of counties, within which is any franchise, the lord whereof is entitled to a return of writs, shall, on his request, appoint one or more deputies to reside at some place near there, to receive all writs in the sheriff's name, and under his seal to issue warrants for their due execution; and the Lord Chancellor is to settle the charges to be paid any such deputy, &c. Stat. 13 G. 2. c. 18.

A franchise hath no relation to the county wherein it lies, as has been generally held; for it is not necessary to set forth the county when any thing is shown to be done within a liberty or franchise. Trin. 23 Car. B. R

If a franchise fails to administer justice within the same, the franchise shall not be allowed; but on any such failure, the Court of B. R. may compel the owners of the franchise, &c., to do justice; for that court ought to see justice equally distributed to all persons. 1 Lill. Abr. 635.

Wherever the king is party to a suit, as in all informations and indictments, the process ought to be executed by the sheriff, and not by the bailiff of any franchise, whether it have the clause non omittas, &c., or not; for the king's prerogative shall be preferred to any franchise. 2 Hawk. P. C. A

sheriff, upon a non omittas, or on a capias utlagatum, or quo minus, may enter and make arrests in a franchise. I Lill. 635. An arrest by the sheriff within a franchise on a common writ, is said to be good, though the officer be subject to an action at the suit of the lord of the franchise, &c. See tit. Arrest.

By the long established usage of the King's Bench, a capias with a non omittas clause may issue in the first instance, and be executed by the sheriff in a particular liberty (such as the Honour of Pontefract in the county of York, the bailiff of which has the execution and return of writs), without a prior latitat first issued, and a return of mandari ballivo qui nullum dedit responsum.

Carrel v. Smallpage, 9 East, 330.

Where, by letters patent, James I. granted to A. and his heirs that he and they, by his or their bailiff or bailiffs for that purpose from time to time deputed, should have full return of all writs, mandates, and precepts, within a certain district; and that no sheriff, or other officer, should intermeddle concerning such returns, or enter to do any thing in execution of the premises, unless through the default of the bailiff or bailiffs of A. or his heirs. Held that, by virtue of this special grant, the bailiffs odeputed might return writs, &co., iu his own name. 3 B. & Ad. 630.

Franchises may be forfeited and seized where they are abused, for mis-user or nonuser, and when there are many points, a mis-user of any one will make a forfeiture of the whole on a quo warranto brought. Kitch. 65. For contempt of the king's writ, in a county palatine, &c., the liberties may be seized, and the offenders fined; and the temporalities of a bishop have been adjudged to be seized until he satisfied the king for such a contempt, on information exhibited, &c. Cro. Car. 253. The Bishop of Durham pretending he had such a franchise, that the king's writ was not to come there, and because one brought it thither he imprisoned him; this being proved upon an information brought against him, it was adjudged he should pay a fine to the king, and lose his liberties. 2 Shep. Abr. 250.

If a person claims franchises which he ought not to have, it is an usurpation upon the king; and not showing his title the king shall take from him his franchise. Poph. 180: 1 Bulst. 54. The King's Bench will not grant an information on private usurpation of franchises, but the proper remedy is to proceed by quo warranto. Hardw. 261.

If franchises and liberties are granted to the king, which were before in esse, as flowers of his crown, and afterwards by escheaf, surrender, or otherwise, come back to the crown, they are re-united to the crown, and the king has them in jure corona as before. 9 Co. 256. So if liberties, franchises, &c., which were appendant to a manor, come with the manor to the king, the appendancy is extinct, and the king is reseized of them

Vol. I.—106.

in jure coronæ. 9 Co. 25. b.: Cro. Eliz. 591: | lord may at this time confirm his estate, to 1 And. 87. See Jon. 285. But if franchises, liberties, &c., created de novo by the king, come back to the crown, they are not merged or extinguished in the crown. 9 Co. 25. b.: 1 And. 87. See Cro. Eliz. 592: Dyer, 327. a.: Com. Dig. tit. Franchise (G).

Disturbance of franchises happens when a man has the franchise of holding a courtleet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays, or, in short, any other species of franchise whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces, or persussions, prevail upon the suitors not to appear at my court; or obstruct the passage to my fair or market; or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes, or is carried out of my liberty: in all cases of this kind, and which are of a variety too extensive to be here enumerated, an injury is done to the legal owner of the franchise; his property is damnified: and the profits arising from such his franchise are diminished. medy which, as the law has given no other writ, he is therefore entitled to sue for damages by a special action on the case: or in case of toll, may make a distress, if he pleases. 3 Comm. 236.

Franchises and liberties are not within

either of the nullum tempus acts of the 21 J. 1. c 2. and the 9 G. 3. c. 16.

See further as to franchises, tits. Cognizance, Quo Warranto.

FRANCIGENÆ. Was anciently the general appellation of all foreigners.

Englecery FRANCLAINE. Used in ancient authors to denote a freeman or a gentleman. Fortescue.

FRANK. A French gold coin, worth twenty sols, which is a livre, about 101d. English money

FRANKALMOIGN, Libera Eleemosyna, Free Alms.] A tenure by spiritual service, where an ecclesiastical corporation, sole or aggregate, holdeth land to them and their successors, of some lord and his heirs in free and perpetual alms. And perpetual supposes it to be a fee simple: though it may pass without the word successors. Lit. § 133: Co. Lit. 94. A lay person cannot hold in free alms; and when a grant is in frankalmoign, no mention is to be made of any manner of service. Lit. 137. None can hold in frankalmoign but by prescription, or by force of some grant made before the statute of Mortmain (7 Ed. 1. st. 2.) and the 18 Ed. 1. st. 1. c. 3. So that the tenure cannot at this day be created, to hold of a founder and his heirs in free alms; but the king is not restrained by the statutes; nor a subject licensed or dispensed with by the king, to make such a grant, &c. Co. Lit. 98, 99. And if an ecclesiastical person holds lands by fealty and certain rent, the

hold to him and his successors in frankalmoign; for the former services are extinct. and nothing is reserved but that he should hold of him, which he did before; whereby this change and alteration is not within the stat. 18 Ed. 1. of quia emptores terrarum. Lit. 140 540: Co. Lit. 99. 306.

Tenure in frankalmoign is incident to the inheritable blood of the donor or founder; except in case of the king, who may grant this tenure to hold of him and his successors. Lit. 135. And the reason why a grant in frankalmoign, since the stat. 18 Ed. 1. (quia emptores) is void, except in the case of the king, &c., is because none can hold land by this tenure, but of the donor; whereas the statute enjoins, that it be held of the chief lord, by the same service by which the feoffor held it; though the king may grant away any estate, and reserve the tenure to himself. Co. Lit. 99, 223.

The service which ecclesiastical corporations were bound to render for lands held in frankalmoign was not certainly defined, but only in general, to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this), because this divine service was of a higher and more exalted nature. Lit. § 134, 135.

This is the tenure by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy and very many ecclesiastical and eleemosynary foundations hold them to this day, the nature of the service being, upon the Reformation, altered and made conformable to the doctrines of the Church of England. It was an old Saxon tenure, and continued under the Norman revolution; from the respect then shown to religion and religious men: which is also the reason that tenants in frankalmoign were discharged of all other services, except the trinoda necessitas of repairing the highways, building castles, and repelling invasions. See Bract. l. 4. tr. 1. c. 28. § 1: Seld. Jan. 1. 42.

Even at present, this is a tenure of a nature very distinct from all others, being not in the least feodal, but merely spiritual. For this reason, if any person that holds lands or tenements in frankalmoign, make any failure in doing such Divine service as they ought, the Lord may make complaint of it to the ordinary or visitor; which is the king, if he be founder, or a subject where he was appointed visitor upon the foundation; and the ordinary, &c. may punish the negligence, according to the ecclesiastical Lit. 136: Co. Lit. 96. laws.

In this particular, tenure in frankalmoign materially differs from what was called tenure by Divine service: in which tenants were obliged to do some special Divine services in certain: as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called free alms; especially as for this, if the gift, i. e. sciant, &c. me A. B. dedisse et unperformed, the lord might distrain without any complaint to the visitor. Lit. § 137: uxori cjus, filie, &c. in liberum maritagium, Brit. c. 66.

These donations in frankalmoign are now out of use, as none but the king can make them; but they are expressly excepted, by name, in the stat. 12 Car. 2. c. 24. (§ 7.) abolishing tenures, and therefore subsist in many instances at the present day. 2 Comm. 101. c. 6.

See further on this subject, tit. Mortmain. FRANK-BANK. See Free Bench.

FRANK-CHASE. A liberty of free chase; by which all persons that have lands within the compass thereof, are prohibited to cut down any wood, &c. without the view of the forester, though it be in their

own demesnes. Comp. Juris. 187.

FRANK-FEE. Freehold lands which are held exempted from all services, but not from homage. In the register of writs we find that is frank-free which a man holds at the common law, to him and his heirs; and not by such service as is required in ancient demesne, according to the custom of the manor; and that the lands in the hand of King Edward the Confessor, at the making of the book of Domesday, were ancient demesne, and all the rest frank-fee, wherewith Fitz-Herbert agrees. Reg. Orig. 12: F. N. B. 161. These lands were exempted from all services, but not from homage. Bro. tit. Demesne, 32. says, that land which is in the hands of the king or lord of any manor, or being ancient demesne of the crown (viz. the demesnes) is called frank-free; and that which is in the hands of the tenant, is ancient demesne only. The author of the Terms of the Law defines a free-fee to be a tenure pleadable at the common law; and not in ancient demesne. Cowel: Blount. See tit. Ancient Demesne.

FRANK-FERM. Lands or tenements, changed in the nature of the fee by feoffment, &c, out of knight service, for certain yearly service. Britton, c. 66. See tit.

Fee Furm.

FRANK-FOLD, see Foldage.

FRANK-LAW, libera lex.] The benefit of the fee and common law of the land. You may find what it is by the contrary, from Crompton in his Justice of Peace; where he says, he that for any offence lost his frank-law, falls into these mischiefs, viz.: he may never be impannelled upon any jury or assise; or be permitted to give any testimony. If he hath any thing to do in the king's courts, he must not attend them in person, but appoint his attorney therein for him; and his lands shall be estreated, and his body committed to prison, &c. Cromp. Juris. 156: Lib. Assis. 59.

FRANK-MARRIAGE, liberum maritagium.] A tenure in tail special where a man seised of land in fee-simple; gives it to another with his daughter, sister, &c., in marriage; to hold to them and their heirs. This tenure groweth from these words in

the gift, i. e. sciant, &c. me A. B. dedisse et concessisse, &c. T. B. filio meo, &c. Annæ uxori ejus, filiæ, &c. in liberum maritagium, num messuagium, &c. Lit. § 17: West. Symb. par. 1. lib. 2. § 303. The effect of which words is, that they shall have the land to them and the heirs of their bodies: and shall do no services to the donor, except fealty, until the fourth degree. Glanvil. lib. 7. c. 18. And Fleta gives this reason why the heirs do no service until the fourth degree: Ne donatores vel corum hæredes per homagii receptionem a reversione repelantur. And why in the fourth descent and downward, they shall do services to the donor: quin in quarto gradu vehementer præsumitur, quod terra est pro defectu hæredum donatorum reversura Fleta, lib, 3. c. 11; and see Bracton, lib. 2. c. 7.

Bracton also divides marriages into liberum' maritagium, and maritagium servito obligatum; which last was where lands were given in marriage, with a reservation of the services to the donor, which the donee and his heirs were bound to perform for ever; but neither he, or the next two heirs, were obliged to do homage, which was to be done when it came to the fourth degree, and then, and not before, they were required to be performed, both services and homage. Bract. lib. 2. A gift of lands by one man to another with a wife in frank-marriage, amounts by implication of law to a gift in tail; which in this case may be created without the words heirs or body. Lit. 17: Wood's Inst. 120. A gift in frank-marriage might be made as well after as before marriage: and such a gift was a fee simple before the statute of Westm. 2; but since, it is usually a fee-tail. Though this tenure is now grown out of use, it is still capable of subsisting in law: it is liable to no service but fealty. See tit. Tail and

FRANK-PLEDGE, franci plegium, from Fr. franc, liber, and pledge, fidejussor.] A pledge or surety for the behaviour of freemen; it being the ancient custom of this kingdom, borrowed from the Lombards, that for the preservation of the public peace, every free born man at the age of fourteen (religious persons, clerks, &c. excepted) should give security for his truth towards the king and his subjects, or be committed to prison, whereupon a certain number of neighbours usually became bound one for another, to see each man of their pledge forthcoming at all times, or to answer the transgression done by any gone away: and whenever any one offended, it was forthwith inquired in what pledge he was, and then those of that pledge either produced the offender within one and thirty days, or satisfied for his offence. This was called frank-ford; and this custom was kept, that the sheriffs at every county court, did from time to time take the oaths of young persons as they grew to fourteen years of age, and see that they were settled in one decennary or other: whereby this branch of the sheriff's authority was called visus franci

plegi, or view of frank-pledge.

At this day no man ordinarily giveth other security for the keeping of the peace, than his own oath; so that none answereth for the transgression of another, but every person for himself. 4 Inst. 78. Living under frank-pledge has been termed living under law, &c. See this Dict. tits. Court-leet, Decennary, Deciner.

FRANKS OF LETTERS .- By 42 G. 3. c. 63. § 14. forging the superscription of any letter or packet, to be sent by the post in order to avoid the postage, or altering the date, &c., or sending the same by the post, knowing the same to be forged, is felony, punishable by transportation for seven years.

See further, tit. Parliament. FRANK-TENEMENT. A possession of freehold lands and tenements. See Freehold

FRASSETUM. A corruption of fraxinetum.] A wood or wood ground, where ash-trees grow. Co. Lit. 4.

FRATER CONSANGUINEUS. A bro-

ther by the father's side.

FRATER NUTRICIUS. Used in ancient deeds for a bastard brother. Mamlsb. FRATER UTERINUS. A brother by

the mother's side.

FRATERIA. A fraternity, brotherhood, or society of religious persons, who were bound to pray for the good health, life, &c. of their living brethren, and the souls of those that were dead: in the statutes of the cathedral church of St. Paul in London, collected by Ralph Baldock, Dean, A. D. 1295, there is one chapter de frateria beneficorum ecclesiæ S. Pauli. &c.

FRATERNITIES. See tit. Corporation. FRATURES CONJURATI. Sworn brothers or companions: sometimes those were so called who were sworn to defend the king against his enemies. Hoveden, p. 44,

5: Leg. Ed. 1. c. 35.

FRATRES PYES, Pied friars.] Certain friars wearing black and white garments: of whom mention is made by Wulsingham,

p. 124.

FRATRIAGIUM: A younger brother's inheritance; whatever the sons or brothers possess of the estate of the father, they enjoy it ratione fratriagii, and are to do homage to the elder brother for it, who is bound to do homage for the whole to the superior lord. Bract. lib. 2. c. 35.

FRAUD, fraus, Lat. | Deceit in grants and conveyances of lands, and bargains and sales of goods, &c. to the damage of another person; which may be either by suppression of the truth, or suggestion of false-

hood.

I. What Acts are fraudulent at Common Law and in Equity.

II. What Acts are fraudulent by Statute. III. Public Frauds punishable by Indictment at Common Law.

I. It may be laid down as a general rule, that, without the express provision of any act of parliament, all deceitful practices in defrauding, or endeavouring to defraud, another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence. Co. Lit. 3. b: Dyer, 295. Such as causing an illiterate person to execute a deed to his prejudice, by reading of it over to him in words different from those in which it was written, &c. 1 Sid. 312. 431.

Also it is a rule, that a wrongful manner of executing a thing shall avoid a matter that might have been executed lawfully. Co. Lit. 35: 41 Ass. 28: 47 Ass. 29: 1 Rol. Ab. 420. 549: Co. Lit. 357: Poph. 64, 100.

A deed not fraudulent at first may become so afterwards. And if one add a seal to a note which is good without it, he shall lose his security. 2 Vern. 123. 162

Where a person is party to a fraud, all that follows by reason of that fraud shall be said to be done by him. Cro. Jac. 4. 9. But when fraud is not expressly averred, it shall not be presumed; nor shall the court adjudge it to be so, till the matter is found by

a jury. 10 Rep. 56.

All frauds and deceits, for which there is no remedy by the ordinary course of law, are properly cognisable in equity; and it is admitted, that matters of fraud were one of the chief branches to which the jurisdiction of Chancery was originally confined. 4 Inst. 84.

Wherever fraud or surprise can be imputed to, or collected from the circumstance of the transaction, equity will interpose and relieve against it. Toth. 101, 2: 2 Ch. Ca. 103: Finch. 161: 2 P. Wms. 203. 270: 3 P. Wms. 130: 2 Vern, 189: 2 Atk. 324: 2 Ves. 407. It is said, however, it must not be understood, from cases of this kind being generally brought into equity, that the courts of law are incompetent to relieve; for where the fraud can be clearly established, courts of law exercise a concurrent jurisdiction with courts of equity; and will relieve by making void the instrument obtained by such corrupt agreement or fraud. 1 Burr. 396: Wood's Inst. 296. Therefore where the obligor was an unlettered man, and the bond was not read over to him, he was allowed to plead this circumstance in an action on the bond. 9 H. 5. 15. cited 11 Co. 27. b. So if the bond be in part read to an unlettered man, and some of its material contents be omitted or misrepresented. 2 Rol. Ab. 28. p. 8. It is observable that Lord Coke in the same passage where he confines the jurisdiction of courts of equity to such "frauds covin and deceit, for which there is no remedy by the ordinary course of law, seems to admit that all frauds were not relievable at law. See 3 Inst. 84.

That a party prejudiced by a fraud may

file a bill in equity for a discovery of all its | sale. 3 Madd. 417: Coop. Ca. 125: 2 Jac. circumstances is unquestionable; the invariable practice in such cases is to seek relief, and the issue directed is to furnish the ground upon which the court is to proceed in giving relief. Fonblanque's Treat. Eq. c. 2. § 3. in n.

The Chancery may decree a conveyance to be fraudulent merely for being voluntary, and without any trial at law; yet it has been insisted, that fraud or not was triable only by a jury. Pre. Ch. 14, 15.

Where a poor man was drawn in to sell an estate, at a great undervalue, but no fraud appearing, though the purchase was not a fair bargain, the seller could not be relieved in equity, to set it aside. Preced. Chanc. 206.

But the Court of Chancery will set aside a deed obtained by the keeper of a house of lunatics from a person residing under his care, though the party be not a lunatic at the time, on the general principle of inequality of station, like the cases of guardian and ward, attorney and client, &c. 13 Ves. 136. And so also a deed executed in favour of a person acting as agent for managing a lady's affairs, if undue influence

appears. 14 Ves. 273.

There does not appear to be a single case in the books in which it has been held that mere inadequacy of price alone is a ground for a court of equity to annul an agreement, though executory, if the same appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed; still less does it appear to have been considered as a ground for rescinding an agreement actually executed. See Gilb. Rep. 156: Bro. P. C. Keen v. Stukeley, 2 Atk. 251: Ambl. 18. To set aside a conveyance there must be an inequality of price so strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it. I Bro. C. R. 9. and see 2 Bro. C. R. 179. in n. A strong argument in support of this rule may be drawn from those cases in which losing bargains have been actually established and decreed. See 2 Vern 423: 1 Eq. Abr. 170: 2 Vez. 422: 1 Bro. C. R. 158. But though courts of equity will not relieve against agreements merely on the ground of the consideration being inadequate, yet if there be such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to a fraud. 2 Bro. C. R. 175. See also 1 Bro. C. R. 558: Herne v. Meers, 2 Ves. 155: 2 P. Wms. 203: 3 Ves. & Bea. 187: 1 Cox's Rep. 278: 2 Madd. 430: 9 Ves. 246: 10 Ves. 219. 474: 2 Scho. & Lef. 488: 16 Ves. 517. So inadequacy of price coupled with distress of the vendors, and want of advice, is a ground for invalidating a

& Walk. 13. And see post.

It seems agreed that if a woman on the point of marriage, charge, or convey her property to a mere stranger, for whom she was not under even a moral obligation to provide, that such a conveyance will be decreed a fraud on the marital rights. 2 C. R. 41: 2 Ves. 264.

Since the cases of Kerrich v. Bransby (Bro. P. C.) and Webb v. Cleverden (2 Atk. 424), it appears to have been settled that a will cannot be set aside in equity for fraud and imposition; because a will of personal estate may he set aside for fraud in the ecclesiastical court, and a will of real estate may be set aside at law: for in such cases, as the animus testandi is wanting, it cannot be considered as a will. 2 Atk. 324: 3 Atk. 17. Though equity will not set aside a will for fraud, nor restrain the probate of it in the proper court, yet if the fraud be proved, it will not assist the party practising it, but will leave him to make what advantage he can of it. 2 Vern. 76. But if the validity of the will has been already determined and acted upon, equity will restrain proceedings in the Prerogative Court, to controvert its validity. 1 Atk.

If a security be obtained from a person by fraud and practice, upon a pretence of a demand that is fictitious, it will be relieved against in equity. 2 Vern. 123. 632.

But no man can be allowed to allege his own fraud to avoid his own deed; and therefore when a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game; it was held that as against the parties to the deed it was valid and was sufficient to support an ejectment for the premises. Doe, d. Roberts v. Roberts, 2 B. & A. 367.

There are several instances where a parol agreement, intended to be reduced into writing, but prevented by fraud, has been decreed in equity, notwithstanding the statute of frauds and perjuries; as where upon a marriage treaty, instructions were given by the husband to draw a settlement, which he privately countermanded, and afterwards drew in the woman by persuasions and assurances of such settlement to marry him: it was decreed, that he should make good the settlement. 1 Eq. Abr. 19. So where a parol agreement was concerning the lending of money on a mortgage, and the covenants proposed were an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had got the deed of conveyance, he refused to execute the defeasance; it was decreed against him on the point of fraud. 1 Eq. Abr. 90. See tit. Agreement.

Having said thus much generally on the nature of fraud, and the jurisdiction of the courts of law and equity, we will now shortly refer to the additional cases on the subject, which it seems convenient to arrange |

under the following heads:—
1. Acts prevented by fraud.—If a person be fraudulently prevented from performing any act, equity will consider the act as done. 1 Jac. & W. 94.

Where a copyholder, by his will, intending to give the greater part of his estate to his godson, and the other part to his wife, was persuaded by the wife to nominate her to the whole, on a promise that she would give the godson the part designed for him; it was decreed against the wife on the ground of fraud, though there was no memorandum of the agreement in writing pursuant to the statute of frauds. Preced. Chanc. 3.

And where a son promised to pay his father's legacies, if he would forbear to alter his will, such promise shall be enforced; 2 Freem. 34; wherein it is said to be the constant practice of the Court of Equity to make a decree on a promise of this nature.

So where a devisee prevented a testator from charging a legacy on his real estate by undertaking to pay it, he was held bound in equity, though not in law. 11 Ves. 638. Also where a tenant in tail was prevented from completing a recovery by the fraud of a person whose wife was entitled in remainder; the estate was treated in equity as if the recovery had been suffered, even in favour of a volunteer. Ibid.

2. Ignorance of rights.—Equity relieves against bargains made under misconception

of rights. 1 Ves. 126.

If a party, ignorant of plain and settled principles of law, is induced to yield portion of his indisputable right, equity will give relief; but where his title is disputable, and he enters into a compromise, he will not be relieved, nor will the court inquire into the consideration, if it appear to have been taken after due deliberation. 1 Simon

& St. 564, 5.

A conveyance obtained from a woman in ignorance of her rights, and upon misrepresentation of the circumstances of the pro-perty, was set aside, although she was of full age, and acquiesced in the sale, and had re-ceived the interest of the purchase money for twelve years; and although she had consulted her friends, and had their assent, they being in equal ignorance with herself. 2 Scho. & L. 474

So an agreement as to the distribution of personal estate was set aside, although ratified, the value appearing much greater than was known at the time. 1 Ves. 401.

Neither will family agreements be supported if founded on the mistake of either party, to which the opposite party is accessary; 3 Swans. 467. Nor will they be enforced where there is no proof of direct fraud, or undue influence, even after an acquiescence of five years, if it appear that a party surrendered an unimpeachable title without consideration, and evidence is given of his gross ignorance, habitual intoxication,

liability to imposition, and want of professional advice. 1 Swanst. 137.

But a purchaser who has given full value for an estate, and without notice, shall not be prejudiced by the mistake of a party conveying a claim under a marriage settlement. 2 Atk. 8.

3. Concealment of value or title by parties purchasing, &c .-- In treaties for an agreement, concealment of a material fact by one one of the parties, in order to keep the other in ignorance, whereby to profit, is a gross fraud, and the contract will be set aside in equity. 1 Bro. P. C. 308. And where there has been a concealment on the part of the vendor, a specific performance will not be decreed. 1 Bro. C. C. 440. And if an attorney or agent, on the sale of an estate, does not disclose to the buyer an incum-

brance, and leads him to suppose the title is good, he will be held liable to make satis-

faction in default of the vendor. 1 Ves. 95. So concealment of a material fact by the person whose duty it was to disclose it, is sufficient to avoid a release so obtained by him. 1 Scho. & L. Also where a partner. who exclusively superintended the accounts of the concern, agreed to purchase his copartner's share, for a sum which he knew, from accounts in his possession, but which he concealed from his copartner, was an inadequate consideration; the agreement was

set aside. 1 Sim. 89.

Imperfect information is held to be equivalent to concealment. 3 Swan. 73.

4. Concealment of title by parties lying by. 4.c.-Where a man conusant of his right suffers another to build on his ground without setting up a right till afterwards, the court will oblige him to permit the person building to enjoy quietly. 2 Atk. 83. Soit is a ground of relief against a remainderman who lies by and allows a tenant to build without giving him notice of his intention to impeach his title. 2 Sch. & L. 73.

If A. has a prior incumbrance on an estate, and is a witness to a subsequent mortgage, but does not disclose his own incumbrance; this is such a fraud in him for which his incumbrance shall be postponed. Vern. 151. And see 2 Vern. 554. So if A. having a mortgage on a leasehold estate, lends the mortgage deed to the mortgagor, with an intent to borrow more money; that is such a fraud in the mortgagee, for which his mortgage shall be postponed to the subsequent incumbrance. 2 Vern. 726: 1 Eq. Ab. 321. See this Dict. tit. Mortgage.

Where a mortgagee was present while the mortgagor was in treaty for his son's marriage, and fraudulently concealed his mortgage, he was held precluded from his claim. 2 Atk. 49. S. C.: Barn. 101.

So where a mother being absolute owner of a term, the same being limited to her in tail, was present at a treaty for her son's marriage, and heard her son declare, that the term was to come to him at his mother's death, and was a witness to the deed, whereby the reversion of the term was settled on | pending the treaty, made deceitful reprethe issue of the marriage after the mother's death; she was compelled in equity to make good the settlement. 2 Vern. 150.

Where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterwards desiring to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which she accordingly did, and the defendant stood by at the corner of a street to see them go by to be married; the plaintiff was relieved on the point of fraud. 1 Eq. Ab. 20: 2 Vern. 373.

So where a person, knowing his own title, does not give notice of it to a purchaser, although an infant, he shall not afterwards set it up. 9 Mod. 35. So a tenant in tail under a settlement encouraging a stranger to purchase an annuity charged on his estate by a will, which was void as against the settlement, was decreed to make the annuity

good. 1 Vern. 136.

Where A. being tenant in tail, remainder to his brother B. in tail, A. not knowing of the intail, made a settlement on his wife for life for her jointure, without levying a fine, or suffering a recovery, which B. who knew of the intail ingrossed, but did not mention any thing of the intail, because, as he confessed, in his answer, if he had spoke any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him: although after A.'s death B. recovered in ejectment against the widow by force of the intail; yet she was relieved in Chancery, and a perpetual injunction grant-ed for this fraud in B. in concealing the intail; for if it had been disclosed, the settlement might have been made good by a recovery. Preced. Chanc. 35: 2 Vern. 239.

5. Misrepresentation .- As to frauds in contracts and dealings, the common law subjects the wrong-doer, in several instances. to an action on the case; as if a person, having the possession of goods, sell them to another, affirming them to be his own, when in truth they are not, an action on the case lies. 1 Rol. Ab. 90: Cro. Jac. 474. But if A. possessed of term for years, offers to sell it to B. and says, that a stranger would have given him twenty pounds for this term, by which means B. buys it, though in truth A. was never offered twenty pounds, no action on the case lies, though B. is hereby deceived in the value. 1 Rol. Ab. 91. 101: 1 Sid. 146: Yelv. 20. S. P.

If on a treaty for the purchase of a house, the defendant affirms the rent to be more than it is, whereby the plaintiff is induced to give more than the house is worth, this is a fraud. 1 Salk. 211: 1 Lev. 102: 1 Sid. 146: 1 Keb. 510. 518. 522. S. P. And see Kel 24. 81: 1 Show. 50. 51.

sentations as to the amount of the business done at it, whereby the plaintiff was induced to give a large sum of money for it, it was held that the latter might sue for the deceitful representations, though not entered in the conveyance or agreement of sale. Dobell v. Stevens, 3 Barn & C. 625.

A misrepresentation of the value of an estate is a sufficient ground in equity to refuse a specific performance; 1 Bro. P. C. 211: 1 Mad. 80; even misrepresentation to a slight degree; 18 Ves. 10; but there is a distinction where it is urged as an objection

to rescind the contract. Ibid.

A party obtaining an agreement by a partial misrepresentation is not entitled to a specific performance, on waiving the part affected by the misrepresentation. The effect of partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy it entirely, and to operate as a personal bar to the party who has practised 1 Jac. & W. 112.

Misrepresentation of a fact misleading others to deal for value upon the faith of it. is binding on the person making it. 3 V. & B. 111. And even if he make it through mistake, it shall bind him, if he might have had notice of it. 2 Bro. C. C. 338.

As to purchases by agents, trustees, &c.

see tit. Vendors and Purchasers.

II. What Acts are fraudulent by Statute.— By stat. 1 Ric. 2. c. 9. no gift or feoffment of lands or goods shall be made by fraud for maintenance. And the disseisees shall have their recovery against the first disseisors as well of their lands as of double damages, without regard to such alienations. also stats. 4 H. 4. c. 7: 11 H. 6. c. 3: and this Dict. tits. Disseisin, Forcible Entry.

By stat. 3 H. 7. c. 4. (and see stat. 50 Ed. 3. c. 6.) all deeds of gift of goods made in trust for the use of persons making the said gifts, with intent to defraud creditors, shall

be null and void.

By stat. 13 Eliz. c. 5. (made perpetual by stat. 29 Eliz. c. 5.) every feoffment, gift, alienation, and conveyance of lands or goods, leases, rents, &c. and every bond, judgment, and execution, with intent to defraud creditors, or others, shall (only against creditors and others whose actions shall be thereby defrauded or delayed) be of none effect; all parties and privies to such conveyances, bonds, &c. shall forfeit one year's value of the lands; and the whole of the goods, or money contained in the bond, &c. half to the crown and half to the party grieved; and suffer half a year's imprisonment. This statute not to extend to any estate made on good consideration bond fide to persons not having notice of such fraud. As to determinations on this act, see

By stat. 27 Eliz. c. 4. (made perpetual by stat. 39 Eliz. c. 18.) every conveyance, Where the vendor of a public-house, | charge, lease, or incumbrance, of any lands

shall be deemed utterly void as against such | previous to its passing; and the remedy purchasers and all claiming under them. The parties and privies to such conveyances shall forfeit one year's value of the land, and suffer half a year's imprisonment. The statute expressly excepts any conveyance made for good consideration and bond fide. If any person shall make any conveyance or limitation of lands with a clause of revocation, and after such conveyance shall convey or charge the same lands for money or other good consideration, the said first conveyance against the said vendees shall be void. Lawful mortgages made bond fide on good consideration are excepted. By the same act statutes merchant and statutesstaple are to be entered in the office of the clerk of the recognizances. See this Dict those titles.

By stat. 29 Car. 2. c. 3. (known more commonly by the name of The Statute of Frauds, and by which various provisions are made as to contracts, wills, &c. which see in this Dict. under tits. Agreement, Assumpsit, Trusts, Wills, &c.) all leases, estates of freehold, or terms for years, or any uncertain interest in lands, made by livery and seisin only, or by parol, and not put in writing and signed by the parties or their agents, shall have the force of leases at will only. cept leases not exceeding the term of three years at two thirds of the improved value. And no leases, estates, or interests of lands, either of freehold or terms of years, or any uncertain interest, not being copyhold, shall be assigned, granted, or surrendered, unless by deed or note in writing signed by the parties or their agents; or by the operation of law.

By stat. 3 (or 3 and 4) W. & M. c. 14. continued by stat. 6 W. 3. c. 14. all wills or appointments of lands, or of any rent, &c. out of the same should be deemed, only as against creditors by bond or specialty binding the heir, to be fraudulent and void. And every such creditor should have his action of debt upon his bonds and specialties against the heir at law of such obligators, and such devices jointly. This statute, however, excepted dispositions for the payment of debts and raising portions for children in pursuance of marriage contracts made before marriage: it further provided, that where any heir at law should be liable to pay his ancestor's debt, in respect of lands descended to such heir, and aliened the same before action brought, he shall be answerable to the creditor in an action of debt to the value of the land aliened; but the lands bond fide aliened before action brought should not be liable. Every devisee made liable by the statute should be chargeable, in the same manner as the heir, though the lands devised should be aliened before action brought.

By the 1 W. 4. c. 47. the two last-mentioned acts, and also the 4 Anne, c. 5. and the 47 G. 3. c. 74. are repealed, except so far | Treat. Eq. c. 4. § 12. in notes.

made with intent to defraud purchasers, as they affect the estates of persons who died given to creditors by bond or specialty by the former statutes is extended to creditors by covenant See further tit. Real Estate.

The stats. 50 Ed. 3. c. 6: 3 H. 7. c. 4. expressly declare all gifts, &c. of goods and chattels intended to defraud creditors, to be null and void: creditors might, however, still in some cases be defrauded, by their debtors executing powers of appointment (vested in them by settlement, &c.) in favour of mere volunteers, unless courts of equity interposed, and made such voluntary appointment in the first place subject to payment of debts. 2 Vern. 319. 465: 2 Vez. 1. But though courts of equity will subject a voluntary appointment to payment of debts, yet they will not interfere where the debtor has not executed his power of appointment. 2 Vern. 465: 2 Vez. 1. See also Hob. 9. as to the rule of law.

As the stat. 13 Eliz. c. 5. not only declares all deeds made in fraud of creditors to be null and void, but subjects the parties to such fraud, to the penalties and forfeitures above mentioned, it should seem that the provisions of this act ought to be construed strictly; but Lord Mansfield has said that the stats. 13 Eliz. c. 5: 27 Eliz. c. 4 cannot receive too liberal a construction, or be too much extended in suppression of fraud.

Согор. 434. The object of the legislature was evidently to protect creditors from those frauds which are frequently practised by debtors under the pretence of discharging a moral obligation: for as to those gifts or conveyances which want even a good or meritorious consideration for their support, their being voluntary seems to have been always a sufficient ground to conclude that they were fraudulent: but though the statute protects the legal right of creditors against the fraud of their debtors, it anxiously excepts from such imputation the bond fide discharge of a moral duty. It therefore does not declare all voluntary conveyances, but all fraudulent conveyances, to be void: and whether the conveyance be fraudulent or not is declared to depend on the consideration being good, and also bond fide. 1 Ch. Ca. 99. 291: 1 Vent. 194: 1 Mod. 119: 1 Ath. 15. Cowp.

A good consideration is that of blood, or of natural love and affection. See this Dict. tit. Consideration. A gift made for such consideration ought certainly to prevail, unless it be found to break in upon the legal rights of others; in that case it is equally clear it ought to be set aside. If therefore a man being indebted convey to the use of his wife or children, such conveyance would be within the statute; for though the consideration be good, yet it is not bond fide; that is, the circumstances of the grantor render it inconsistent with the good faith which is due to his creditors. Fonblanque's

A limitation in a marriage settlement in as where the husband after marriage being favour of a stranger, is held not within the indebted conveyed an estate to trustees to the consideration of marriage, and is consequently separate use of his wife, it was held that the voluntary and void against a subsequent pur- trustees, having undertaken to indemnify him chaser for valuable consideration, and it mat- against his wife's debts, was sufficient to supters not that the purchaser had notice. Merv. 254. And a limitation in favour of the tion. 2 Bro. C. R. 90. But if this transacsettler's brothers is also void against a subsequent purchaser. 3 Madd. 283: 6 Maule & S. 67. But a limitation in favour of the settler's issue by a second marriage is held valid against a subsequent purchaser. 6 Maule & S. 67. And where a father refused, on his son's marriage, to enable him to make a settlement, unless provision was made by the settlement for his brothers and sisters, these persons were held not to be mere volunteers, for though not within the consideration of marriage, they were within the agreement between the father and son, and therefore the settlement was not void as to them within the statutes. 18 Ves. 92: 2 Atk 189.

If there be a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and there is no particular evidence or badge of fraud to deceive subsequent creditors, that will be good; but if any mark of fraud collusion, or intent to deceive subsequent cre-

711.

But the grantor's not being indebted is not the only badge of fraud; several other circumstances are enumerated in Twyne's Case (3 Rep.) as furnishing a strong presumption that the transaction is mala fide. Gifts made in secret are liable to suspicion of fraud; a genegoods; if the deed be secretly made; if there 105. be a trust between the parties; or if it be ance being absolute. 2 Bulst. 218. So if the although made with intent to deprive the creconveyance or gift be in general of the whole ditor of his execution. Pickstock v. Lystor, 3 or the greater part of the grantor's property, Maule & S. 571. And see Meux v. Slowell, 4 such conveyance or gift would be presumed East, 1: Bac. Ab. Fraud, C. to be fraudulent; for no man can voluntarily To bring a case within t to be fraudulent; for no man can voluntarily divest himself of all or the most of what he has, without being aware that future creditors will probably suffer for it. In short, if circumstances, (5 Ves. 387.) but this must not the transaction be chargeable with any circumstances sufficiently strong to raise a presumption of its being a fraud, it cannot be supported, unless some other consideration be where, immediately before the transfer, the interpretation of the chiral property of the support of the chiral property of the chiral property of the support of the chiral property of the support of the chiral property of the support of the chiral property of the chiral property of the support of the chiral property of the support of the chiral property of the support of the chiral property of the c

port the settlement as a valuable consideration had been with a view to defraud creditors, it would probably have been set aside; for if the transaction be not bona fide, the circumstance of its being even for a valuable consideration will not alone take it out of the statute. Cowp. 434: 2 Atk. 477.

But though creditors may under the above and other circumstances avoid a voluntary conveyance, yet it is binding on the party making it and all claiming under him. Jac. 270: 1 Eq. Ab. 168: 22 Vin. Ab. 16. 18: 1 Vern. 100. 152. 464: 2 Vern 475: 22 Vin. Ab. 24. pl. 3. And if there be two or more voluntary conveyances, the first shall prevail, unless the latter be for payment of debts. 1

Ch. Rep. 92: 2 Ch. Rep. 199.

A conveyance, if made of lands by fraud, is not void by the stat. 13 Eliz. c. 5. against all persons; but only against those who afterwards come to the land upon valuable consideration. Cro. Eliz. 445: Cro. Juc. 271.

A distinction has been taken between the claims of real creditors, and a debt founded ditors appear, that will make it void. 2 Ves. in maleficio; for A. having brought an action 11. See also 2 Atk. 481: 1 Atk. 13: Coup. against B. for criminal conversation with A.'s wife, B. assigned his estates to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should name. A. recovered 5000l. damages, and brought his bill to set aside this deed as fraudulent, but the court held that it was not fraudulent either in law or equity; for the plainral gift of all a man's goods may be reasonably tiff was no creditor at the time of making the suspected to be fraudulent, even though there deed: and though it were made with an inbe a true debt owing to the party to whom tent to prefer his real creditors before this made. The several marks or badges of fraud, debt when it should come to be such, yet it in a gift or grant of goods, are, if it be gene- was conscientious so to do. But the plaintiff ral, without exception of some things of neces- was held to have an interest in the surplus sity; if the donor still possesses and uses the after payment of the other debts. Pre. Ch.

Where a debtor being sued pending the suit made pending the action. 3 Rep. 80, 82 .- If and before execution, being insolvent, excalso the conveyance contain a power of revo- cuted an assignment of all his effects to truscation, or a power to mortgage, it will be con- tees for the benefit of all his creditors, under sidered as fraudulent against creditors. 2 which possession was immediately taken, the Vern. 510 .- So if the grantor be allowed to court of K. B. held that this assignment was continue in possession of lands, the convey- not fraudulent within the stat. 13 Eliz. c. 5.

To bring a case within the 13 El. c. 5. it interposed to obviate the objection arising party's attorney had written to a creditor to from the general natures of the transaction; say that his demands, if persisted in, would

Vol. I.-107

render the party's wife entirely destitute after 'act, must be a purchaser for money or other his death; held, that this authorised a conclusion he was not able to pay the debt, and that 444. See also Com. Dig. Fraud. 4. I. 2; 1 at any rate he must have made himself incapable by the subsequent transfer (the conveyance in question). 3 B. & Ad. 362.

A farmer giving a bill of sale of all his farming stock to secure a debt, the agent of the vendee took possession and resided on the farm while he converted the stock, but the a purchaser shall avoid a fraudulent conveyvendor also continued to reside on the farm, and exercised acts of ownership over part of the stock: the court of C. P. held that a debt being boná fide due, and the bill of sale taken with a view to recover that debt, the jury were warranted in finding the bill of sale good against a judgment creditor taking the stock in execution. Benton v. Thornhill, 7 Taunton, 149.

A creditor having taken in execution the goods of a defendant who had confessed judgment, and having bought them by public auction, and taken a bill of sale for a valuable consideration from the sheriff, and let the goods to the former owner for a rent which was actually paid, has a title which cannot be favourable to such purpose is that which eximpugned as fraudulent by other creditors having executions against the same defendants.

4 Taunt. 823.

Want of possession accompanying a conveyance of chattels does not of itself constitute fraud, and avoid the deed as against creditors; it is only evidence (or as the cases term it, a badge,) of fraud. Therefore, where a bill of sale of household furniture given as a security for a boná fide advance of money; provided, that if the debtor should repay the money by instalments in certain days, the deed should be void; but in default of such payment, the creditor might take possession and sell the goods; the deed was held not to be fraudulent as against a judgment creditor, by reason of the debtor remaining in possession, being given for a good consideration, and vour of purchasers with notice, were traced, his continuance in possession being provided it would probable appear to have originated in

for by its terms. 3 B. & Ad. 498. On the construction of the stat. 27 Eliz. c. 4. tary conveyances whatever; though, as very it has been held that every voluntary constrongly observed by Lord Mansfield in Doc veyance shall be presumed to be fraudulent v. Routledge, (Cowp. 708.) it merely affects against a subsequent purchaser. 1 Vent. 194; fraudulent conveyances. Fonblanque. Treat. 1 Cha. Ca. 100. 217: Cro. Jac. 158. But if Eq. c. 4. § 13. in n. the conveyance, though voluntary, appear to The assignees of an insolvent debtor are have been made for a meritorious considera- "parties grieved" within the 13 El. c. 5. by a tion, and without fraud or covin, it shall not fraudulent conveyance by the insolvent, and be void against a subsequent purchaser; for may recover the penalty thereby given against there is no part of the act which affects vo- the parties to the fraud. On a fraudulent alieluntary settlements eo nomine unless they are | nation of lands, the offenders forfeit by that fraudulent. Doe. v Routledge, Cowp. 708. See statute a year's value of the land, but not the also, 2 Wils. 356: Forrest. 64: 2 Vern. 44. consideration money named in the convey-As to what shall be deemed a meritorious con- ance. 4 B. & Ad. 129. sideration, see the above cases, and also 1 Vern. 408, 467: 1 Atk. 265. And though a convey- fraud the lord of his heriot, shall be void; and ance be covinous in its creation, it may ac- the value of the goods forfeited, under statquire validity by subsequent matter; as where 13 Eliz. c. 5. the land conveyed is afterwards aliened or settled for valuable consideration.

valuable consideration. 3 Co. 83. a; Cro. Eliz. Eq. Ab. 353.

I here A. made a voluntary conveyance to able consideration, it was held the latter conveyance defeated the former. 2 N. & M. 64.

Gooch's case (5 Co. 60. b.) determines that but this can by no means bear out the inference that all voluntarily conveyances are fraudulent, and therefore absolutely void, be sufficiently distinct to confine its operation to such conveyances as are made with an intent to defraud and deceive subsequent pura conveyance was made with intent to defraud a person who before he became a purchaser had full notice of such conveyance. See 2 Lev. 105. The policy of the act was to prevent fraud; the construction most cludes all temptation to the practice of it. A voluntary deed, as has already been noticed, is binding on the party and all claiming under him as subsequent volunteers; and to allow him to defeat his bounty in favour of a purchaser for valuable consideration without notice is merely to prefer a higher consideration; but to allow a purchaser with notice to supersede the claims of a volunteer seems to encourage a breach of the respect morally due to the fair claims and interests of others; and may render the provisions of a statute, intended by the legislature to be preventive of fraud, the most effectual instrument of accomplishing it. This point seems deserving of consideration; for if the construction of this act which has certainly prevailed in fathe opinion, that the statute avoids all volun-

Fraudulent gifts, or grants of goods to de-

Fraudulent conveyances to multiply votes

134: Skin. 423: 3 Lev. 387. It has also open ; taken against the persons making mas held that a purchaser, to avail himse ... inscine and ansamire, and an securious for reStat. 10. Ann. c. 23. See tit. Parliament.

fraudulent conveyances, and obtaining relief against them; and as to the operation of the statute of frauds, and other statutes before mentioned, see this Dict. tits. Agreement, III, IV; Assumpsit, Bankrupt, Bill of Sale, Chancery, Contract, Deed, Equity, Execution, Judgment, Will, &c.

III. Frauds punishable by Indictment at Common Law.—Gross criminal frauds are punishable by way of indictment or information; such as playing with false dice, causing an illiterate person to execute a deed to his prejudice, &c.; for these and such like offences the party may be punished with fine and imprisonment, and also might formerly have been set in the pillory. Cro. Jac. 497: 2 Rol. Ab. 78: 2 Rol. Rep. 107: 1 Keb. 849: 6 Mod. 42: 1 Sid. 312. 431: Noy, 99. 103; Moor, 630: Cro. Eliz. 531: 1 Mod. 46: 2 Jon. is not within the statute. 1 Stra. 384. So a 64: 6 Mod. 105: 1 Salk. 379.
Frauds are not indictable at common law,

unless they be such as affect the public; such as using false weights or measures, or unless they he affected by means of false tokens; per Lord Mansfield, 1 Bl. Rep. 273; or by way of conspiracy; or unless they affect the crown. or the administration of justice. East, P. C. 821.

Mere private frauds without false tokens are not indictable.

As where a man sold a quantity of liquor as being eighteen gallons, knowing there were only sixteen. Burr. Rep. 1125: Bl. Rep. 273. Or where a miller wrongfully detained wheat sent to him to grind; East, P. C. 818; or where a miller having received good corn, delivered musty and unwholesome flour; unless indeed it had been laid as being "for the food of man." 4 M. & S. 216. Or where a brewer sent to a publican, barrels of ale, marked as containing such a measure, and wrote a letter falsely assuring him they did contain such a measure. Burr. Rep. 1128. The marked vessels, though in some sense they are false tokens, yet resolve themselves into no more than the dealer's own affirmation. East, P. C. 820. So where the defendant purchased lottery tickets, and gave in payment a draft on a banker with whom he had no account, this is no false token, for it leaves his credit where it was before; per Lord Kenyon, Leach, 656. Or where defendant falsely affirmed a sack of corn to be a Winchester bushel. 1 Sess. Ca. 198. [Aliter had he used a false bushel measure. Ibid.] Or sold gum falsely affirming it to be gum seneca, and worth 71. Say, 205. Or sold base gold for standard gold. Cowp. 323. These are mere lies. So pretending to be sent by another for make amerciaments, &c. Cowel. money, or goods. Salk. 379: 2 Str. 866: 1 FREE BENCH, francus bun money, or goods. Salk. 379: 2 Str. 866: 1 FREE BENCH, francus bancus; sedes E. R. 185. So a false warranty of a horse is libera.] That estate in copyhold lands which no crime, if there be no conspiracy proved. 1 Stark. R. 403.

deeming and restoring, &c. are rendered void. public tokens are indictable at common law. As using false weights and measures, coun-For further matter relative to trands, and territing the Alnager's seal on cloth. Tremadululent conveyances, and obtaining relief C.P.103. Or the general seal or mark of the trade. Ibid. 106. So using false dice. Cro. Jac. 497. Or forging a receipt which the party was bound to deliver. 2 Stra. 749.

So are frauds which affect the public. vending unwholesome provisions for the food of man; mixing alum in bread. 4 Camp. 12: 3 M. & S. 11. Although in very small quantities it might be innocent, and the defendant had no intention that an excessive quantity should be employed. Ibid. So unwholesome bread, full of dirt and filth. East, P. C. 821.

So are frauds upon the crown and public revenue and public justice. As enabling persons to pass their accounts with the paymaster, so as to defraud government. 6 E. R. 1364. So for a public officer to transmit false vouchers, cited 6 E. R. 590. So it would seem to personate bail where the offence feme covert executing a bail bond as a feme sole. East, P. C. 821. An apprentice enlisting in the army, and so obtaining money from the paymaster. Leach, 174. This latter offence now comes within the provisions of the annual Mutiny Act, but in the above case the indictment was at common law.

As to the frauds of obtaining goods by false pretences, see that tit. And see further tits. Cheats, Deceit.

FRAUDS AND PERJURIES, Statute of; see tit. Frauds, II.

FRAUNC FERME. See Frank Ferm: Fee-Farm.

FRAUS LEGIS. If a person having no manner of title to a house, procure an affidavit of the service of a declaration in ejectment, and thereupon gets judgment, and by virtue of a writ of hab. fac. possessionem turns the owner out of possession of the house, and seizes and converts the goods therein to his own use, he may be punished as a felon; because he used the process of the law with a selonious purpose, in fraudem regis. Raym. 276: Sid. 254.

FRAXINETUM. A wood of ash trees. Domesday.

See Affray.

FREDUM. A composition anciently made by a criminal to be freed from prosecution, of which the third part was paid into the Exchequer. Formerly compositions were paid for crimes in general, particularly for murder. The magistrate was to determine the composition, and protect the offender against the violence of resentment. See Montesquieu's Spirit of Laws, l. 30. c. 20: Robertson's Charles V. i. 300.

FREDWIT. A liberty to hold courts and

the wife hath on the death of her husband for her dower, according to the custom of the But irauds committed by means of false manor; but it is said the wife ought to be espoused a virgin, and is to hold the land only which a man holds either in fee, or during so long as she lives sole and continent. Kitch. life; and in the register of writs it is said, that 102. Of this free bench several manors have he who holds land upon an execution of a staseveral customs; and Fitzherbert calls it a tute-merchant until he is satisfied, the debt custom, whereby in certain cities the wife holds as freehold to him and his assigns, and shall have the whole lands of the husband for the same of a tenant by elegit; but such tenher dower, &c. F. N. B. 150. In the manors of the East and West Embourne, in the county of Berks, and the manor of Torre in Devonshire, and other parts of the West of England, there is a custom, that when a copyhold tenant dies, his widow shall have her free bench in all his customary lands, dum sola & casta fuerit; but if she commits incontinency she forfeits her estate: yet nevertheless, on her coming into the court of the manor, riding backwards on a black ram, with an estate for the term of his own life, or the his tail in her hand, and saying the words life of another, hath a freehold, and no other following, the steward is bound by the custom of a less estate; though they of a greater to readmit her to her free bench; the words estate have a freehold, as tenant in fee, &c. are these,-

Here I am, Riding on a black ram, Like a whore as I am: And for my crincum crancum, I have lost my bincum bancum; And for my tail's game Have done this worldly shame;

Therefore pray Mr. Steward, let me have my land again. Cowel.

See tits. Copyhold, Dower.

FREEBOARD, francbordus.] Ground claimed in some places more or less, beyond or without the fence: it is said to contain intended a transmutation of the estate, and two foot and a half. Mon. Angl. tom. 2. p. not to pass it by way of use. March. Rep. 50,

as did not engage like the frank-pledge men wainscot, &c. affixed to the house are parcel

for their decennier. See Friburgh.

are properly free-chapels which are of the may take them down and remove them, so as king's foundation, and by him exempted from he do it before the end of the term, and he do the ordinary's visitation; also chapels founded not thereby injure the freehold. 1 Salk. 368. within a parish for the service of God, by the See further tits. Fixtures, Heir. devotion and liberality of pious men, over and Any thing fixed to the freehold may not be above the mother-church, and endowed with taken in distress for rent or in execution, &c. maintenance by the founders, which were free See tits. Distress, Execution. for the inhabitants of the parish to come to, . It was not felony at common law, only treswere therefore called free-chapels. Reg. Orig. pass, to steal or take any thing annexed to the 40, 41. The Free-chapel of St. Martin-le- freehold: such as lead on a church or house, Grand is mentioned in the stat. 3 Ed. 4. c. 4. corn or grass growing on the ground, apples as are others likewise by ancient statutes: but on a tree, &c. Though if they were severed these chapels were given to the king, with the from the freehold, whether by the owner or a chanteries, &c. by stat. 1 Ed. 6. c. 14. See tit. thief, if he severed them at one time, and

FREEHOLD, liberum tenementum.] That take them. 12 Ass. 32: 1 Hawk. P C. land or tenement which a man holds in feesimple, fee-tail, or for term of life. Bract. lib. freehold is made larceny by statute. See tits. 2. c. 9. It is described to be of two sorts: Fixtures and Larceny. freehold in deed, and freehold in law; the first | Magna Charta, c. 29. ordains, "that no being the real possession of lands, &c. in fee or person shall be disseised of his freehold, &c. for life; the other, the right a person pain to but by magment or his peers, or according to search lands or tenements, before his entry or time taw of the tand :" which does not only reseisure. Freehold is also extended to wees, late to common disseisms, but the king may

ants are not in fact freeholders, only as freeholders for their time, till they have received the profits of the land to the value of their debt. Reg. Judic. 68. 73. A lease for ninety-nine years, &c. determinable upon a life or lives, is not a lease for life to make a freehold, but a lease for years, or chattel determinable upon a life or lives; and an estate for one thousand years is not a freehold, or of so high a nature as an estate for life. Co. Lit. 6. He that hath

When a man pleads liberum tenementum generally, it shall be intended that he hath an estate in fee; and not a bare estate for life. Cro. Eliz. 87. An estate of freehold cannot by the common law commence in future; but it must take place presently in possession, reversion or remainder. 5 Rep. 94.

A man made a deed of gift to his son and his heirs, of lands after his death, and no livery was made; now if there had been livery, it had been void, because a freehold cannot commence in futuro: and it has been held, that it shall not enure as a covenant to stand seised, by reason of the word give: by which it was 1. 51. Whatsoever is part of, or fixed to, the FREE-BOROUGH MEN. Such great men freehold, goes to the heir; and glass windows, of the house, and cannot be removed by ten-FREE-CHAPEL, libera capella.] A cha- ants. 4 Rep. 63, 64. But it hath been adpel, so called because it is exempt from the judged, that if things necessary for trade, &c. jurisdiction of the diocesan. Those chapels are affixed to the freehold by the lessee, he

took them away at another, it was larceny to

Now the stealing of chattels annexed to the

not otherwise seize into his hands, the freehold | might not detain it in the absence of such a of the subject. Wood's Inst. 614. None shall clause, so that with us the clause is wholly title Estate.

FREEHOLDERS. Such as hold any freehold estate. By the ancient laws of Scotland, freeholders were called milites; and freehold in this kingdom, hath been sometimes taken in opposition to villenage, it being lands in the hands of the gentry and better sort of tenants by certain tenure, who were always freeholders, contrary to what was in the possession or the inferior people, held at the will of the lord. Lambard.

FREEMAN, liber homo. One distinguished from a slave; that is, born or made free; and these have divers privileges beyond others. In the distinction of a freeman from a vassal under the feudal policy, liber homo was commonly opposed to vassus or vassallus; the former denoting an allodial proprietor; the latter one who held of a superior. See tit. Tenures.

The title of a freeman is also given to any one admitted to the freedom of a corporate town, or of any other corporate body, consisting, among other members, of those called freemen. See tits. Corporation, London.

FREE-MASONS. See Masons. FREE-WARREN. See Warren.

FREIGHT, Fr. fret.] The money paid for carriage of goods by sea; or in a larger sense, it is taken for the price paid for the use of a ship to transport goods; and for the cargo, or burthen of the ship. Ships are freighted right to detain something of which the party either by the ton, or by the great: and in respect of time, the freight is agreed for, at so to freight, the merchant charterer was conmuch per month, or at a certain sum for the whole voyage. If a ship freighted by the great, happens to be cast away, the freight is lost; but if a merchant agrees by the ton, or at so much for every piece of commodities, though by the language of the charterparty, and by any accident the ship is cast away, if it may be expressed that the owner or master part of the goods is saved, it is said she ought lets the ship to freight, this phrase does not to be answered her freight pro rata: and when necessarily import that the possession of the a ship is insured and such a misfortune ship is given up and taken by the charterer. happens, the insured commonly transfer those And the result of the cases seems to be, that goods over to the assurers, towards a satisfac- this must depend upon the terms of the intion of what they make good. Lex. Mercat.

lading of cattle at such a port, and some die Moo. 294: 8 Taunt. 293: Christie v. Lewis, before the ship arrives there, the whole freight 2 B. & B. 410: 5 Moo. 211. shall be paid for the living and the dead; but the same of slaves. Ibid. 85.

distrain any freeholders to answer for their inoperative. In the cases where a lien is allowfreeholds, or any thing touching the same, ed, it is not derived from this clause, but without the king's writ. Stat. 52 H. 3. c. 22. either from some general principle of law, or Nor shall any person be compelled to answer some special contract. Where it depends for his freehold before any lord of a manor, upon the general principle of law, it is confin-&c. Stat. 15 Ric. 2. c. 12. See this Dict. tit. ed to the specific chattels or some part thereof, Liberty. As to the freehold qualifications ne- in respect of which the payment is claimed, cessary in certain cases, see this Dict. tits. and consequently goods actually brought by Parliament, Jury, &c.; and further for the a ship cannot be detained for a breach of a definition and description of freehold estates, covenant to furnish a full cargo; or for demurrage (15 East, 547); or for pilotage or port charges, although the freighter may have engaged to pay them. 4 B. & A. 630.

An entire ship was chartered for a voyage out and home, and by the terms of the charterparty, the merchant covenanted to pay for the homeward cargo at certain rates per ton, on delivery of the cargo at Liverpool, by bills at three months, to load a full cargo, and to pay demurrage, and he bound the goods to the performance of his covenants: decided the owner could not detain the goods, either for the freight of such as were put on board, but afterwards re-landed on compulsion, or for dead freight, or for demurrage. 3 M. & S. And a bill filed in Chancery, to obtain a declaration that the shipowners were entitled to a lien in equity, was dismissed. 2 Mer. 401.

By another charterparty, containing the same obligatory clause, an entire ship was let to freight for a voyage out and home, at a definite sum, payable by instalments, in the progress and at the end of the voyage: held, the owner could not detain the goods for the payment of the money. 7 Taunt. 14: 2 Marsh. 339. S. C.

In each of these two cases the goods belonged to the charterer himself, who had become bankrupt. The latter was decided upon consideration of the nature of a lien, as being has possession; and as the entire ship was let sidered to be the owner pro tempore, and the goods on board to be in his possession, and not of the owner, who had let out the ship.

It has, however, been since held, that aln of what they make good. Lex. Mercat, strument taken altogether, or upon the purpose If freight is agreed for the lading and unand object of it. See 4 M. & S. 288: 2 B.

From the case of Saville v. Campion 2 B. & if the agreement be for transporting them, A. 503, and also from Christie v. Lewis, it freight shall be only paid for the living: it is seems that the right of lien for freight does not absolutely depend on a particular cove-In this country the usual clause in the nant to pay on delivery of the cargo, whereby charterparty, whereby the merchant binds the the payment and delivery are expressly made cargo, does not give to the owner a lien on concomitant acts; but this may exist if it apthe cargo for any payment for which he pears from the instrument that the payment is livery of the cargo; or even if it does not ap- that although there is no original privity of pear that the delivery is to precede such pay- contract between the purchasers from conment. The cases also show that the goods of signees and the owner, yet the taking of goods the charterer may be detained, not only for by purchasers under a bill of lading is evifreight properly so called, but also for a sum dence of a new agreement by them as the ulagreed to be paid for the use and have of the timate appointees of the shippers, to pay the ship, although the goods of others raden in the freight for the carriage of the goods, the deship can only be detained for the sums they livery being stipulated with the shippers to may have agreed to pay to the charterer, or be made to the consignees named in the bill that may be mentioned in the bill or being; of lading, or their assigns, he or they paying and that the bankruptcy of the charterer, or | freight for the same. 13 East, 399. any assignment or pledge made by him of his goods, does not deprive the owner of his right. shipped tobacco for Liverpool, consigned to A. 4 B. & A. 630.

Where payment is to be made by approved bills, if the owner object to a bill delivered to him, but afterwards negociate it, he thereby loses the benefit of his objection, and his right to detain the goods. 3 B. & A. 497.

The master of a ship has not a lien on the freight for his wages, nor for his disbursements on account of his ship during the voyage, nor for premiums paid by him abroad for the purpose of procuring the cargo. Smith v. Plumber, 1 Barn. & Ald. 581: and in the knowledge of the captain, made an ensee Bac. Ab. Merchant, D.

The master has a special property in the vessel, and may declare for the freight of goods an acceeptance of the cargo by C. as would as carried in his vessel, though he be not the owner. Shields v. Davis, 6 Taunt. 65.

But the payment of the freight to the owners on their demand will be a discharge against a claim by the master, not only in the case of goods brought in a general ship, but also in the case of an agreement not under seal, made between the master and the charterer, and although the master may have previously given notice not to pay the freight to any person but himself, 3 B. &

are frequently regulated by express stipula- against the other and recover his damages tions in the charterparty, and then the payment must be according to the agreement. If there be no express stipulation, we have seen that the master is not bound to part with the

goods until his freight is paid.

It is also often provided by charterparties, that the goods shall be delivered agreeably to bills of lading to be signed by the master, and he, on receiving the goods, signs bills of lading for delivery on payment of freight, or with words of similar import, giving him a right to refuse delivery to the person designated by the bill of lading without such payment. It some. times happens that the master does not insist laders, by the law marine he forfeits his freight; upon the exercise of this right, and it was at and if a master of a ship shall put into any one time much questioned whether the mer- other port than what the ship was freighted chant charterer was answerable for the freight: to, he shall answer damages to the merchant; it is now decided that he is. See cases, 8 unless he is forced in by storm, enemies, or

of the usual bill of lading, by which it is ex- Oleron. pressed he is to pay the freight, by such re- | A ship is freighted so much out and so much ceipt he makes himself debtor for the f and may be sued for it. 2 Show. 443. although it was held otherwise by Lore Mer- 10000000 months onewards, as wen as

to be made in each or bills before or at the de-tyon in 1 Esp. 23, it has since been decided,

But where A. and B. merchants abroad, himself there, to whose order the bills of lading were made, and one of the bills was sent inclosed in a letter from the shippers to C. at Liverpool, advising him of such consignment to A. and that A. intended to proceed to Liverpool; but in case he should not arrive in time, desiring C. to do the best for them. The tobacco having arrived in a damaged state, and requiring to be landed, was deposited in the king's warehouse, pursuant to the statute; and afterwards C. acting as agent for A. withtry of it in his own name in the custom-house to avoid seizure. Held, that this was not such make him liable to the captain for the freight. Ward v. Felton, 1 East, 507.

If part of the lading be on ship-board, and through some misfortune happening to the merchant, he had not his full lading abroad at the time agreed, the master shall have freight by way of damage, for the time those goods were on board; and is at his liberty to contract with another, lest he lose his season and voyage; and where a ship is not ready to take in, or the merchant not ready to lade his goods abroad, the parties are not only so at liberty, The time and manner of payment of freight | but the person damnified may bring an action

sustained. Leg. Rhod.

If the freighter of a ship shall lade on hoard prohibited goods, or unlawful merchandize, whereby the ship is detained, or the voyage impeded, he shall answer the freight agreed for. Style, 220. And when goods are laden abroad, and the ship hath broken ground, the merchant may not afterwards unlade them; for if he then changes his mind, and resolves not to venture, but will unlade again, by the marine law the freight becomes due. If a master freights out his ship, and afterwards secretly takes in goods unknown to the first Term Rep. 45: 1 Taunt. 300: 13 East, 565. pirates; and in that case he is obliged to sail If a consignee receive goods in pursuance to the port agreed, at his own expense. Leg.

if no freight be payable till the return, if the the abandonment, and on the underwriters on ship is lost returning, the freight outwards shall be lost as well as that inwards. Mal. 98. And see 2 Ch. Ca. 75: 2 Vern. 212: and also Dougl. 541, 542. that where a ship perishes, the whole freight from the last place or time

of payment will be lost.

By charterparty the freighter covenanted to pay to the owner freight, at and after a rate per ton per month for six months at least, and so on in proportion for further time, till her discharge or being lost, &c. to be paid as follows, viz. so much as might be earned on arrival of the ship at her destined port abroad, within ten days after her arrival there, and the remainder at specified periods. This was held to constitute one entire covenant, and that the arrival of the ship at her outward bound port was a condition precedent to the owner's right to recover any freight: and therefore the ship being lost on her outward voyage, the owner was not entitled to recover uny portion of freight. 2 B. & A. 17.

If a freighted ship becomes disabled without the master's fault, he has his option to refit (if possible, in convenient time), or to hire another ship to carry the goods. If the merchant will not agree to this, the master is entitled to the full freight for the whole voyage.

1 Bl. Rep. 190.

And if the ship is disabled or taken when part of the voyage is performed, a rateable proportion of the freight shall be paid for the

goods saved. 2 Burr. 882.

And further, as to the cases in which the owner of the ship is entitled to secover freight pro rata, where only part of the goods are conveyed to their destination, or the whole voyage is not performed, see Abbott on Ship.

ping, 300. 307. 5th edit.

with A. and his freight with B. for a certain is given by government to a captain of a ship voyage, and having notice of an embargo laid of war for carrying public treasure. Montague on the ship in a foreign port, abandons the v. Janverin, 3 W. P. Taunton, 442. Nor for ship and freight to the respective underwriters, carring the money of individuals. and receives from them the whole amount of Shereff, 5 Maule & Selwyn, 32. their subscriptions as for a total loss of both; first undertaking, by a memorandum on the rate, and directing the disposal of freight-moship policy, to assign to the underwriters ney for conveying specie and jewels on board thereon his interest in the ship and to account king's ships. to them for it; and afterwards undertaking, by a similar memorandum on the freight po- that the goods shall be delivered at London, and licy, to assign to those underwriters all right the freighters by parol direct them to be deliof recovery, compensation, &c. The ship be- vered at Liverpool, which is accordingly done, of recovery, compensation, etc. The simples vertex at invergoor, which is accordingly done, ing afterwards liberated, and earning freight, the master cannot recover on the charterparty which was received by the assured, held, that freight for such delivery, since the contract however the question of priority as to the title by deed cannot be altered by parol. Thomson of the freight might have been as between the v. Brown, 1 Moo. 358: and see 1 East, 319: different sets of underwriters litigating out of 8 Taunt. 254. But if the subsequent agreethe same fund, and however the weight of argument might preponderate more in favour of it may be sued on in assumpsit. 12 East, the underwriters on the ship, yet that the assured, who had received the freight from the Dict. tits. Charter-Party, Insurance, Mershippers of goods, was at all events liable on chant. his express undertaking to pay it over to the underwriters on freight; and that without de. law records. See tit. Pleading. ducting the expenses of provisions, wages, FRENCHMAN. Heretofore a term for

inwards, are both gone. 1 Brownt. 21. And | &c., which were charges on the owner before the ship afterwards. Thompson v. Rowcroft, 4 East's Rep. 34.

Freight may be insured for a part of a voyage without notice to the underwriters of the ultimate destination. 15 East's Rep.

A policy on freight at and from the ship's port of lading at J. to her port of discharge. with leave to call at intermediate ports, and there discharge, exchange, or take goods on board, covers the freight of goods laden at any intermediate port; and therefore where the ship, having sailed with a cargo laden at J. was cast on shore at an intermediate port, and lost part of her cargo, and there took other goods on board and arrived at her port of discharge and earned freight, the assured, who had abandoned to the underwriter, and had adjusted with him as for a total loss, was held liable to the underwriter for the freight of the part of the cargo laden at the intermediate port. Barclay v. Stirling, 5 M. & S. 6: and see 6 Taunt, 3: 1 Marsh. R. 402.

By a chapterparty a ship was described to be of the burden of 261 tons, and the freighter covenanted to lade a full and complete cargo. The Court of K. B. held that the lading of goods, equal in number of tons to the tonnage described in the charterparty, was not a performance of this covenant: but the freighter was bound to put on board as much goods as the ship was capable of carrying with safety. Hunter v. Fry, 2 Barn. & Ald. 421. And where there is a custom in the country to compress cotton wool by machinery, to improve the stowage, a full cargo means a cargo so stowed. Benson v. Schneider, 7 Taunt.

The flag officers of a fleet have no right to A shipowner having first insured his ship any share in the freight (or gratuity) which

See now stat. 59 G. 3. c. 25. for fixing the

If the covenant in a charterparty by deed be

FRENCH Language, anciently used in the

every stranger or outlandish mun. Bract. lib. pursuit. Termes de Ley. It has been an-3. tract. 2. c. 15. See Francigena.

FRIENDLESS-MAN. See Friendless-

man

FRENDWITE. From Saxon freend, amicus, and wite, mulcta.] A mulct or fine exacted of him who harboured his outlawed friend. Blount. But see Fleta, lib. 1 c. 7.

FRESCA. Fresh water, or rain, and land floods. Chart. Antiq. in Somner of Gavelkind,

p. 132.

FRESH DISSEISIN. Frisca disseisina, from Fr. faris, recens; and disseisin, possessione ejicere.] That disseisin which a man might formerly seek to defeat of himself, and by his own power, without resorting to the king or the law; as where it was not above fifteen days old, or of some other short continuance. Britton, c. 5. Of this Bracton writes at large, concluding it to be arbitrary. Lib. 4. c. 5. See tit. Disseisin.

FRESH FINE. A fine levied within a year past: it is mentioned in the statute of Westm.

2. 13 Ed. 1. st. 2. c. 45.

FRESH FORCE, frisca fortia.] Is a force newly done in any city, borough &c. And if a person be disseised of any lands or tenements within such a city or borough, he who hath a right to the land, by the usage and custom of the said city, &c. may bring his assise or bill of fresh force, within forty days after the force committed, and recover the lands. F. N. B. 7: Old Nat. Br. 4. This remedy may be also had where any man is deforced of any lands, after the death of his ancestor, to whom he is heir, or after the death of tenant for life, or in tail, in dower, &c. within forty days after the title accrued; and in a bill of fresh force, the plaintiff or demandant shall make protestation to sue in the nature of what writ he will, as assise of mertdancestor, of novel disseisin, intrusion, &c. New Nat. Br. 15. The assise or bill of fresh force is sued out without any writ from the Chancery; but after the forty days there is to be a writ out of Chancery, directed to the mayor, &c. But this writ is absolute since ejectments have come in use for recovering the possession of lands,

FRESH SUIT, or pursuit, recens insecutio.] Such a present and earnest following of an offender, where a robbery is committed, as never ceases from the time of the offence done or discovered until he be apprehended. Vide post. And the benefit of such pursuit of a felon is, that the party pursuing shall have his goods restored to him, which otherwise are forfeited to the king. Staundf. Pl. Cor. lib. 3. c. 10. & 12. When an offender is thus apprehended and indicted, upon which he is convicted, the party robbed shall have restitu- Fridstoll is expounded cathedra pacis & quiettion of his goods; and though the party udinis &c. And there were many such in robbed do not apprehend the thief presently, England; but the most famous was at Beverbut that it be some time after the robbery, ley, which had this inscription: hac sedes if the party did what in him lay to take lapidea freedstoll dicitur, i. e. pacis cathedra, the offender; and notwithstanding case he happen to be apprehended to see a community of the case he happen to be apprehended to see a community of the case he happen to be apprehended to see a community of the case he happen to be apprehended to see a community of the case he happen to be apprehended to see a community of the case of the

other person, it shall be adjudged Wesn tuon Sunctuary.

ciently holden, that to make a fresh suit the party ought to make hue and cry with all convenient speed, and to have taken the offender himself, &c. But at this day, if the party hath been guilty of no gross negligence. but hath used all reasonable care in inquiring after, pursuing, and apprehending the felon, he shall be allowed to have made sufficient fresh suit. 2 Hawk, P. C. c. 23. Also it is said, that the judging of fresh suit is in the discretion of the court, though it ought to be found by the jury; and the justices may, if they think fit, award restitution without making any inquisition concerning the same. 2 Hawk. P. C. c. 23. See tit. Hue and Cry.

Where a gaoler immediately pursues a felon, or other prisoner, escaping from prison, it is fresh suit, to excuse the gaoler: and if a lord follow his distress into another's ground, on its being driven off the premises, this is called fresh suit; so where a tenant pursues his cattle, that escape or stray into another man's lands. Fresh suit may be either within the view, or without, as to which the law makes some difference; and it has been said that fresh suit may continue for seven years. 3 Rep. S. P. C. See tits. Arrest, Distress, Escape.

FRETUM BRITANNICUM. It is used in our ancient writings for the Streights be-

tween Dover and Calais.

FRETTUM; FRECTUM. The freight of a ship or freight money. Acquietari facietis frettum navium, &c. Claus. 17. Joh. m.

FRIBURGH, or FRITHBURGH, frideburgum, from the Sax. frid, i. e. pax, and borge, fidejussor.] The same with frank pledge; the one being in the time of the Saxons, and the other since the Conquest; of these friburghs, Bracton treats, lib. 3, tract. 2. c. 10. And they are particularly described in the laws of King Edward, set out by Lambard fol. 143. Fleta likewise writes on this subject, lib. 1. c. 47. And Spelman makes a difference between friborg- and frithborg; saying the first signifies libere securitas, and the other pacis securitas. Although friburghs or frithburghers were anciently required as principal pledges or sureties for their neighbours, for the keeping of the peace, yet certain great persons were a sufficient assurance for themselves and their menial servants. Skene. See tit. Court-Leet.

FRIDSTOLL; FRITHSTOW, Sax. frid, pax, and stol, sedes.] A seat, chair, or place of peace. In the charter of immunities granted to the church of St. Peter in York, by Henry I., and confirmed anno 5 H. 7.

word for an outlaw: because he was, upon his expulsion from the king's protection, denied all help of friends after certain days; nam forisfecit amicos. Bract. lib. 3. tract. 2. c. 12.

See tit. Frendwite.

FRIENDLY SOCIETIES. Associations, chiefly among the most industrious of the lower and middling class of tradesmen, for the purpose of affording each other relief in sickness, and their widows and children some assistance at their death. These have been thought worthy the protection of the legislature to prevent frauds which had arisen from the irregular principles on which many of them were conducted. For this purpose were passed the 33 G. 3, c. 54: 35 G. 3, c. 111: 43 G. 3. c. 111: 49 G. 3. c. 125: and 59 G. 3. c. 128.

By the 10 G. 4.c. 56. which extends to Great Britain and Ireland, all of the above, as well as the Irish statutes (35 G. 3. c. 111. § 1: and 36 G. 3. c. 58.) are repealed after the expiration of three years, or on existing societies previously conforming to the act. § 1.40. The following is a short outline of its provisions:-any number of persons may form themselves into a society, and raise among themselves a fund for their mutual benefit, and make and alter rules, impose fines, &c. § 2. Societies shall declare in their rules the purpose of their establishment, &c.; and direct the uses to which the money subscribed shall be appropriated; and may impose penalty on treasurer, &c. for misapplication of money. & 3. The rules of every society shall be submitted to, and approved by, the barrister appointed to certify the savings' banks in England, to the lord advocate or his deputies in Scotland, and to a barrister appointed by the attorney-general in Ireland (unless they are copies of approved rules of other societies already inrolled under the act of the same county), and deposited with clerk of the peace, to be confirmed by justices at sessions, and the involment certified by clerk of the peace § 4. an appeal is given to the sessions in case of rules being rejected by the barrister, &c. § 5. Rules are not to be allowed, unless justices are satisfied with the tables of payment to the members. § 6. No society is to be entitled to the benefit of this act until their rules have been entered in a book for the inspection of all the members, &c., and a transcript thereof deposited with the clerk of the peace § 7. Rules, when entered and deposited, binding on the members, and a copy of the transcript is to be received in evidence. § 8. No confirmed rule to be altered but at a general meeting of the society, &c. § 9. Rules shall specify place of meeting and duties of officers; but societies may alter their place of meeting on giving seven days' notice in writing to the clerk of the peace. § 10. Societies may appoint officers, and require securities for offices of

FRIENDLESS MAN. The old Saxon of the society to invest surplus of contributions in the public funds, savings' banks or government securities. § 13. Treasurer, &c. to render accounts and pay over balances, &c.; and in case of neglect, application to be made to the Court of Exchequer in England, or Ircland, and the Court of Session in Scotland, who may proceed thereon in a summary way. § 14. Where persons are seised of lands or other property as trustees for any society, and they are out of the jurisdiction of the court, &c., court may appoint a person to convev. & 15. In absence, &c. of trustees, court may order stock to be transferred, and the dividends paid. § 16. No fee to be taken by any officer for proceedings in such courts. § 17. The secretary, deputy secretary, or accountant-general of Bank, &c., or the one of them, shall be the persons named in orders for making transfers, except in the cases therein mentioned. § 18. The act to be an indemnity to the Bank. § 19. Executors of officers shall pay money due to societies in preference to other debts. § 20. All estates and effects of societies to be vested in trustees, &c. for the time being, who may bring and defendactions, &c. § 21. Responsibility of treasurer or trustees to be limited to the money they actually receive. § 22. Payments by society to persons appearing to be next of kin declared valid. § 23. Sums not exceeding 201. due to members who die intestate, may be paid without probate. § 24. One justice may determine complaints of fraud, &c., and punish by fine or imprisonment. § 25. Societies may be dissolved by five-sixths in value of the members, and the consent of all parties receiving relief; but the intended appropriation of the funds is to be stated in the plan of dissolution, and such funds are only to be divisible for the general purposes of the societies. § 26. Rules to be made to direct how all disputes shall be settled; if referred to arbitration, arbitrators to be appointed, whose award may be enforced by one justice. § 27. Disputes may be referred to justices, if so directed by the rules. § 28. Orders of justices final. § 29. Funds may be subscribed into savings' banks: § 30: or into the Bank of England. § 31. Minors, with consent of parents, &c. may be members of societies. § 32. Societies shall make annual audits and statement of the funds. § 33. Returns of sickness and mortality to be made to the clerks of the peace within three months after the end of the year 1835, and every subsequent five years. § 34. Returns to be trans. mitted every five years to the secretary of state, to be laid before parliament. § 35. Societies not making returns shall lose the benefit of this act § 36. All instruments taken under, or authorised by the act, &c., exempt from stamp duties. § 37. Act to extend to all present and future societies. § 39. Societies already inrolled, not conforming to the provisions of the act within three years, shall cease to be entitled to the provisions of the repealed acts. § 40.

By the 4 and 5 W. 4. c. 40. several of the

provisions of the 10 G. 4. c. 56. have been re-

854

By § 10. members of friendly societies may be witnesses on trials, indictments, or other proceedings respecting the property of such

And by § 12. executors, &c. of officers of friendly societies shall pay money due to the

societies before other debts.

FRIAR, Lat. frater, Fr. frere.] The name of an order of religious persons, of which there were four principal branches, viz. 1. Minors, Grey Friars, or Franciscans. 2. Augustines. 3. Dominicans, or Black Friars. 4. White Friurs, or Carmelites, of which the rest descend. See stat. 4 H. 7. c. 17. Lynde-

wood de Relig. Domibus, c. 1.

FRIAR-OBSERVANT, frater observans.] A branch of the Franciscan friars, who were minors, as well as the Conventuals and Capuchins. They were called Observants because they are not combined together in any cloister, convent, or corporation, as the Conventuals are: but tied themselves to observe the rules of their order more strictly than the Conventuals, and upon a singularity of zeal separated themselves from them, living in certain places of their own choosing. Zach. de Rep. Eccles. de Regular. c. 12. They are mentioned in the stat. 25 H. 8. c. 12.

FRILING, FREOLING, from Sax. freoh, liber, and ling, progenies.] A freeman born.

FRIPPERER, Fr. fripier, i. e. interpolator.] One that scours and furbishes up old clothes to sell again; a kind of broker. See stat. 1. Jac. 1. c. 21. and tit. Brokers.

Fresh uncultivated ground. FRISCUS.

Mon. Angl. tom. 2. p. 56.

FRITH, Sax.] A wood, from frid, pax; for the English Saxons held woods to be sacred, and therefore made them sanctuaries. Sir Edward Coke expounds it a plain between Co. Lit. 5. Camden in woods, or a lawn. his Britannia useth it for an arm of the sea, or a straight, between two lands, from the word fretum.

FRITHBRECH, pacis violatio.[The breaking of the peace. LL. Ethelred, c. 6. See

Grithbreche.

FRITHGEAR, from Sax. frith, or frid, pax. and gear, annus. The year of jubilee, or of meeting for peace and friendship. Somn.

FRITHGILD. A Guildhall; also a com-

pany or fraternity.

FRITHMAN. One belonging to such fra-

ternity or company. Blount.

FRITHMOTE, is mentioned in the records of the county palatine of Chester: per frithmote J. Stanley, Ar. clamat capere, annuatim de villa de Olton, quæ est infra feodum mannerium de, &c. 10 sol. quos comites Cestriæ ante confectionem chartæ præd. solebant capere. Pl. in Itin. apud Cestriam 14 H. 7.

frith, pax, and socne, libertas.] Surety of de- his lands, till he was acquitted or pardoned: fence, a jurisdiction for the purpose of pre-1 nat when one indicted of and serving the peace; according to Fleta, liversas | capital erine, before | assuces of Oyer, occ. was habendi franci plegii; seu immunitatis Cowel, Blount.

FRODMORTEL, rather FREOMORTEL from Sax. free, free, and morthdel, homicide.] An immunity for committing manslaughter. Mon. Angl. tom. 1. p. 173.

FRUIT, Stealing of.] See tit. Gardens. FRUMGYLD, Sax.] The first payment made to the kindred of a person slain, towards the recompense of his murder. LL. Edmund.

FRUMSTOL. The chief seat or mansion house; which is called by some the Homestal.

Leg. Inc. c. 38.

FRUSCA TERRÆ. Waste and desert

lands. Mon. Angl. tom. 2. p. 327.

FRUSSURA, from Fr. froissure.] A breaking down; also a ploughing or breaking up. Frussura domorum is house-breaking; and frussura terræ, new broke land. Mon. Angl. tom. 2. p. 394.

FRUSTRUM TERRÆ. A small piece or

parcel of land. Domesday.

FRUTECTUM. A place where shrubs or tall herbs do grow. Mon. Agl. tom. 3. p. 22.

FRYTH. See Frith.

FUAGE. In the reign of King Edward III. the Black Prince, having Acquitain granted him, laid an imposition of fuage upon the subjects of that dukedom, i. e. 12d. for every fire. Rot. Parl. 25 Ed. 3. And it is probable that the hearth money imposed anno 16 Car. 2. took its original from hence. See tit.

Fumage.

FUEL. By the 43 Eliz. c. 14. (repealed by the 5 G. 4. c. 74. § 23.) if any person shall sell billet wood or faggots for fuel under the assise, &c. on presentment thereof upon oath by six persons sworn by a justice of peace, the party may be set on the pillory, in the next market town, with a faggot, &c. bound to some part of his body. None are to buy fuel but such as will burn it or retail it to those who do, on pain to forfeit the treble value; also no person may alter any mark or assise of fuel, on the like forfeiture. Stats. 7 Ed. 6. c. 7: 43 Eliz. c. 14. See tit. Common.

FUER, Fr. fuir, Lat. fugere.] Flight is used substantively though it be a verb, and is two-fold, fuer in fait, or in facto, where a man doth apparently and corporally fly; and fuer in ley, in lege, when being called in the county court he appeareth not, which is flight in the interpretation of the law. Standf. pl. Cor.

 $lib.\,3.\,c.\,\,22.$

FUGA CATALLORUM. A drove of cattle; fugatores carrucarum, wagoners who drive oxen, without beating or goading. Fleta,

FUGACIA. A chase; so fugatio is hunting, or the privilege to hunt. Blount.

FUGAM FECIT, was where it was found by inquisition that a person fled for felony, &c. And if flight and felony were found on an indictment for felony, or before the coroner, where a murder was committed, the offender FRITHSOKE, FRITHSOKEN, from Sax. should forfeit all his goods, and the issues of

and consequently the issues. 3 Inst. 218. The legatees. Salk. 196: 4 Dow. P. C. 227. party might in all cases, except that of the found to be forfeited, might be always tradictment, &c., whereby outlawry was awardcd, was a flight in law.

By 7 and 8 G. 4. c. 28. § 5. where a person is indicted for treason or felony the jury shall not be charged to inquire of his lands, tenants,

or goods, or whether he fled.

In Scotland, where a criminal does not obey the citation to answer, the court pro-nounces sentence of fugitation against him, which induces a forfeiture of goods and chattels to the crown. See this Dict. tits. Exigent, Outlawry, Forfeiture.

FUGITIO, pro fuga .-- Knighton, Anno 1537. FUGITIVES' GOODS, bona fugitivorum. The goods of him that fled upon felony, which after the flight lawfully found on record belonged to the king or lord of the manor. 5

Rep. 109.

Fugitives over Sea. By two ancient and obsolete, if not expired, statutes; 9 Ed. 3. c. 10: 5 Ric. 2. st. 2. c. 2; to depart this realm elsewhere, it seemed his funeral might have over the sea, without the king's license, except it were great men and merchants, and the king's soldiers, incurred forfeiture of such persons beyond sea, for feited their vessels; also if any searcher of any port negligently suffered any persons to pass, he should be imprisoned, &c. See tits. Aliens, Allegiance, Foreign Service, Treason.
FULLAGE. See tits. Age, Infant.

water, such as comes from a mill.

Pal. 5 Ed. 4. And this word has been some-Domesday. See 1 Comm. 324. and this Dict. tit. Taxes.

FUMADOES. Pilchards garbaged and salted, then hung in the smoke, and pressed; so called in Spain and Italy, whither they are exported in great abundance. See tits. Fish, Navigation Acts.

FUNDITORES, is used for pioneers, in

Pat. 10 Ed. 2. m. 1.

FUNDS. See tits. National Debt, Stock-

brokers, Stocks.

FUNERAL CHARGES. The executor or administrator must bury the deceased in a manner suitable to the estate he leaves be-

he should notwithsthnding his acquittal, for prepresentative be guilty of extravagance, it is feit his goods: but not the issues of his lands, a species of devastavit, which shall only be because by acquittal the land was discharged prejudicial to himself, and not the creditors or

In strictness no funeral expenses are allowcoroner's inquest, traverse the finding of a fu-able against a creditor, except for the coffin, gam fecit; and the particulars of the goods ringing the bell, parson, clerk, and bearer's fees; but not for pall or ornaments; per Holt, versed; also whenever the indictment against 1 Salk. 296. Ten pounds are enough to be a man was insufficient, the finding of a fugum allowed for the funeral of one in debt; per fecit would not hurt him. 2 Hawk. P. C. c. Holt. Baron Powell in his circuit would allow 49. Making default in appearance on an in- but 11s. 6d. as all the necessary charge. Comb. 342. And it would seem 40s. was once the usual sum in case of an insolvent. See Salk. 196: Godolp. p. 2. c. 26. § 2.

In the time of Lord Hardwick 10l. appears

3 Atk. 119.

Where the deceased had been a captain in the army, the Court of K. B. lately held that 791. was too large a sum, and intimated that 201. would now be the proper allowance. B. & Ad. 260.

A liberal scale is adopted as against other persons than creditors where there are suffi-

A person died in debt, and 600l. was laid out in his funeral: decreed the same should be a debt, payable out of a trust estate, charged with payment of debts, he being a man of great estate and reputation in his country, and buried there, but had he been buried been more private, and the court would not have allowed so much. Prec. Ch. 27. See also 14 Ves. 364. But the court in a recent goods: and masters of ships, &c. carrying case refused to allow 2210l. for the funeral expenses of a nobleman whose personal estate was believed to be solvent at his death, but ultimately from unforeseen circumstances proved to be insolvent. 4 Sim. 512.

Where (previous to the 11 G. 2. c. 18. enabling freemen of London to bequeath their FULLUM AQUÆ. A fleam or stream of whole personal estate) a citizen of London devised 7001. for mourning, the question was, if FUMAGE, fumagium.] Dung for soil, or it should come out of the whole estate, or out manuring of land with dung. Chart. R. 2: of the legatory part only; it was insisted that if there had been no direction by the will, or times used for smoke money, a customary pay- if the will had directed that the expenses of ment for every house that had a chimney. the funeral should not exceed such a sum, there the deduction must have been out of the whole estate. Per cur. Mourning devised by the will must come out of the legatory part, and not to lessen the orphanage and customa-

part. 2 Vern. 240.

The funeral expenses of a freeman of London dying intestate are to be paid out of the general personal estate, and not the dead man's part merely. Swinb. Pt. 3. c. 16. pl. 3.

Settlements for separate maintenance of the wife shall never extend to funeral charges; and though she made a will (according to a power given her), and an executor, and gave several legacies, but there was no residuum for the executor, the husband's estate in the hands of a devisee, subject to the payment of debts, was made liable to the funeral charges sonal of the wife. 6 Mod. 31.

absence of evidence to charge any other per- a piece of land of more or less acres. son, an executor with assets is answerable in point of law, without any express contract for 41, enables the court to award costs (to be the funeral expenses of his testator suitable to paid by the convicted party) upon the conviction of a nuisance occasioned by furnaces also 1 B. & Ad. 262;

But it is not clear whether the judgment should be de bonis propriis, or de bonis testatoris, or consequently whether plene adminis- owners of furnaces used solely for working travit is a good plea. It should seem, however, that naming the defendant executor in the declaration is surplusage, and that he is liable de bonis propriis, if liable at all; but that, oven; hence furniare signifies to bake or put since the maintenance of the action is depen- any thing in the oven. Mat. Paris anno 1258. dent on the fact of his being an executor with assets, he may show under the general issuethat his testator left none. Williams on Exccutors, 1101.

FUNGIBLES. Moveable goods which may be estimated by weight, number, or measure. In this sense, jewels, paintages, or other works of art, or taste, are not functibles, their value differing in each individual, without pessessing any common standard. Belt's Scotch

Law Dict.

FURCA et FOSSA; the gallows and the In ancient privileges granted by our pit. king, it signified a jurisdiction of punishing felons; that is, men by harging and women with drowning. And Sir Edward Coke says, fossa is taken away, but that furca remains. 3 Inst. 58; and see Skene.

with a fork in loading a wagon, or in making

a rick or mow. Cowel.

FURCAM et FLAGELLUM. The meanest of all service tenures when the bonoman limb. Placit. Term Mich. 2 Joh.: Rot. 7.

FURIGELDUM. A mulet paid for theft: by the laws of King Ethelred, it is allowed, that they shall be witnesses qui nun, nam accused of theft.

FURIOSITY Madness, as distinguished

from fatuity or ideatey.

FURIOUS DRIVING. By 1 G. 4 c. 4. it any person shall be maimed or injured by reason of the wanton or furious driving or racing, or by the wilful misconduct o. any coachman, or other person having the charge of any stage coach or public carriage; such wanton and furious driving or racing, or wilful misconduct, shall be a misdemeanor, punishable by fine and imprisemment.

The act does not extend to backney coaches drawn by two horses only, and not plying for

FURLONG. A quantity of ground containing generally forty poles or perches in DUNG. From Sax. firderung, i.e. expedilength, every pole being sixteen feet and a tuonis apparatus. A going out to war, or a half; eight of which furiongs make a mile; military expedition at the king's command; it is otherwise the eighth part of an acre of not going upon which, when summoned, was land in quantity. Stat. 34 Ed. 1. st. 5. c. 6. pumshed by fine at the king's picasure. Leg. In the former acceptation the Romans call it H. 1. c. 10. Blount calls it an expedition: or stadium; and in the latter jugerum. Also a fault or trespass for not going upon the same.

It appears to be now decided, that, in the !the word furlong has been sometimes used for

FURNACES. The stat. 1 and 2 G. 4. c. used in working steam engines, and to make an order for remedying such nuisance. By § 3. these provisions are not to extend to the

FURNAGIUM. See Fornagium. FURNARIUS. A baker who keeps an

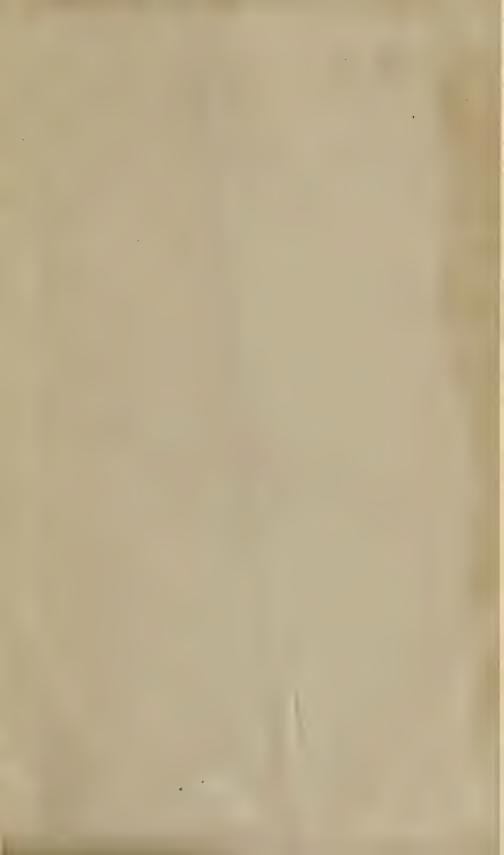
FURR, furrura, from the Fr. fourer, i. c. pelluntare. The coat or covering of a beast. The stat. 24 H. S. c. 13, mentions different kinds of it, viz. sables; which are a rich fur, of a beast called a suble, of bigness between a pow-cat and an ordinary cat, bred in Russia and Tartary. Lucerus, the skin of a beast of that name, near the size of a wolf, in colour neither red nor brown, but between both, and mingled with black spots; which are bred in Muscovy; and is a very rich fur. Genets, a beast's skin so called, in bigness between a cat and a weazle, nailed like a cat, and of that nature; and of two kinds, black and grey, the black most precious, which hath black spots upon it hardly to be seen; this beast is the product of Spain. Foins are of fashion like FURCARE AD TASSUM. To pitch corn the sable, the top of the fur is black, and the ground whitish; bred for the most part in France. Marten is a beast very like the sabl, the skin something coarser, produced in England and Ireland, and all countries not too was at the disposal of his lord for life and cold; but the best are in Ireland. Besides these, there are the fitch or pole-cat; the calabar, a little teast, in bigness near a squirrel; municer, being the bellies of squirrels; and stanks, or what is called budge, &c. all of furigeldum reddiderunt, i. e. who never were them furs of torcign countries, some whereof make a large branch of their inland traffic.

FURST and FONDONG, Sax.] Time to advise, or to take counsel. Leg. H. 1. c. 46,

FURTHCOMING. See Forthcoming. FURZE, maliciously setting fire to, wherever growing, is felony by 7 & 6.4 c.30. § 17. II RTEM. Then or robbery of any kind.

FUSTIANS. No person shall dress tustians with any other instrument than the broad sneers, under the penalty of 20s. And the master and wardens of the company of Clothworkers in London, &c. have power to search the workmanship of shermen, as well for fustian as cloth. Stats. 11 H. 7. c. 27: 39 Eliz. c. 13. See this Dict. tit. Manufacturers.

FYRDERINGA; FYRTHING; FYR-













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KF 156 .T6 v.1

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